

Local content, trade and investment:

**Is there policy space left for linkages
development in resource-rich countries?**

by Isabelle Ramdoo

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December 2016

Key messages

Local content policies are critical to ensure that the maximum of benefits from production activities accrue to local economic actors.

Yet, local content policies entail some distortionary effects in favour of local actors, which may be considered as too discriminatory if done in an unbridled manner.

International trade and investment rules have, over time, disciplined the use of industrial policies, including local content policies.

Developing countries still maintain numerous flexibilities and significant policy space to stimulate linkages development.

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Acknowledgements

ECDPM gratefully acknowledges the financial contribution of the UK Department for International Development (DFID), which made this study possible.

The author, Isabelle Ramdoo, conducted this study while she was a Senior Policy Officer and Deputy Head of Economic and Trade transformation Programme at the European Centre for Development Policy Management (ECDPM). She is currently a Senior Investment and Linkages Advisor, at the African Minerals Development Centre.

The views expressed in this study are those of the author only and should not be attributed to any other person or institution.

Acronyms

ASCM	Agreement on Subsidies and Countervailing Measures
BITs	Bilateral Investment Treaties
BOP	Balance of Payments
CCSI	Columbia Centre for Sustainable Investment
DMA	Domestic Marketing Assessment
EAC	East African Community
EC	European Commission
ECDPM	European Centre for Development Policy Management
ECOWAS	Economic Commission for Western African States
EPAs	Economic Partnership Agreements
ESA	Eastern and Southern Africa
EU	European Union
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
FTAs	Free Trade Agreements
GATT	General Agreement on Tariffs and Trade
GATS	General Agreement on Trade and Services
GDP	Gross Domestic Product
GNP	Gross National Product
GPA	Government Procurement Agreement
ICC	International Chamber of Commerce
IMF	International Monetary Fund
ICSID	International Centre for Settlement of Investment Disputes
IOCs	International Oil Companies
ISDS	Investor-state dispute settlement
JV	Joint Venture
LCPs	Local Content Policies
LDCs	Least Developed Countries
MFN	Most Favoured Nations
NAFTA	Northern American Free Trade Area

OECD	Organization for Economic Co-operation and Development
OEMs	Original Equipment Manufacturers
OPEC	Organization of Petroleum Exporting Countries
PSA	Production Sharing Agreements
PSC	Production Sharing Contracts
R&D	Research and Development
SADC	Southern African Development Community
SCC	Stockholm Chamber of Commerce
SDT	Special and Differential Treatment
SLQ	Régime sans limite de quantité
SOEs	State-Owned Enterprise
SSA	Sub-Saharan Africa
STEs	State Trading Enterprises
TRIMS	Trade-Related Investment Measures
TRIPS	Agreement of Trade Related Intellectual Property Rights
TTP	Trans-Pacific Partnership
UAE	United Arab Emirates
UNCITRAL	United Nations Commission on International Law
US	United States
USD	US Dollars
USTR	United State Trade Representative
VAT	Value Added Tax
WTO	World Trade Organization

Executive Summary

Local content policies (LCPs) seek to promote the supply of domestically produced goods and services and the employment of the local workforce. They generally require that a producer sources part of its inputs or labour force from the domestic economy. In the extractive sector, it may also require that companies conduct certain activities, such as technology transfer or research and development in the country where the extractive operations take place. These are essentially aimed at reducing the volume or value of imports or at restraining the employment of foreign labour.

Such measures can be critical to ensure that the maximum of benefits from production activities accrue to local economic actors. LCPs remain widely used and recent years have even seen a proliferation of instruments to support industrial objectives, in particular in the extractive sector where the linkages with the broader economy remain weak and shallow. This is because LCPs are often perceived as important to achieve national development objectives by resource-rich countries in particular.

Measures to stimulate the use of local content in the extractive sector can be grouped into three main categories. First, instruments are designed to encourage sourcing of local inputs, with a view to promote *upstream linkages*. These include measures such as local procurement, employment of local workforce in the mining or petroleum industry, research and development or local ownership. Second, measures are implemented to stimulate *downstream linkages*, notably through local value addition or beneficiation. Third, horizontal measures of general economic applications are taken to promote upstream and downstream linkages, but still focused on stimulating local industries. Examples include tariff or fiscal exemptions, financial incentives available only for local producers, subsidies or creation of industrial zones or clusters.

With respect to upstream linkages, many governments chose to implement LCPs by imposing mandatory numerical targets in volume or in value, to which extractive companies must compulsorily comply with, pending strict penalties. These take the form of procurement requirements, employment requirements, ownership requirements or spending requirements. In addition to quantitative targets, governments set specific timeframes for companies to achieve the stated objectives and the latter must report regularly on their progress towards reaching these targets. Critics however often point to the lack of, or insufficient monitoring mechanisms put in place by regulatory authorities, to ensure that challenges that may be faced in case of unmet targets are addressed and that long-term impacts of the targets, on government's economic programme, local participation and industries, are measured.

Regarding downstream linkages, LCPs attempt to meet two main objectives, through (i) *export-oriented strategies*, to develop local manufacturing capabilities and add value to unprocessed minerals, with a view to export higher-value added products and (ii) *import-substitution strategies*, to respond to growing local demands for processed products, in particular when the country is a producer of the unprocessed inputs. LCPs are implemented through mechanisms such as domestic sales requirements; various forms of export restrictions; licensing requirements; trade-balancing measures; and domestic and international market reserve policies. Instruments are often in the form of market restrictions and numerical requirements.

Yet, LCPs entail some distortionary effects in favour of local actors, which may be considered as too discriminatory if done in an unbridled manner. Thus, LCPs may contravene a number of trade and investment disciplines at the bilateral and multilateral levels, notably in free trade agreements (FTAs), bilateral investment treaties (BITs) and at the World Trade Organization (WTO).

In the **WTO rule book**, the General Agreement on Tariffs and Trade (GATT), that preceded the advent of the World Trade Organization (WTO), has, over various rounds of negotiations, **significantly constrained the use of a number of trade policy instruments**, frequently used in the past to foster industrial development (Chang: 2012). For example, under the *national treatment provision (Article III of GATT)*, countries are expected not to discriminate between ‘like products’ from local industries and imports. Similarly, *Article XI.1 of GATT* now completely proscribes the use of *quantitative restrictions* (like quotas) and regulates the use of non-automatic licensing systems. Activities of State Trading Enterprises are disciplined under *Article XVII of GATT*. The *Trade-Related Investment Measures (TRIMs) Agreement* in particular, prohibits the use of most forms of performance requirements on investment for goods, as provided by its ‘illustrative list’. However, developing countries are permitted to retain TRIMs to the extent that the measures are consistent with the specific derogations permitted under Article XVIII of the GATT 1994 by virtue of economic development needs and subject to notification to the General Council.

Further, various other WTO agreements contain rules that condition the design, application and use of LCPs. These include:

- (i) *The Agreement on Subsidies and Countervailing Measures (ASCM) prohibits the use of subsidies in two cases: (i) in the case of export subsidies, with an exception made for LDCs and low-income countries with a GNP per capita of less than US\$1,000 and (ii) when subsidies are granted to investors or industries contingent on the use of domestic products (local content subsidies).* Other forms of subsidies are not prohibited but are actionable and may be subject to disciplines if they have ‘adverse effects’ on international trade.
- (ii) *LCPs that may impact on foreign investment and employment of local and foreign staff are regulated by the GATS.* While the GATS provides clear indications on the types of measures that are allowed or not, unlike the GATT, LCPs are regulated only to the extent that countries have scheduled specific commitments. As a result, countries maintain significant margins of manoeuvre to design and implement LCPs in service sectors that are not specifically identified in their schedules.
- (iii) *The multilateral disciplines provided under the GATT and the GATS do not regulate government procurement.* To respond to political pressures to address discriminatory treatment in favour of local suppliers for government transacted businesses, in particular regarding tendering procedures for contracts above a certain financial threshold, some WTO members agreed to negotiate a **plurilateral agreement on Government Procurement (GPA)**, whose scope is limited only to its signatories. The cornerstone of the GPA is non-discrimination between local and foreign suppliers.

In addition to multilateral obligations, resource-rich countries have contractual obligations with their extractive companies and/or have signed up to **bilateral treaties, such as investment agreements or free trade agreements**. Those agreements, generally in favour of investors, have attempted to go beyond the scope provisions of the WTO, either by deepening the limitations or by adding new commitments that currently fall outside the scope of the WTO. These have significantly constrained the policy space of resource-rich countries to use LCPs.

Bilateral investment treaties contain at least four types of provisions to limit the scope of LCP design and the use thereof. These are:

- (i) *Non-discrimination provisions:* Countries can no longer provide incentives/subsidies or impose any preferences that would apply only to local investors. State-owned enterprises are covered by these provisions as well as pre-establishment rights, hence limiting the capacity of countries to develop indigenisation policies. More importantly, they limit countries’ space to impose ownership requirements to foreign investors.

- (ii) *Fair and equitable treatment provisions* (FET), aimed at protecting investors against serious instances of arbitrary, discriminatory or abusive conduct by host states. It is an '*absolute standard of protection*' and applies to investments in a given situation without reference to how other investments or entities are treated by the host state.
- (iii) *Measures to restrict performance requirements*, in particular establishment of joint ventures and minimum domestic participation; employment conditions including foreign labour; location of headquarters in a specific location; procurement of goods and services; export conditions and transfer of technology, production processes, propriety knowledge and research and development.
- (iv) *Specific measures relating to nationality of board members and senior management*, to ensure that investments do not face restrictions on foreign labour for senior management and board members.

Although the **scope of BITs varies significantly, they have become the preferred instruments of investors** as they are perceived to be more predictable and offer higher security for investors, including in terms of financial compensation in case of dispute. Of the 600 known dispute cases under BITs, it is estimated that 25% relate to the extractive sector.

Investment chapters contained in Free Trade Agreements (FTAs) contain legal obligations that may affect the use of LCPs. Their scope and coverage vary significantly. By including investment chapters in their FTAs, parties seek to go beyond the GATS provisions. Like with BITs, new generation FTAs, in particular those concluded between developed countries, have more stringent disciplines that curtail the use of LCPs. For instance, in the latest rounds of FTAs negotiated by the EU and the US respectively, investment chapters have a place of choice, and disciplines include additional features. For instance, the recently concluded Trans-Pacific Partnership (TPP) contains an extensive list of prohibited performance requirements such as local content or technology localisation requirements. Interestingly, these restrictions apply to all investors and not only to nationals of the treaty parties, which implies that those countries agreed to eliminate certain forms of LCPs on a multilateral basis.

Despite limitations highlighted above, within the multilateral trading system, guided by WTO rules, **developing countries in particular maintain a certain degree of policy space to pursue legitimate economic objectives, including industrial policies**. Although the WTO provides rather clear rules on what types of LCPs are permitted or not, some fundamental policy instruments remain widely available, although in practice, this space may have been eroded and therefore no longer permitted, if countries have entered into more constraining bilateral agreements, through BITs and FTAs. These include:

- (i) *Customs duties and charges*: The GATT does not prohibit the *use of tariffs* but regulates the level of protection by requiring countries to 'bind' their tariffs. Further, there is no legally binding agreement that sets out the targets for tariff binding and consequently for reductions. Developing countries have very low levels of industrial tariff binding and when they have, the bound rates are higher than what is currently applied in practice. Furthermore, export taxes are not prohibited by the WTO.
Interestingly, few developing countries have used tariffs to stimulate local industries. Perhaps one of the reasons is that the increasing internationalisation of supply chains is dependent on market access, through low trade barriers, including tariffs.
- (ii) *Provisions regarding services*: the GATS provides the widest range of policy space for the use of LCPs for resource-rich countries, in particular for those who have not made specific commitments to grant market access and national treatment to service providers and natural persons.
- (iii) *Subsidies*: despite clear rules regarding the types of LCPs that are allowed or not, the ASCM provides certain flexibilities for developing countries, while distinguishing among three categories: (a) LDCs; (b) countries with a GNP per capita of less than US\$1,000 per year; and (c) other

developing countries. Other forms of subsidies of particular relevance to LCPs, which are permitted include general subsidies such as financial incentives, credit finance, infrastructure financing; subsidies on services; sector-specific subsidies, although they are actionable; and government subsidies to support R&D and innovation.

While subsidies remain an area where substantial policy space exists for developing countries, the main challenge is the capacity to use these flexibilities. Developing countries often lack the financial resources necessary to provide substantive subsidies that can accompany nascent domestic industries long enough, to allow them to reach a critical size to thrive on their own. In this case, the challenge is not policy space, but financial space.

- (iv) Another area loosely regulated by WTO agreements pertains to *state-owned companies and exclusive service providers*. This is particularly relevant for petroleum-rich countries, given the market and ownership structures that surround hydrocarbon production and related downstream activities.
- (v) LCPs, through *government procurement* are not inconsistent with WTO rules, unless resource-rich countries are party to the plurilateral Government Procurement Agreement. In this case, countries need to specify what commitments they are willing to take and the threshold value for procurements to be covered by the GPA.
- (vi) *Special and differential treatment (SDT)*: There is an explicit recognition of the position of developing countries and their need for derogations from some trade measures, including the support of Infant Industries and remedying Balance of Payments problems. Besides, various WTO agreements contain clauses that allow developing countries derogate from the rules, contained under (i) *exception clauses* for particular situations or that may be necessary for security reasons; and (ii) *SDT provisions*, found in all agreements, applying to developing countries and LDCs. There are 139 SDT provisions in WTO Agreements.

LCPs remain a key instrument of linkages development. But given legal constraints, resource-rich countries may have to find alternative ways to quota-related LCPs to avoid the risk of being challenged. These include:

- (i) *LCPs linked to horizontal or non-specific incentives*, to entice companies to deploy efforts to source locally or to employ the local workforce. A ‘carrot’ approach is more likely to attract support from the private sector than a ‘stick’ approach.
- (ii) *Institutional frameworks*, set up in partnership with the private sector, such as the development of suppliers programmes, aimed at accompanying local suppliers in meeting the requirements of the company, accessing mining procurement, and sustaining supply on a long-term basis.
- (iii) More broadly, LCPs are not an end *in themselves*. They need to be *integrated in countries’ national development plans or industrial policies*. Too often, countries have not succeeded because measures were done to meet expectations regarding insufficient contribution of the extractive sector to the economy, without having regards to the overall role the extractive industry should play in the industrial development of a country.
- (iv) Finally, *a regional approach to LCPs is essential* to the success of the policies. In fact, most national LCPs contradict the objectives of regional integration, because by design, they only focus on their national interests. This can potentially jeopardise regional integration efforts. A coherent and coordinated effort is therefore needed, not only to preserve regional integration agenda but also to tap market opportunities from neighbouring countries and make use of their comparative advantage to complement national efforts.

1. Introduction

Local content policies (LCPs) seek to promote the supply of domestically produced goods and services and the employment of the local workforce. They generally require that a producer sources part of its inputs or labour forces from the domestic economy. In the extractive sector, it may also require that companies conduct certain activities, such as technology transfer or research and development in the country where the extractive operations take place. These are essentially aimed at reducing the volume or value of imports or at restraining the employment of foreign labour (for comprehensive overview of the LCP debate, see for example Ramdoo I: 2016; 2015 a, b; Tordo et. al: 2013; GIZ: 2016).

Such measures can be critical to ensure that the maximum of benefits from production activities accrue to local economic actors. LCPs remain widely used and recent years have even seen a proliferation of instruments to support industrial objectives, in particular in the extractive sector where the linkages with the broader economy remain weak and shallow (Morris et al.: 2012). This is because LCPs are often perceived as important to achieve national development objectives by resource-rich countries in particular.

Yet, LCPs entail some distortionary effects in favour of local actors, which may be considered as too discriminatory if done in an unbridled manner (Hufbauer G. et al., 2013). Thus, LCPs may contravene a number of trade and investment disciplines at the bilateral and multilateral levels, notably in free trade agreements (FTAs), bilateral investment treaties (BITs) and at the World Trade Organization (WTO). These commitments notably prohibit the use of quantitative restrictions and condition the use of other forms of performance requirements, which may be contingent on the use of domestic factors of production.

The rule book of the WTO however provides significant degrees of ‘policy space’¹ to developing countries, and in particular to least developed countries (LDCs) to conduct development policies and to promote the use of local factors of production, while avoiding undue discriminatory practices and without contravening international trade and investment commitments. The challenge however is not the space in itself, but rather the ability of developing countries to use them. Domestic subsidies are a case in point: they are not prohibited, but may require substantial financial resources for effective support to the industrial sector. However, developing countries may be financially constrained and therefore may not have the capacity to use them.

Besides multilateral commitments, countries have made the most constraining commitments at the bilateral level. In effect, when entering in international investment agreements, either through BITs, or through investment chapters in FTAs, countries have eroded their policy space, by agreeing to prohibit most forms of LCPs. The essence of BITs is to ensure level playing fields for foreign investment on the domestic market and as such, they constrain the use of discriminatory instruments, such as those that favour local industries and factor of production. FTAs tend to be more flexible, but policy space is generally limited in time, with derogations allowed on a temporary basis only.

The purpose of this paper is to examine the compatibility of LCPs with international and bilateral trade and investment commitments and the degree of policy space left for countries to conduct their legitimate economic objectives. The discussion is focused on LCPs in resource-rich countries. The paper examines the

¹ The term ‘policy space’ in its current meaning appeared in 2002 in UNCTAD documents and acquired its first official status in the São Paulo Consensus of 2004. It is generally understood to be ‘the scope for domestic policies, especially in the areas of trade, investment and industrial development’ which might be ‘framed by international disciplines, commitments and global market considerations’.

contours of LCPs in detail, with examples of measures taken in resource-rich countries. It further analyses the nexus with bilateral and international trade commitments and finally, examines what policy space is left, if at all, for countries to design and implement LCPs. In particular, the paper is organised in four main sections:

Section 2 examines in detail the various forms of LCPs designed and implemented to promote upstream and downstream linkages. In particular, the section details the two main categories of LCPs, namely (i) those that seek to encourage companies to meet certain requirements, but without imposing quantitative restrictions; and (ii) those that require companies to meet specific targets, within a defined timeframe, pending penalties. This section provides country-specific examples of various types of LCPs.

Section 3 looks at the nexus between various forms and LCPs and international trade and investment commitments. In particular, it looks at various agreements under the WTO rulebook that may impact on the design and implementation of LCPs. A summary of measures disciplined and prohibited is provided. In addition, the section looks at bilateral obligations undertaken by resource-rich countries, through BITs and FTAs. The section examines in detail the various types of provisions under BITs that limit the scope of countries to use LCPs.

The rule book of the WTO however provides some degree of policy space for developing countries, and least developed countries (LDCs) in particular, for a number of local content related policy. **Section 4** examines what space is left for resource-rich developing countries in various WTO agreements. It however guards against the nullification of these flexibilities in case countries have entered into more constraining bilateral agreements, through BITs and FTAs.

Finally, **section 5** concludes by providing few alternative strategies to prohibited LCPs, which can have equivalent effects, without the risk of legal challenges. These are (i) better and more efficient use of non-quota related LCPs, such as horizontal subsidies; (ii) institutional structures and partnerships with the private sector, notably through suppliers development programmes; (iii) integrating LCPs in industrial strategies to make them less sector-specific, with a particular focus on knowledge- and technology-driven support; and (iv) enhanced focus on regional value chains, to prevent inconsistencies between national commitments and regional ambitions, but more importantly, to get sufficient critical market size to drive LCPs.

2. Local content policies: what forms do they take?

Measures to stimulate the use of local content in the extractive sector can be grouped in three main categories:

- (i) Instruments that seek to encourage sourcing of local inputs, with a view to promoting *upstream linkages*. These include measures such as local procurement, employment of local workforce in the mining or petroleum industry, research and development or local ownership;
- (ii) Measures affecting outputs or production, with a view to stimulating *downstream linkages*, notably through local value addition or beneficiation; and
- (iii) Horizontal measures, sought to stimulate both upstream and downstream linkages, with general economic applications, but still focused on stimulating local industries. Such measures include tariff or fiscal exemptions, financial incentives available only for local producers, subsidies or creation of industrial zones or clusters.

2.1. Promoting upstream linkages through LCPs

Over the last decade, there has been an increasing quest in a number of resource-rich countries to boost upstream linkages with the extractive sector, with a view to creating business opportunities for local producers to supply inputs to the mining industry (Ramdoo, 2015c). Proponents of active support to upstream linkages have notably put forward a number of policy instruments to accompany and support local industries. In the same vein, an increasing use of local workforce, directly employed by extractive companies or indirectly employed, notably by their sub-contractors, is seen as a way to increase the participation of the labour force in mineral-related activities.

When inscribed in legal frameworks, LCPs are considered as mandatory. But they can take two forms:

- (i) Requirements encouraging companies to meet certain needs, but without stating particular targets that must be met within a given timeframe; or
- (ii) Requirements with specific numerical targets, expressed in value, volume, or categories.

LCPs belonging to the first category, i.e. those that do **not include binding numerical requirements** are not considered as very constraining for companies, although non-compliance may deny companies from accessing certain fiscal or trade-related incentives. They generally require operators to give preferences to local suppliers only if the latter are competitive on the basis of price, quality and availability, including during the tendering process or to employ local labour.

Another way is to put the onus on companies to self-define the level to which they are prepared to commit. In Malaysia for example, employment of local workforce is a critical factor for economic transformation. To meet this objective, companies are expected to recruit local workforce, when the latter is available and to train them in case competencies are lacking. To do so, companies are sought to define a 'minimum training budget'. The amount (or the 'minimum') is not defined in the law but is deliberately left to companies to be outlined. It is hoped that companies would budget a higher amount than the government would have defined if it were to legislate on a target.

Sometimes, governments may decide to leave softer measures to contractual arrangements, notably by individual companies and local communities. In Canada, for instance, downstream operators are often required to negotiate benefit agreements with local Aboriginal groups to provide labour, goods and services in support of mine development. The same types of arrangements exist in Australia, between indigenous communities and mining industries.

Table 1 gives examples where LCPs are legal requirements but do not require any specific targets to be met by companies. Implementation and monitoring remain critical, although in these cases there are no pecuniary penalties for non-compliance. Companies may not be able to access certain incentives in case they do not show progress, but those are difficult to measure.

Table 1: Local content requirements without numerical targets: Some examples

Employment requirements	
<i>Preference to employ local labour</i>	<u>Tanzania (oil and gas)</u>: International oil companies (IOCs) are required to employ Tanzanian citizens having appropriate qualifications to the maximum extent possible. <u>Canada (upstream petroleum)</u>: The legislation governing the offshore areas of Nova Scotia and Newfoundland and Labrador requires companies to grant preference to local employees. Residents of each province must be given first consideration for training and employment. In addition, many project proponents negotiate benefit agreements with local Aboriginal groups, including guarantees for certain benefits that may include preferential hiring and training. <u>Botswana (mining)</u>: Holders of mineral concessions are required to employ Botswana citizens to the 'maximum extent' possible, and to provide training to local labour force.
<i>Training and employment</i>	Angola (petroleum): Companies are required to financially contribute to human resource development and those expenses are tax deductible. Malaysia (petroleum): Contractors must train Malaysian personnel for all positions, including those held by expatriate personnel in which local personnel is not competent. They must commit to a minimum training budget and bear all the further expenses for such training.
Procurement requirements	
<i>Preference to local purchase</i>	<u>Tanzania (petroleum)</u>: IOCs are required to give preference to the purchase of Tanzanian goods, services and materials provided such goods and materials are of an acceptable quality and are available on a timely basis in the quantity required at competitive prices and terms. This requirement is also applicable to the sub-contractors who are contracted by the IOCs. <u>Canada (upstream petroleum)</u>: The legislation governing the offshore areas of Nova Scotia and Newfoundland and Labrador sets forth certain requirements and preferences for local contractors. Preference must also be given to services performed and goods manufactured in the province where those goods and services are competitive in terms of price and quality. When negotiating benefits agreements with First Nations, companies are required to provide business opportunities to the communities. <u>Malaysia (petroleum)</u>: Petroleum operations under the PSC and the contractors are required to give priority to locally manufactured goods and to purchase the goods and services from suppliers who are licensed by PETRONAS. <u>Botswana (mining)</u>: Preferential treatment should be given to materials and products made in Botswana as well as to services located in Botswana and owned by Botswana citizens.

Source: Chambers and partners, 2016; Countries' legal frameworks; CCSI (various country case-studies).

Local content policies with 'soft' requirements are less subject to scrutiny within the international trade and investment frameworks.

Many governments chose to implement LCPs by imposing **mandatory numerical targets** in volume or in value, to which extractive companies must compulsorily comply with, pending strict penalties. With a view to stimulating upstream linkages, governments designed LCPs in the form of:

- (i) *Procurement requirements*: In an attempt to secure minimum participation of domestic suppliers in the mining value chain, extractive firms and their sub-contractors may be required to:
 - a. Meet mandatory numerical targets, in terms of a requisite number of products to be purchased from local suppliers;
 - b. Procure a specific volume or value of intermediate inputs to be sourced locally;
 - c. Source specific categories of products or types of services from local suppliers;
 - d. Provide procurement plans and subsequent implementation reports to local authorities; or

- e. Give tender preferences to local suppliers, by reducing the price of bids for local suppliers by a certain percentage or by allocating tenders to lowest bidders, if they are nationals.
- (ii) *Employment requirements*: extractive firms and their sub-contractors may be required to:
- a. Employ specific percentages of local work force, at various levels of competencies (e.g. engineers, managers, technicians etc.) and in various categories of jobs (such as at various management levels, or as board directors etc.);
 - b. Limit the number of employment of expatriates and provide compulsory succession plans for their replacement with local talents; or
 - c. Reserve some categories of employment, such as unskilled labour and non-technical/administrative staff, exclusively for nationals.
- (iii) *Ownership requirements*, where extractive companies may be:
- a. Sought to enter into joint ventures or partnerships with local companies;
 - b. Asked to engage into partnerships with the state. This can take several forms, ranging from equity participation to service contracts; or
 - c. Mandated to cede a percentage of equity participation in licenses to local partners. This is more frequent in the petroleum sector but recent regulatory reforms in the mining sector, in particular in Africa, has triggered increasing local participation through ownership and stakes; or
 - d. Required to limit foreign ownership to a maximum participation in value or through limited licences allocated.
- (iv) *Spending requirements*, notably through:
- a. Research and Development (R&D), including by specifying the percentage share of their spending must be allocated to R&D with local institutions;
 - b. Compulsory training of local staff with a view to fostering the transfer of know-how and technology. Companies may be required to allocate a specific share of their spending on training of local staff.

To illustrate how the measures roll out in practice, Table 2 gives a comprehensive overview of various types of ‘quantitative’ local content prescriptions, as they are currently applied in resource-rich countries.

Table 2: Where are quantitative local content policies applied and in what area?

Procurement requirements	
<i>Defined list of products to be manufactured locally</i>	<u>Ghana</u>² publishes a list of specific products to be manufactured in Ghana for the mining sector. The list published in November 2015 identified 19 goods and services to be procured in Ghana. In the petroleum sector, minimum levels are prescribed for services and goods, increasing over the first 10 years of the project. <u>Nigeria</u>³ (petroleum) provides for categories of activities (for example, floating products; storage and offloading vessels; steel plates) to be locally procured.
<i>Obligation to provide procurement plans and subsequently implementation reports</i>	<u>Ghana (mining)</u>: Procurement plan to be submitted within one year of the commencement of the regulation or activity, for an initial period of 5 years, to be renewed for a further 5 years. The plan should include (i) targets, <i>at least</i> as per the list; (ii) <i>prospects</i> for local procurement and (iii) specific support to local suppliers. Implementation report to be submitted semi-annually.

² See Minerals and Mining (General) Regulations, 2012, L.I 2013; and the publication of the second edition of local procurement list in accordance with Minerals and Mining (General) Regulations, 2012, L.I 2013), Minerals Commission, November 2015.

³ See Local Content Act, 2010.

<i>Obligation to use locally manufactured goods</i>	<u>Kazakhstan (petroleum)</u> : Subsoil users are obliged to use equipment, materials and products manufactured in Kazakhstan on the condition that they meet the necessary standards and requirements.
<i>Categories of goods and/or services reserved for nationals</i>	<u>Angola (petroleum)</u> : logistics and catering <u>Nigeria (petroleum)</u> : Exclusive consideration to Nigerian indigenous service companies provided local company has capacity to execute.
<i>Local content targets</i>	<u>Nigeria (petroleum)</u> : LCP targets for some goods and services set between 80 and 100%. <u>South Africa (mining)</u> : Procurement targets around black economic empowerment, for example, 40% on local procurement expenditure, 50% on local consumable goods, and 70% on local services. Participants in the <u>petroleum</u> industry must adopt procurement policies that facilitate and leverage the growth of historically disadvantaged South African companies. <u>Indonesia (petroleum)</u> : Companies to procure locally at least 35% of services for contracts larger than US\$100,000. <u>Mexico (petroleum)</u> : The Hydrocarbons Law provides that exploration and production activities must reach, on average, a local content of 35%. This percentage does not apply to exploration and production activities in deep waters and ultra deep waters.
<i>Tender preferences with specific quotas</i>	<u>Kazakhstan (petroleum)</u> : Procuring entities to reduce price of bids by 20% for local suppliers. <u>Ghana (mining)</u> : Bids with highest level of Ghanaian participation must be selected where bids are within 2% of each other on price. In the <u>petroleum</u> sector, preference must be given to a qualified indigenous Ghanaian company, if within 10% of the lowest bid and a non-indigenous company must incorporate a local joint venture.
<i>Criteria for bid evaluation</i>	<u>Brazil (petroleum)</u> : The minimum local content requirement ⁴ is a criterion for evaluation of the bid in the concession regime and in the PSA regime it is defined in the tender protocol. Companies must therefore comply with the respective minimum local content percentages by acquiring local services and goods. <u>Kazakhstan (petroleum)</u> : When awarding a tender for the procurement of goods, works and services, a company must notionally reduce the price of a tender bid of Kazakhstan producers/providers by 20%. <u>Ghana (petroleum)</u> : Detailed requirements for bids, with information to be submitted at each stage.
<i>Promoting regional content</i>	<u>Liberia (mining)</u> : The 2014 bid round provided that bidding groups that included a significant West African company or a company operating in the Economic Community of West African States (along with a Liberian partner) would have their bids evaluated with a 20% uplift in their signature bonus proposal.
Employment requirements	
<i>Job categories reserved exclusively for nationals</i>	<u>Ghana (mining)</u> : Unskilled labour and clericals only for nationals. <u>Ghana (petroleum)</u> : Ghanaians must be employed in junior or middle level positions. <u>Nigeria (petroleum)</u> : Companies are required to employ only Nigerians in junior and intermediate positions.
<i>Obligation to use local</i>	<u>Kazakhstan (petroleum)</u> : Subsoil users are obliged to retain Kazakhstan producers

⁴ In general terms, local content is measured by the ratio between the amount of national goods and services and the total amount of goods and services acquired during the execution of the exploratory or development activities. The local content percentage is verified by certificates issued by specific companies accredited by ANP for this purpose. The certificates must be delivered to the concessionaires by the suppliers. ANP performs audits at the end of the respective phase where the local content commitment is applicable and, if the commitment is not accomplished, the ANP may impose a penalty of 60% over the amount not complied with, should the percentage of that local content which has not been complied with be less than 65%. If the amount not complied with is more than 65%, the penalty may vary between 60 and 100% of the amount not complied with.

<i>workforce</i>	of works and services on the condition that they meet the necessary standards and requirements.
<i>Quotas for employment of local workforce</i>	<u>Angola (petroleum)</u>: At least 70% of workforce to be Angolan nationals. <u>Ghana (mining and petroleum)</u>: Minimum levels of employment of Ghanaians prescribed, increasing over the life cycle of the project. Specific timeframes set to achieve the local employment targets. <u>South Africa (mining)</u>: Companies must achieve a minimum percentage of historically disadvantaged South African representation at executive management, senior management, core and critical skills, middle management, and junior management levels. <u>Kazakhstan (petroleum)</u>: 95% minimum requirement for employment of nationals. <u>Brazil (petroleum)</u>: Companies to hire local personnel as employees, respecting the maximum proportion of two thirds of Brazilian employees and one third of foreign employees. This proportion must also be observed regarding the payroll of the companies, which means that the remuneration received by the foreign employees is to observe the same proportionality in relation to the number of employees.
<i>Immigration quotas for expatriates</i>	<u>Ghana (mining)</u> : Firms must apply for an immigration quota for expatriates, with the ability to adjust the quota in certain circumstances.
<i>Conditions for employment of foreign labour</i>	<u>Tanzania (petroleum)</u>: Where a foreign national is employed, a succession plan to a Tanzanian national must be submitted alongside any work permit application. <u>Angola (petroleum)</u>: Angolans need to be employed upon the same conditions as foreigners.
Ownership requirements	
<i>State participation</i>	<u>Brazil (petroleum)</u>: Target set at 50% for onshore projects; 51% for offshore in shallow water; 37% for deep-water projects. <u>Tanzania (petroleum)</u>: Tanzania Petroleum Development Corporation to participate in the oil and gas business during the production phase from 5 up to 20% of the entire business so long as they provide the needed capital for the projects. In <u>mining</u> projects, the state can negotiate a free equity participation in mining companies for projects requiring investment of at least US\$100 million. <u>Saudi Arabia (petroleum)</u>: The state-owned company has <u>monopoly</u> over exploration and production, and role of private companies is limited to being a "service provider" to the state-own enterprise (SOE). <u>Angola, Malaysia, Ghana</u>: The state is a 'concessionaire' and can choose the private companies it wants to work with. <u>Kenya (mining)</u>: Requires local equity participation of at least 35% in companies holding mining rights. <u>Brazil (petroleum)</u>: Petrobras as operator of all exploration and production has a minimum 30% stake.
<i>Equity participation (non-state)</i>	<u>Ghana (petroleum)</u> : Compulsory 5% equity participation of an indigenous Ghanaian company to obtain a licence.
<i>Rights of application to citizens only</i>	<u>Botswana (mining)</u>: Only citizens of Botswana to be granted permits to exploit industrial minerals (exceptions can be granted by minister). Non-compliance may lead to termination of exploitation concession. <u>South Africa (mining)</u>: Historically disadvantaged South Africans must have 15% ownership of existing mining companies and 26% ownership of companies applying for new mineral rights.
<i>Maximum foreign ownership</i>	<u>Indonesia (petroleum)</u> : (i) Exploration drilling and sampling services: oil and gas survey services (49%); geological and geophysical survey (49%); geothermal survey (95%); (ii) Construction companies ⁵ : non-small scale EPC services (67%)

⁵ For certain construction, different requirements may apply, such as for platform construction the maximum foreign ownership is 75%, for spherical tank and offshore piping installation the maximum foreign ownership is 49% whilst for onshore piping, vertical/ horizontal tank construction is reserved for domestic investors only.

	and for construction contracting and consulting (55%); (iii) hauling and barging company: ferry, river and lake transport and transport facilities (49%); special goods, cargo and heavy equipment transport (49%); support business in terminals (49%); domestic and international sea transport (49%); land transport rental (local investor only); Up to 100%, if formed as a general mining services company.
<i>Joint ventures</i>	<u>Libya (petroleum)</u>: Foreign companies that wish to do business in Libya are required to enter into a joint venture with a local entity in which the foreign entity can hold a maximum equity stake of 49%. <u>Uganda (petroleum)</u>: Where goods and services required by a contractor or licensee are not available locally, these must be purchased from a company that has entered into a joint venture with a Ugandan firm (provided the Ugandan firm has an equity stake of at least 48% in the joint venture).
<i>Licensing requirements</i>	<u>Indonesia (mining)</u> : Privately-owned companies are limited to one licence per country. Only companies that are listed on the Indonesian stock market can hold more than one license.
Spending requirements	
<i>R&D and technology</i>	<u>Norway (petroleum)</u>: Requirement to conduct at least 50% of research for technology in partnership with local institutions. <u>Ghana (petroleum)</u>: A national policy on technology transfer to be developed in partnership with industry. Companies must have a programme for technology transfer, in accordance with the national plan, outlined in a sub-plan. Company must have a sub-plan outlining a 3-5 year programme of R&D initiatives to be undertaken in Ghana. <u>Malaysia (petroleum)</u>: Contractors must pay an annual research contribution of 0.5% of the amount of cost oil plus their share of profit oil to PETRONAS.
<i>Training requirements</i>	<u>Angola (petroleum)</u>: Companies are required to contribute US\$0.15 for every dollar per barrel of oil produced each year towards the training of Angolan personnel, with companies in the exploration stage being obliged to contribute a fixed amount of US\$200,000 each year. <u>Malaysia (petroleum)</u>: Contractors have to undertake the development and training of their Malaysia personnel for all positions, including administrative, technical and executive management positions. The PSC requires annual submission for PETRONAS' approval of plans and programmes for development and training. <u>Ghana (petroleum)</u>: Company must provide or fund training to Ghanaian employees. <u>South Africa (mining)</u>: Companies must invest a percentage of annual payroll (5% in 2014) in essential skills development activities of historically disadvantaged South Africans.

Source: Ramdoo (2015:a; b); PwC (2016); Easo and Wallace (2014); CCSI (various country case studies).

Those forms of LCPs have been most frequent in oil-producing countries. However, recent years have seen a proliferation of similar regulatory measures in mining countries. As highlighted in Table 1, there are various modulations to those requirements. The variations are defined by country specific contexts and by the need to balance the political and economic objectives of the state, the capacity of local stakeholders to take up the opportunities and the need to maintain the competitiveness of the mining industry.

In addition to quantitative targets, governments set specific timeframes for companies to achieve the stated objectives and the latter must report regularly on their progress towards reaching these targets. Critics however often point to the lack of, or insufficient monitoring mechanisms put in place by regulatory authorities, to ensure that challenges that may be faced in case of unmet targets are addressed and that long-term impacts of the targets, on government's economic programme, local participation and industries, are measured.

Penalties for non-compliance can be prohibitive. In Ghana, for example, non-respect of the time frame and quota for expatriates can cost companies the equivalent of one-year expatriate gross salary for every month

of ‘illegitimate’ stay and a delisting from duty exemptions.⁶ Similarly, in Ghana non-compliance to procurement requirements is subject to the following penalties:

- (vii) Firms that fail to provide a *‘procurement plan’* within the prescribed timeframe incur a penalty of US\$10,000 per month for the first six months of delay, and after that, US\$10,000 per day that the delay is not respected;
- (viii) Firms that fail to submit their *reports* regarding the implementation of the procurement plan incur a penalty of US\$10,000 per month for the first two months of delay, following which an additional US\$10,000 must be paid for each additional day of delay;
- (ix) Firms that fail to procure locally as required under the local procurement list must pay the full customs duty on imports of goods as well as a penalty to be determined in local procurement list.

2.2. Promoting downstream linkages through LCPs

Downstream linkages are often described as the ‘missing links’ in many resource-rich countries, in particular in developing countries. In many cases, historical circumstances have shaped the structure of the extractive sector. In Africa for instance, most resource-rich countries export mainly unprocessed minerals, with little value addition performed in the country. Increasingly, policy makers have voiced their concerns regarding little value capture and therefore the need to promote downstream linkages, to create more value and to generate more jobs in related manufacturing and services sectors.

This paper does not argue for or against downstream linkages⁷ or whether it has worked or not. It rather looks at measures that countries have taken in recent years to promote industrial development, and assesses their compatibility with international trade and investment rules.

Local content policies to stimulate **downstream linkages** have two main objectives:

- (v) As an *export-oriented strategy*, policies are intended to develop local manufacturing capabilities to add value to unprocessed minerals, with a view to exporting higher-value added products. Examples include setting up of refineries and smelters to export transformed products.
- (vi) As an *import-substitution strategy*, policies are meant to respond to growing local demands for processed products, in particular when the country is a producer of the unprocessed inputs. Examples include domestic processing of industrial minerals such as cement, glass, ceramics etc.

In both cases, local content policies are implemented through the following mechanisms:

- (i) *Domestic sales requirements* as a means to foster local value addition. These are achieved through:
 - a. *Domestic market obligations*, where companies may be requested or forced to sell a percentage of their proceeds to local manufacturers to meet domestic needs or for beneficiation purposes;
 - b. *Captive mining*: Companies may be required to own the mining operation that produces the needed raw material inputs; or governments may award mining rights on the condition that the mineral will only be used in domestic production. Examples of the use of certain inputs for the steel industry (such as ferro-manganese) in India and or of nickel in Indonesia are cases in point.
- (ii) *Export restrictions* to safeguard domestic supply of raw materials for local industries: these are widely used in developing countries and take several forms, namely:

⁶ See Minerals and Mining (General) Regulations, 2012, L.I 2013.

⁷ For an overview of the debate in favour of downstream linkages, see for example ISG Bulletin No. 2: 2009; Jourdan; 2013; Ramdoo; UNECA: 2013; Kaplan: 2011; Morris et al. 2012. For the debate against downstream linkages, see Hausmann et al.: 2008; Harvey 2015; Eunomix: 2015.

- a. Export taxes (also referred to as export surtax or fiscal tax on exports);
 - b. Export quotas;
 - c. Export prohibitions or bans;
 - d. Minimum/ or price reference for exports. This measure is aimed at reducing exports, notably by affecting their competitiveness on the world market. These are sometimes combined with export taxes to prevent under-invoicing (European Parliament, 2016).
 - e. Dual pricing schemes;
 - f. A reduction or the elimination of VAT rebates on exports, aimed at reducing the profitability of exporting a product in order to promote domestic sales (European Parliament, 2016);
 - g. Restrictions in customs clearing points with a view to controlling exports of certain products.
 - h. Limiting the right to export certain goods to specific firms.
- (iii) *Licensing requirements*: governments may regulate the export of certain unprocessed minerals, through the issuance of export licences. Sub-soil assets being the property of the state, most resource-rich countries (developing and developed alike) maintain non-automatic licensing requirements to control ownership structures, the number of firms and what minerals is being extracted. These are instruments that can also serve to monitor the exports of minerals and to regulate in what forms those should be exported.
- (iv) *Trade-balancing measures*: Governments may require that imports should represent a limited proportion of locally produced exports, either in terms of volume or in terms of value. These types of instruments can be used as 'rules of origin' to determine or calculate the percentage of value added that must be procured locally for a product to qualify as 'locally procured'.
- (v) *(Domestic and international) market reserve policies*: some markets may be reserved for local production or may be managed internationally. This can take the form of:
- a. *Government procurement* contracts and tendering processes, where preferences are given to locally manufactured goods or to local service suppliers;
 - b. Production management through *state owned enterprises*⁸ in the extractive sector;
 - c. *Production controls*: a typical case in point is the OPEC cartel, whose policies have had serious consequences on the global market for oil, although in the last two years their weight seemed to have been somehow diminished by unconventional oil producers;
 - d. *Offset agreements*: Generally linked to the sectors such as defence or aerospace, government may enter into a contract with a company and in return request for investment in the economy, including setting up of industries, infrastructure facilities and the use of domestic factors of production, including minerals or value added inputs produced from mineral proceeds. For purchasing countries, offsets offer opportunities to acquire technological knowhow, support local industry and other economic benefits.
- (vi) *Import duties*: Governments may impose prohibitive import duties on finished products to protect and promote local production;
- (vii) *Subsidies*: Government may provide financial support to local industries to support their 'competitiveness'. Governments may decide to subsidise consumption and production (OECD: 2010) by:
- a. Transferring funds directly to beneficiaries;
 - b. By assuming part of industries' risks;
 - c. By selectively reducing or increasing the taxes they would otherwise have to pay; and/or;
 - d. By imposing mandates and barriers to trade.

⁸ In 2012, the IMF reported that "some 80 percent of world petroleum reserves are controlled by state companies and 15 of the 20 largest oil companies are state-owned". State-owned enterprises are less common or dominant in the mining sector but may still play an important role in some countries.

Table 3 gives concrete examples of measures adopted by countries to meet the above-mentioned objectives.

Table 3: Who implements LCPs to stimulate downstream linkages and in what areas?

Domestic sales requirements	
Domestic market obligations ⁹	<u>Russia</u>: Certain precious metals; non-industrial diamonds unworked, worked but not mounted; gold; platinum; palladium; iridium; base metals silver or gold; <u>Tajikistan</u>: waste and scrap, iron and steel, copper, nickel, lead, tin, zinc, molybdenum, magnesium, cobalt, cadmium, titanium, zirconium; aluminium (incl. waste and scrap); <u>Indonesia</u>: Minimum processing requirements (i.e. quantitative restrictions) are set for different types of minerals¹⁰ and coal; oil and gas.
Captive mining	<u>Indonesia</u>: companies are required¹¹ to carry out in-country processing¹² and refining¹³ to increase the value of the relevant minerals or coal. <u>India</u>: Bituminous coal; ferro-manganese; manganese.
Export restrictions ¹⁴	
Export taxes	<u>Indonesia</u>¹⁵: Various minerals, incl. coal, copper, gold, nickel; <u>China</u>: Various minerals incl. antimony, cobalt, copper, iron and steel, lead; manganese, molybdenum, silver, titanium, tungsten, tin, zinc, zirconium; <u>Argentina</u>¹⁶: Various minerals incl. cobalt, copper, iron and steel; waste and scrap of various metals; <u>Bolivia</u>: antimony, tin; tungsten; <u>Dominican Rep.</u>: Various minerals incl. antimony, cobalt, copper, iron and steel, lead; manganese, molybdenum, silver, titanium, tungsten, tin, zinc, zirconium; <u>Vietnam</u>¹⁷: Various minerals incl. antimony, cobalt, copper, iron and steel, lead; manganese, molybdenum, silver, titanium, tungsten, tin, zinc, zirconium;

⁹ Generally rolled out as policies on preference for allocating mineral resources to meet domestic needs through production and export restrictions.

¹⁰ The Regulation stipulates two types of minerals: (i) Type 1 includes copper, iron ore, manganese, lead, zinc, ilmenite and titanium. These can be exported as concentrates at much lower minimum processing levels than the second type of minerals. However, this relaxation is valid for three years (i.e. until 11 January 2017) and is subject to a progressive export duty (as well as commitments to build or cooperate with others building refining facilities). Type 2 minerals consist of nickel, bauxite, tin, gold, silver and chromium. Type 2 minerals must be refined to a much higher minimum level than Type 1 minerals prior to export. There is no export duty for Type 2 minerals (PwC: 2016).

¹¹ The key provisions of the above regulations are as follows: (i) there should be an increase in added value for the following classes of minerals: metallic minerals; non-metallic minerals; and rocks; (ii) The increase in added value shall be carried out through the processing and refining for metallic minerals; processing for non-metallic minerals, or processing for rocks.

¹² Processing is defined as activities to improve the quality of minerals or rocks without changing their physical and chemical properties, such as conversion into metallic mineral concentrates or polished rocks.

¹³ Refining is defined as activities to improve the quality of metallic minerals through an extraction process and by increasing the purity of the mineral to produce a product with different physical and chemical properties from the original, such as metals and alloys.

¹⁴ For a good overview of export restriction measures, see OECD: 2014.

¹⁵ Progressive rates of export duties are imposed on certain minerals to stimulate the setting up of refineries. The rate ranges from 20–60%. For companies that already have investments in smelters, the rate is lower (ranges from 0–7.5%, depending on the stage of the construction of the smelter).

¹⁶ Although not stated as the rationale for the tax structure used, Argentina's export taxes favour exports of processed products over primary raw materials, and hence are supportive of local processing activities. Exporters pay a 10% export tax when exporting iron ores and concentrates, which falls to 5% for semi-processed items. Iron and steel waste and scrap is also taxed at 5%. The same export policy and rates are applied to the different processing stages of copper and cobalt. In the case of borates, the export of the primary natural borate and concentrate is taxed at 10% whereas the rate on borate-related chemical compounds is 5%. The 5% tax rate for waste and scrap applies to a long list of different types of metal; these metals are not taxed if exported as primary or as semi-processed materials (source: OECD: 2014).

	<u>India</u>: Manganese, iron and steel, chromium, mica; <u>Russia</u>: Various minerals incl. copper, molybdenum, tungsten; <u>Malaysia</u>: Waste and scrap incl. of aluminium, copper, lead, silver, zinc; <u>South Africa</u>: diamonds; <u>Zambia</u>: Copper and cobalt concentrates.
(Non-automatic) licensing requirements ¹⁸	<u>China</u>: Various minerals incl. rare-earth elements¹⁹, antimony, bauxite, molybdenum, cobalt, tungsten, tin; phosphates, talc, thorium; <u>Malaysia</u>: Antimony, molybdenum, cobalt, tungsten, tin; <u>Philippines</u>: Antimony, molybdenum, cobalt, tungsten, tin; <u>Russia</u>: Antimony, bauxite, molybdenum, cobalt, tungsten, tin, copper, sulphur; <u>South Africa</u>: Antimony, molybdenum, tungsten, cadmium, chromium, copper, lead, precious metals and other; <u>Grenada</u>: Antimony, molybdenum, cobalt, tungsten, tin; <u>Argentina</u>: iron, copper and cobalt; <u>India</u>: Chromium, manganese, silica sands; <u>Indonesia</u>: Precious metals and stones; <u>Burundi</u>: Niobium, tantalum, vanadium; <u>Brazil</u>: limestone, titanium, phosphates, iron and steel, nickel, aluminium, manganese, titanium.
Exports prohibition	<u>Indonesia</u>²⁰: Ban on exports of unprocessed ores. Government has issued regulations to allow exports of certain types of ores on the condition that companies: ➤ Pay export levies till 2017; ➤ Commit to build processing/ refining facilities in Indonesia; <u>Angola</u>: Export ban on unworked diamonds; <u>Burundi</u>: Waste and scrap of various metals such as copper, nickel, aluminium, tin, tungsten, tantalum, antimony, chromium, cobalt, magnesium; <u>US</u>²¹: Crude oil (ban was suspended in December 2015);

¹⁷ A multi-tiered taxation regime is applied to exports from the mining sector. The policy includes the following features. Exporters of iron ore and concentrates, the raw material in its least processed form, must pay a 40% export duty. For iron and steel scrap, the government charges a lower tax of 15-17% on shipments abroad whereas exporters of iron ingots and other semi-finished products made from alloy and non-alloy steel pay just 2%. For copper, a 30% tax must be paid for ores and concentrates, a 22% tax for copper waste and scrap and 10-20% for copper that is semi-processed (copper mates, etc.). For other materials including nickel, cobalt, aluminium, lead and zinc, the government collects a 22% tax on ores and concentrates, 22% for waste and scrap and 5-15% for semi-processed material. For molybdenum, it charges a 20% tax on ores and concentrate, a 22% tax on waste and scrap and a 5% tax on semi-processed material (source: OECD: 2014).

¹⁸ Exporters must obtain prior approval, in the form of a license or permit, to export the product. By reviewing applications for a licence on a case-by-case basis, governments can control who exports and how much (see OECD: 2014).

¹⁹ Rare earth elements are cerium (Ce), dysprosium (Dy), erbium (Er), europium (Eu), gadolinium (Gd), holmium (Ho), lanthanum (La), lutetium (Lu), neodymium (Nd), praseodymium (Pr), promethium (Pm), samarium (Sm), scandium (Sc), terbium (Tb), thulium (Tm), ytterbium (Yb) and yttrium (Y).

²⁰ Indonesia is a significant producer of coal, copper, gold and nickel. The Law on Mineral and Coal Mining No. 4 of 2009 introduced a number of restrictions for companies exporting raw or insufficiently processed products; as well as tax incentives for processing facilities. In view of the difficulty to meet the requirements and investors' concerns about the deteriorating business climate, the government introduced subsequent regulations to allow companies to export unprocessed materials, but on the condition that they would ultimately increase the processing facilities in the country.

²¹ An oil export ban was signed into law in 1975, part of the reaction to an OPEC embargo that created a shortage of crude and slammed the American economy with skyrocketing prices. Current laws and regulations allow for unlimited exports of petroleum products, but require licensing of crude oil exports. The 40-year ban was lifted in January 2016.

	<u>Ghana</u> : Waste and scrap of iron and steel.
Export quotas	<u>China</u> : Various minerals incl. rare earth elements, tungsten, tin, bauxite, magnesium, molybdenum, phosphates, aluminium, coke, fluorspar, iron and steel; <u>Belarus</u> : Waste and scrap of iron and steel; nickel, copper aluminium; <u>Brazil</u> : Niobium, zirconium.
Qualified exporters	<u>Russia</u> : diamonds; <u>Indonesia</u> : Waste and scrap of silver; <u>Oman</u> : Aluminium ores and concentrates, corundum; aluminium (incl. chemicals).
Restrictions on customs clearing points	<u>Russia</u> : Diamonds, unsorted; industrial diamonds unworked; gold; base metals or silver; platinum, palladium; rhodium, iridium.
Minimum export prices	<u>Argentina</u> : copper.
Production controls	Decisions to limit production implemented by <u>OPEC</u> countries can affect the amount of crude oil available on the global market. These OPEC measures may have the same effect as that of any other quantitative restriction on export.
Local content requirements for beneficiation	
Use of mine support services	<u>Indonesia</u> : Apart from the mandatory in-country processing, a license holder can only engage a mining services company for the purposes of consultation, planning and testing, overburden stripping and transportation. Mining services must be provided by an Indonesian entity, with a clear preference for the use of local ²² and/or national ²³ companies.
Employment conditions	<u>Mexico (petroleum)</u> : National content policies take into account the value of wages, salaries, fees and benefits paid in Mexico to national workers according to the number of man-hours incurred in the activities.
Local content for marketing, storage and distribution	<u>Malaysia (petroleum)</u> : LCP for wholesale and retail marketing and distribution of petroleum and petrochemical products is at 70% Malaysian. Foreign participation is restricted to 30%. <u>Kazakhstan (petroleum)</u> : Storage and transportation of gas by a gas distribution system, transportation of oil and oil products by main pipelines are considered a natural monopoly. Private investors conducting those activities are subject to procurement rules, which apply to natural monopoly companies.
Trade balancing requirements	
Regulating the share of imports in domestic production	<u>Mexico</u> set a minimum percentage of national content requirements at 25% in 2015, which will gradually increase to 35% in 2025. One of the 5 criteria ²⁴ includes the origin of the goods and services. For goods, it includes the value of Mexican goods used by the producer, including the proportion of domestic materials incorporated into the goods and excluding the value of imported materials as well as the value of materials produced locally but that do not qualify as Mexican.
Market reserve policies	
Production sharing agreements (PSAs)/ contracts (PSCs)/ service contracts (SCs)	Most petroleum-rich countries have PSCs, PSAs or SCs, with various structures. One of the objectives is to dispose of a percentage share of the production, that the state can sell internationally or for downstream beneficiation (for refineries or petrochemicals). Examples of proceeds used for domestic needs include natural gas in Indonesia and Mozambique; oil for refinery including in Uganda.
State owned enterprises (SOEs)	SOEs can use part of their proceeds for domestic use. Examples include Brazil; Myanmar, China, Russia; Venezuela, Saudi Arabia, Algeria.
Offset agreements	Although <u>the US</u> officially discourages offsets, the Buy American Act applies to

²² A local company is a wholly Indonesian owned company/entity operating and domiciled only in one regency/province.

²³ A national company is an Indonesian legal entity where all shares are owned by Indonesian nationals and which operates in Indonesia or offshore.

²⁴ These are (i) the origin of goods and services; (ii) local labour force; (iii) training; (iv) investment in local physical infrastructure; and (v) transfer of technology.

	partners or defence sub-contractors of US prime contractors. The aim is to provide preferential treatment for domestic sources of supplies, manufactured goods, and construction material for public use. The Act requires the government to purchase domestic supplies for use in the United States, when certain thresholds are met. The <u>United Arab Emirates</u> (UAE) offset policy for aerospace and defense industries focuses on technology transfer, employment of Emirati citizens, and a system of credits that values net profitability and export sales in favoured fields such as advanced materials, precision manufacturing, and electronics. In <u>Turkey</u>, offset policies include the purchase of locally manufactured products.
Subsidies	
Subsidies on inputs	<u>Nigeria, Venezuela or Indonesia</u> provide subsidies on fuel prices, including to support industrial production
Tax incentives	
Tax incentives to refiners	<u>Indonesia</u>: The government offers generous tax incentives to smelters to build in-country processing plants. <u>Zambia</u> allows companies to deduct the costs of refining and smelting from the 6% mineral royalty

Source: PwC (2016); OECD (2014); OECD Raw Materials Database; Deloitte. (2015).

The long list of measures highlighted in Table 3 demonstrates that local content measures to promote downstream industrial development are common practice. In addition, it is not rare that countries combine several measures or impose more than one restriction to reach their objectives. For instance, licenses are almost always required when countries want to control the volume of export of unprocessed minerals that have a potential to be transformed locally. In those cases, licencing requirements are often combined with other measures to discourage potential exporters, such as export taxes, quotas or bans.

Complementary to discouraging exporters, countries may provide incentives to local industries, to enhance their capabilities or support their development. These can take the form of subsidies, grants, loan guarantees, tax credits, or fiscal exemptions, conditional upon meeting the downstream linkage obligation.

3. LCPs: What do international trade and investment rules say?

The previous section highlighted one fact: LCPs are widely used across the world, in developed and developing countries alike. Despite their popularity and wide application, some forms of measures may however not be compatible with various international trade and investment commitments that countries have taken. This section examines the nexus between LCPs and trade and investment rules.

3.1. The WTO Rulebook

The General Agreement on Tariff and Trade (GATT), that preceded the advent of the World Trade Organization (WTO), has, over various rounds of negotiations, significantly constrained the use of a number of trade policy instruments²⁵, frequently used in the past to foster industrial development (Chang: 2012). Some measures such as quantitative restrictions (like quotas) or performance requirements are now completely proscribed.

²⁵ In 1982, under the pressure of foreign investors, the US government included the performance requirement issue on the GATT's ministerial meeting agenda. Eventually, the outcomes indicated that some trade-related investment measures had been prohibited (Ado: 2013).

The scope of various other measures has been heavily constrained. For instance, WTO member states are requested to “bind²⁶” their tariff schedules and subsequently, to gradually reduce their rates. Further, the conditions under which WTO members can raise their bound tariffs levels to protect their domestic products have been disciplined.

Various WTO agreements, notably the General Agreement on Tariff and Trade (GATT), the Agreement on Trade-Related Investment Measures (TRIMs), the Agreement on Subsidies and Countervailing Measures (ASCM) and the General Agreement on Trade in Services (GATS) all contain rules that condition the design and application of LCPs.

WTO agreements however provide a certain degree of flexibility to developing countries and, in particular, to least developed countries (LDCs). In effect, developing countries have more policy space to adopt certain policy measures, if these are needed to help them address their development concerns. These will be developed in section 4.

3.1.1. LCPs and the GATT 1994

(i) National treatment

The core principle that disciplines LCPs under the GATT is defined under the **national treatment** provision, as specified in *Article III*, which sets out the legal basis regarding the treatment accorded to local *goods* providers compared to foreign producers.

In particular, *Article III:4* of the GATT outlines the criteria that define the contours of the compatibility of LCPs with the principles of national treatment. Three criteria must however be met:

- a) Whether the imported products are accorded *less favourable treatment* compared to local suppliers. This implies that a country is not allowed to discriminate between a foreign and a local supplier. Measures that seek to reserve certain markets or to require certain products to be procured only from domestic suppliers may fall in this category.
- b) Whether the imported goods and the domestic products are considered as ‘*like products*’. For this condition to apply however, one must be able to determine the ‘*likeness*’ of domestic products with foreign products. This is not obvious, despite clarifications brought by Panel reports²⁷ under the Dispute Settlement Body of the WTO, and the fact that ‘likeness’ can only be determined on a case-by-case basis²⁸; and
- c) Whether the measures are *inscribed* in laws, regulations and requirements. This means that only measures that are clearly defined in legal instruments can be potentially disciplined.

The lack of clarity on the interpretation of the criteria regarding ‘*likeness*’ has, to some extent, given considerable discretionary powers and hence, flexibilities, to countries to design certain measures in a way that would be difficult to discipline under GATT III:4.

In addition to the above, *Article III:5 of the GATT*, prohibits **internal quantitative regulations** pertaining to the “*mixture, processing or use of products in specified amounts or proportions which requires, directly or indirectly, that any specified amount or proportion of any product which is the subject of the regulation must be supplied from domestic sources*”. This Article bans the use of internal regulations regarding a specific

²⁶ While there is no specific threshold for countries to bind its tariffs, countries are however restricted to increase their tariffs within their bound rates. In other words, if countries want to raise their tariffs above the bound rates, this has to be negotiated against compensation to third parties who might be affected by such increases.

²⁷ For example, in the case *Japan – Custom Duties, Taxes and Labeling Practices on Imported Wines and Alcoholic Beverages 1987*, the panel offered up four criteria to assess the likeness of a products: (i) physical characteristics: the greater the physical identity of two products the more likely it is that they are interchangeable; (ii) functional likeness (end-uses): the extent to which two products do in fact perform the same function; (iii) tariff applications; and (iv) consumer tastes and habits (minor differences in taste and habits would not be enough to prevent a finding of likeness). Other relevant elements include substitutability: the extent to which consumers perceive two products as functionally equivalent, measured by the consumer’s willingness to substitute one for the other.

²⁸ See the Working Party Report on Border Tax Adjustments (Border Tax), GATT B.I.S.D. II/18S/97 at para 18 (1947).

percentage of a product of domestic origin that must be used in the *production* of another product (e.g. that a specific proportion of domestically mined iron ore and coal is to be used in fabrication of steel)²⁹.

Compulsory reporting mechanisms, where companies are mandated to report on an annual basis on targets met for local procurement, pending penalties may be inconsistent with *Article III:5* of the GATT. In effect, in a 1994 dispute on “United States - Measures Affecting the Importation, Internal Sale and Use of Tobacco”³⁰, the panel concluded that the requirement for certification was an *internal quantitative regulation* relating to the *use* of tobacco in *specified amounts* or proportions which required, directly or indirectly, that a minimum specified proportion of tobacco be supplied from domestic sources, was inconsistent with Article III:5³¹.

However, *Article III:8 of the GATT* excludes government procurement from the application of the provision of national treatment. Government Procurement falls under the purview of a plurilateral agreement, the Government Procurement Agreement, signed in 1996 and which only applies to its contracting parties (see section 3.2.5. below).

(ii) Elimination of quantitative restrictions

Article XI.1 of the GATT, pertaining to the *general elimination of quantitative restrictions*, prohibits the use of all forms of quantitative restrictions on imports and exports, including through quotas and licences or any *other measures*.³² An interpretative note³³ includes restrictions made through state trading operations.

While the Article is clear about certain types of quantitative restrictions, such as quotas, bans or licences, a Panel Report of 1988 on “Japan - Trade in Semi-conductors” interpreted the scope of this article. The report commented that ‘*unlike other provisions of the General Agreement, [Article XI.1] did not refer to laws or regulations but more broadly to measures*’, which in their application, can have equivalent effects to mandatory requirements. The Report referred specifically to administrative structures that can be set up by governments to administer and monitor product specific costs, export prices and sales of products. Countries like China, Indonesia or Japan have such mechanisms in place. The interpretation of Article XI.1 therefore limits the application of administrative mechanisms aimed at fostering downstream beneficiation, through the restriction of the exportation or sale for export of products, irrespective of the legal status of the measure.

Non-automatic licencing systems also fall within the scope of Article XI of GATT 1994. Various panel decisions have concluded that discretionary or non-automatic licensing requirements constitute restrictions prohibited by Article XI.1, as they are considered to have equivalent effects to quantitative restrictions. For instance, in a several cases³⁴ involving so-called ‘SLQ’ regimes³⁵, where imports or exports licenses or permits were granted upon request, although no quotas were set for specific products, Dispute Settlement panel reports noted ‘*that the SLQ regime was an import licensing procedure which would amount to a*

²⁹ See https://www.wto.org/english/res_e/booksp_e/gatt_ai_e/art3_e.pdf

³⁰ In the 1994 panel report on “United States - Measures Affecting the Importation, Internal Sale and Use of Tobacco”, the panel examined a claim that the US Domestic Marketing Assessment (“DMA”) was inconsistent with Article III:5. The DMA legislation required each “domestic manufacturer of cigarettes”, as defined in the legislation, to certify to the Secretary of the U.S. Department of Agriculture (“USDA”) for each calendar year, the percentage of domestically produced tobacco used by such manufacturer to produce cigarettes during the year. A domestic manufacturer that failed to make such a certification or to use at least 75% domestic tobacco was subject to penalties in the form of a non-refundable marketing assessment (i.e. the DMA) and was required to purchase additional quantities of domestic burley and flue-cured tobacco.

³¹ See https://www.wto.org/english/res_e/booksp_e/gatt_ai_e/art3_e.pdf

³² Paragraph 1 of Article XI reads as follows:

No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

³³ Interpretative Notes from Annex I: Ad Articles XI, XII, XIII, XIV and XVIII: ‘Throughout Articles XI, XII, XIII, XIV and XVIII, the terms “import restrictions” or “export restrictions” include restrictions made effective through state-trading operations’. See https://www.wto.org/english/res_e/booksp_e/gatt_ai_e/art11_e.pdf

³⁴ See GATT Panel Report on *EEC — Import Restrictions*; Panel Report on *EEC — Minimum Import Prices*; Panel Report on *Japan — Trade in Semiconductors*

³⁵ SLQ Regime refers to ‘Regime sans limite de quantité’.

quantitative restriction unless it provided for the automatic issuance of licences'. These interpretations confirm that discretionary or non-automatic licensing systems by their very nature operate as limitations on imports or exports, and therefore are not permitted.

In addition to Article XI of the GATT, the **Agreement on Import Licensing Procedures** further regulates administrative procedures pertaining to *imports*. In particular, the Agreement seeks to ensure that (non-automatic) import licensing procedures 'are not utilized in a manner contrary to the principles and obligations of the GATT and are 'implemented in a transparent and predictable manner'. The agreement does not apply to licensing rules per se (it applies only to procedures, rules are covered under Article XI). It is interesting to note that there is no equivalent Agreement to regulate procedures for export licensing (although rules are regulated under Article XI of the GATT), implying that countries may have more flexibility to administer licences to control exports of their domestic products.

In cases where *restrictions on ports of entry* may lead to increases in costs for importers or exporters and that the measure has a limiting effect on imports or exports, the measure constitutes a restriction on trade within the meaning of Article XI:1 of the GATT and is therefore prohibited.

Enforcement measures, such as pecuniary penalties for non-compliance with quantitative restrictions may violate Article XI.1 of the GATT. This is particularly relevant when fines are prohibitive. This was confirmed by a 2007 Panel decision in *Brazil – Retreaded Tyres*³⁶, where it was stated that '*finest imposing limiting conditions in the relation to the imports acts as a restriction on imports, within the meaning of Article XI.1*'.

The *combination of practices* to regulate export of minerals has been examined and found inconsistent with Article XI.1 of the GATT 1994. For instance, the *Panel in China — Raw Materials* found that China imposed export quotas on bauxite, coke, fluorspar, silicon carbide and zinc and that for each of these minerals, "*the series of measures operating in concert has resulted in the imposition of a restriction or prohibition on their exportation that are inconsistent with China's obligations under Article XI:1*³⁷".

Table 4 summarises the compatibility between LCPs and various provisions of the WTO Agreement.

(iii) State Trading Enterprises

State Trading Enterprises³⁸ (STEs) are allowed but their activities³⁹ are disciplined under *Article XVII of the GATT*. It must be noted however, that the mere fact that imports or exports are conducted through STEs does not mean that in themselves they constitute a restriction.

STEs must operate in accordance with the principles of non-discrimination. In addition, their purchases and sales must be conducted "*in accordance with commercial considerations, including price, quality, availability,*

³⁶ The Panel analysed the fines as follows (See WTO Report WT/DS332/R):

"[W]hat is important in considering whether a measure falls within the types of measures covered by [Article XI:1](#) is the nature of the measure. In the present case, we note that the fines as a whole, including that on marketing, have the effect of penalizing the act of "importing" retreaded tyres by subjecting retreaded tyres already imported and existing in the Brazilian internal market to the prohibitively expensive rate of fines. To that extent, we consider that the fact that the fines are not administered at the border does not alter their nature as a restriction on importation within the meaning of [Article XI:1](#). In addition, the level of the fines — R\$400 per unit, which significantly exceeds the average prices of domestically produced retreaded tyres for passenger cars (R\$100–280) — is significant enough to have a restrictive effect on importation'

³⁷ See [Panel Report, China — Raw Materials](#), para. 7.224.

³⁸ There is a lack of clarity on the definition of what a state trading enterprise is, or what state trading is. Through the GATT history, many attempts were made at such a definition, but all of them failed. This is therefore a major shortcoming in the efforts to enforce the transparency obligation under Article XVII. Article XVII nonetheless makes a distinction between various types of enterprises: a "State enterprise" or "any enterprise" that has been granted "formally or in effect, exclusive or special privileges" (paragraph 1(a)) including "Marketing Boards" (interpretative note to paragraph 1); "any enterprise" under the jurisdiction of a contracting party (paragraph 1(c)); and an "import monopoly" (paragraph 4(b)). See https://www.wto.org/english/res_e/booksp_e/gatt_ai_e/art17_e.pdf

³⁹ The Working Party on STEs developed an illustrative list showing the kinds of relationships between governments and STEs, and the kinds of activities engaged in by STEs, which may be relevant for the purposes of Article XVII. Types of STEs include statutory marketing boards, export marketing boards, regulatory marketing boards, fiscal monopolies, canalising agencies, foreign trade enterprises, or boards or corporations resulting from nationalised industries. See G/STR/4.

marketability, transportation and other conditions of purchase or sale, and shall afford the enterprises of the other contracting parties adequate opportunity... to compete for participation in such purchases or sales”.

Many resource-rich countries have national bodies that are engaged in international commercial trading, including state owned companies⁴⁰ that have commercial operations. The provisions of Article XVII of GATT may apply if STEs operations and transactions influence the direction or volume of imports and exports of commodities.

3.1.2. Trade-related investment measures (TRIMs)

The TRIMs Agreement is essentially focused on regulating investment measures affecting LCPs, which are believed to have a trade-distorting effect, because they are meant to favour the use of domestic products over imported products, and therefore affect trade.⁴¹ It is interesting to note that the term ‘investment measures’ is not limited to measures taken in regard to foreign investment only⁴², which are essentially regulated through the General Agreement on Trade in Services (GATS).

In this regard, the Agreement can have serious implications for industrial policies that are designed to support the development of domestic industries, or to limit the effects of foreign competition to foster local industrial capabilities and encourage linkages and value addition.

The TRIMs Agreement does not create any new rules or disciplines, but refers to existing provisions under the GATT, in particular to Article III and Article XI of the GATT. Therefore, governments are required to provide no ‘*less favourable treatment*’ to investors (national treatment requirement) and must not impose quantitative restrictions or performance requirements on investments.

The *scope* of the TRIMs Agreement covers:

- (i) *Local content requirements*: it bans in particular policies that require companies to use or purchase domestic products in order to avoid a penalty or to benefit from an incentive;
- (ii) *Trade balancing measures*, i.e. policies that impose restrictions on or limit the import of inputs in accordance with its level of exports;
- (iii) *Foreign exchange balancing requirements*, i.e. when policies require that the value of imports should be tied to the value of exports so that there is a net foreign exchange earning.

It is important to note that the TRIMs Agreement covers goods only. Services are covered by the General Agreement on Trade in Services (GATS) and export subsidies are covered by the Agreement on Subsidies and Countervailing Measures. Export performance and technology transfer requirements are not included in the TRIMs Agreement.

The application of the TRIMs Agreement to LCPs is provided in an ‘illustrative list’, which details potential measures that are inconsistent with the Agreement. Consistency is however assessed on two considerations, namely that:

1. Investment measures must be *trade-related*;
2. Measures must fall within the *scope* of the illustrative list, i.e. they must be:
 - a. *Mandatory and enforceable* under domestic law, although Panel decisions later confirmed that a simple advantage conditional on the use of domestic goods is considered to be a violation of Article 2 of the TRIMs Agreement even if the local content requirement is not binding as such.
 - b. In the form of *performance requirements* (i.e. mandatory local procurement of parts and components); and

⁴⁰ A state-owned enterprise (SOE) is a legal entity that is created by the government, in order to partake in commercial activities on the government's behalf. These can include production and commercialisation/trading activities. STEs are therefore a subset of SOEs, which can have broader mandates.

⁴¹ Interpretation given in the panel decision Indonesia – Autos.

⁴² This was clarified in the panel decision Indonesia – Autos.

c. *Compliance is necessary* to obtain an advantage.

More specifically, LCPs are considered to be inconsistent with Article III of GATT 1994 when they relate to *internal measures*⁴³ limiting:

- (i) The purchase or use of products of domestic origin by an enterprise; and
- (ii) The purchase or use of imported products by an enterprise to an amount related to the volume or value of local products that it exports (trade-balancing measures).

In both cases, the inconsistency with Article III of the GATT results from the fact that the measure subjects the imported products to less favourable conditions than domestic products.

Similarly, LCPs are inconsistent with Article XI of the GATT regarding the importation or exportation of products by an enterprise. In particular, they concern:

- (i) *Border measures*⁴⁴ limiting the importation by an enterprise of products used in its local production, generally or to an amount related to the volume or value of local production exported by the enterprise;
- (ii) Measures involving a restriction of imports in the form of a *foreign exchange* balancing requirement⁴⁵;
- (iii) Measures involving *restrictions on the exportation* of or sale for export, by an enterprise, whether specified in terms of particular products, volume or value of products or in terms of a proportion of volume or value of its local production. Since this provision relates to the provisions of Article XI:1 of the GATT, it deals only with measures that restrict exports. Other measures relating to exports, such as export incentives and export performance requirements, are therefore not covered by the TRIMs Agreement.

Although the TRIMs Agreement has significantly reduced the policy space of developing countries⁴⁶, the latter are permitted to retain TRIMs to the extent that the measures are consistent with the specific derogations permitted under Article XVIII of the GATT 1994 by virtue of economic development needs and subject to notification to the General Council.

3.1.3. Agreement on subsidies and countervailing measures (ASCM)

Subsidies are widely used to provide support to the development of industries. They can take two forms (i) direct financial support to industries and (ii) indirect support through favourable fiscal policies, duty exemptions or access to inputs at reduced rates (Singh and Jose: 2016).

⁴³ Measures that affect products after they have been imported.

⁴⁴ Measures affecting the importation of products.

⁴⁵ This means that importation by an enterprise of products used in or related to local production is limited by restricting the enterprise's access to foreign exchange to an amount related to the foreign exchange inflows attributable to the enterprise.

⁴⁶ Article 4 of TRIMs allows developing countries to derogate temporarily from TRIMs obligations, as provided for by Article XVIII of GATT 1994 and related to WTO provisions of safeguard measures for balance of payments difficulties.

The ASCM⁴⁷ prohibits the use of subsidies in two cases:

- (i) When countries take measures to support local content in the form of *export subsidies*, within the meaning of Article 3.1 (a) of the Agreement.⁴⁸ An exception is made for LDCs and low-income countries with a GNP per capita of less than US\$1,000, that are listed under Annex VII⁴⁹ of the Agreement;
- (ii) When subsidies are granted to investors or industries contingent on the use of domestic products (*local content subsidies*), within the meaning of Article 3.1 (b) of the Agreement⁵⁰.

The ASCM is relevant only if subsidies have been ‘specifically’ provided to a company or industry or group of industries. Where subsidies are widely available within an economy (as a horizontal measure), they are not covered by the Agreement. There are three types of “specificity” within the meaning of the ASCM:

- (i) *Enterprise-specific subsidies*: Governments provide subsidies only to a particular company or group of companies;
- (ii) *Industry-specific subsidies*: Governments provide subsidies to a particular industrial sector or to a few sectors only.
- (iii) *Regional specific subsidies*: Governments provide subsidies to producers in specified parts of its territory.

Other forms of subsidies, such as production subsidies, are permitted, although they may be *actionable*, in the event that they cause *adverse effects*⁵¹ to the interests of other WTO members.

3.1.4. The General Agreement on Trade in Services

LCPs that may impact on foreign investment and employment of local and foreign staff are regulated by the General Agreement on Trade in Services (GATS). The Agreement distinguishes between four modes of supplying services, namely:

⁴⁷ The WTO Agreement on Subsidies and Countervailing Measures provides a definition of “subsidy” that has been accepted by all WTO members. Article 1 of the Agreement states that a “subsidy” exists when there is a “financial contribution” by a government or public body that confers a “benefit”. A “financial contribution” arises where: (i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees); (ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits); (iii) a government provides goods or services other than general infrastructure, or purchases goods; or (iv) a government entrusts or directs a private body to carry out one or more of the above functions. A “benefit” is conferred when the “financial contribution” is provided to the recipient on terms that are more favourable than those that the recipient could have obtained from the market.

⁴⁸ Article 3.1(a) of the ASCM prohibits the use of (subsidies contingent, in law or in fact (footnote 4), whether solely or as one of several other conditions, upon export performance, including those illustrated in [Annex I](#) (footnote 5). Footnote 4 clarifies that ‘*this standard is met when the facts demonstrate that the granting of a subsidy, without having been made legally contingent upon export performance, is in fact tied to actual or anticipated exportation or export earnings. The mere fact that a subsidy is granted to enterprises which export shall not for that reason alone be considered to be an export subsidy within the meaning of this provision*’. Footnote 5 indicates that ‘*Measures referred to in Annex I as not constituting export subsidies shall not be prohibited under this or any other provision of this Agreement*.’

⁴⁹ Annex VII countries are Bolivia, Cameroon, Congo, Côte d’Ivoire, Dominican Republic, Egypt, Ghana, Guatemala, Guyana, India, Indonesia, Kenya, Morocco, Nicaragua, Nigeria, Pakistan, Philippines, Senegal, Sri Lanka and Zimbabwe.

⁵⁰ Article 3.1(b) of the ASCM Agreement in particular prohibits the use of “subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods”.

⁵¹ There are three types of adverse effects: (i) there is **injury** to a domestic industry caused by subsidised imports in the territory of the complaining Member, this is the only basis for countervailing action; (ii) there is **serious prejudice** arising as a result of adverse effects (e.g., export displacement) in the market of the subsidising member or in a third country market; (iii) there is **nullification or impairment** of benefits accruing under the GATT 1994. Nullification or impairment arises most typically where the improved market access presumed to flow from a bound tariff reduction is undercut by subsidisation (see https://www.wto.org/english/tratop_e/scm_e/subs_e.htm)

- a. *Cross-border trade*, understood to cover services flows from the territory of one member into the territory of another member (essentially through electronic means);
- b. *Consumption abroad*, where the consumer moves into another member's territory to obtain a service (the classic case is tourism);
- c. *Commercial presence*, where a service supplier establishes a territorial presence, including through ownership or lease of premises, in another territory to provide a service; and
- d. *Presence of natural persons*⁵², where foreign persons enter the territory of another country to supply a service.

While the GATS recognises the right of WTO members to regulate the supply of services in pursuit of their own policy objectives, it nevertheless provides the framework to do so in a '*reasonable, objective and impartial manner*'. In that regard, each mode of supply is guided by provisions regarding market access and national treatment in specifically designated sectors.⁵³

Unlike the GATT where all the provisions apply directly and automatically to all WTO members, the GATS has a two-track approach: (i) *general obligations*, which include MFN treatment, transparency, exceptions for regional integration, have a universal coverage; and (ii) *obligations concerning market access and national treatment*, contained in individual countries' schedules of commitments. The scope of those commitments varies significantly across countries.

Provisions under the GATS that are relevant to LCPs are contained in market access and national treatment clauses. In particular, *Article XVI*, which relates to **market access**, requires countries that have scheduled commitments, not to maintain or adopt, unless expressly specified therein:

- a) Limitations on the *number of service suppliers* whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test;
- b) Limitations on the *total value of service transactions* or assets in the form of numerical quotas or the requirement of an economic needs test;
- c) Limitations on the *total number of service operations* or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test⁵⁴;
- d) Limitations on the *total number of natural persons* that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test;
- e) Measures which restrict or require specific *types of legal entity* or joint venture through which a service supplier may supply a service; and
- f) Limitations on the *participation of foreign capital* in terms of maximum percentage limit on foreign share-holding or the total value of individual or aggregate foreign investment.

As with the GATT therefore, countries that have scheduled commitments in services related to the extractive sector (i.e. their commitments apply to mining as well as petroleum activities), unless they have expressly stated exceptions, are restricted in their ability to use LCPs to:

- (i) *Protect domestic suppliers*: Article XVI.2 (a) – (c) regulate any forms of measures (quantitative and qualitative) that countries can impose on foreign operations, service suppliers and transactions.
- (ii) *Limit employment of expatriates in lieu of local workforce*: Article VI.2 (d) restricts the ability to impose LCPs to secure employment of local workforce. This is relevant for specific job

⁵² The Annex on Movement of Natural Persons specifies, however, that members remain free to operate measures regarding citizenship, residence or access to the employment market on a permanent basis.

⁵³ See the services sectoral classification list [MTN.GNS/W/120](https://www.wto.org/trade-issues/whatis/mtn_gns_w120.htm)

⁵⁴ This does not cover measures of a member which limit inputs for the supply of services.

categories, obligations to use local workforce by sub-contractors and those indirectly involved in supplying services to the mineral sector.

- (iii) *Impose ownership requirements:* Article XVI. 2(e – f) restrict LCPs in the form of joint ventures, equity participation, maximum foreign ownership and obligation of state participation.

Article VIII of the GATS allows monopolies and exclusive service suppliers, to the extent that there is no discrimination made to foreign suppliers in the supply of the service in the domestic market (i.e. that the monopoly does not act in a manner that is inconsistent with Article II of the GATS related to most-favoured nation). For example, Original Equipment Manufacturers (OEMs), which are generally given exclusive access to capital equipment, in particular because they offer guarantees on spare parts and other after sales-services, may fall under this category if market access is restricted.

National treatment provisions are contained in Article XVII of the GATS. They require that WTO members should not impose discriminatory measures that would benefit domestic services or service suppliers over foreign suppliers. The key requirement is not to modify, in law or in fact, *the conditions of competition* in favour of the domestic service industry. Like with market access, the extension of national treatment in any particular sector can be made subject to conditions and qualifications, which must be inscribed in the schedule of commitments.

While the GATS covers the essence of elements that may impact of the flow of trade in services, its *scope* is however limited, compared to the GATT. For instance, not all services-related negotiations could be concluded within the time frame of the Uruguay Round.⁵⁵ Those include, in particular, rules and disciplines for domestic regulation (Article VI), emergency safeguards (Article X), government procurement (Article XIII), and subsidies (Article XV). So far, negotiations have not been concluded on those issues, and therefore these fall outside the scope of the Agreement.

Furthermore, while all countries are required to have a schedule of specific commitments, which identifies the services for which the latter guarantee market access and national treatment and any limitations that may be attached, in reality developing countries have made very shallow commitments, leaving them with a lot of policy space to regulate their services, according to their national policy objectives.

Importantly also, the GATS's core obligations adopts a "*positive list*" approach to market access and national treatment. This implies that market access and national treatment commitments under the GATS *only apply if and to the extent that the WTO Member has expressly "scheduled" the relevant services sector in its Schedule of Commitments*. As a result, countries retain significant margins of manoeuvre to design and implement local content policies in service sectors that are not specifically identified in their schedules (GIZ: 2016).

However, the GATS *Schedule of Commitments* adopts a "*negative list approach*", that is, a specific commitment in a given sector or sub-sector applies to the *whole* of that sector, i.e. *all* services included in that sector or sub-sector are covered by the commitment. If a country wants to *restrict market access* with respect to certain services falling within the scope of a sector or sub-sector, it *should set out the restrictions or limitations on access in its schedule*.

3.1.5. Plurilateral Agreement on Government Procurement

The multilateral disciplines provided under the GATT and the GATS do not regulate government procurement. However, to respond to political pressures to address discriminatory treatment in favour of local suppliers for government transacted businesses, in particular regarding tendering procedures for

⁵⁵ Therefore, the GATS sets out a work programme which is normally referred to as the "built-in" agenda.

contracts above a certain financial threshold⁵⁶, some WTO members agreed to negotiate a plurilateral agreement on Government Procurement (GPA), whose scope is limited only to its signatories.

The GPA entered into force in 1996 and schedules were revised in 2012.⁵⁷ The Agreement is applicable only to the 19 parties⁵⁸ comprising 47 WTO members⁵⁹ that have acceded to it, although all WTO members are eligible to join.⁶⁰ The cornerstone of the GPA is non-discrimination between local and foreign suppliers. The use of offsets is explicitly excluded from GPA but developing countries can benefit from certain flexibilities if they join the GPA. No African countries are signatories of the GPA but Cameroon has been an observer since 2001.

Table 4: Summary of measures disciplined or prohibited under the rules of the WTO

Measures	Relevant WTO rules	Compatibility with WTO rules	Examples of countries potentially affected
Local procurement requirements			
Quota related to local sourcing: Products	Art. XI.1 TRIMs illustrative list para. 1 (a).	Prohibited	<u>Product list:</u> Ghana, Nigeria <u>Targets (volume or value):</u> Mexico, South Africa, Nigeria, Indonesia
Quota-related use of service suppliers	GATS Art. XVI.2 (a) – (c)	Prohibited for service categories scheduled without restrictions Otherwise not disciplined	Angola, Nigeria, Indonesia
Monopolies and exclusive service suppliers	GATS Art. VIII	Disciplined	Possible conflict if OEMs are given exclusive access
Trade balancing requirements	Art. XI.1 TRIMs illustrative list 1 (b) for internal measures; 2 (a) for border measures	Prohibited	Mexico
Manufacturing requirements	TRIMs illustrative list	Prohibited	Kazakhstan, Indonesia
Limitations on imports	GATT Art. III.5; GATT Art. XI.1; TRIMs illustrative list, para. 2(a)	Prohibited	
Licensing requirements	GATT Art. XI.1 (imports only)	Disciplined. Prohibited if non-automatic	China, Malaysia, Philippines, Russia, South Africa, Argentina, India, Indonesia, Brazil
Foreign exchange balancing	GATT Article XI.1 TRIMs illustrative list, para 2 (b)	Prohibited. Exception for developing countries GATT Art XII and XVIII:B	

⁵⁶ While the GATT and TRIMs are based on a positive list approach (i.e. countries agree to liberalise only those sectors that are put forward in their respective list of commitments, the GPA is based on a negative list approach, which means that rules apply to all sectors except those that the countries chose not to include in the Agreement, as reflected in their respective schedules of commitments).

⁵⁷ The coverage Schedule of the Revised GPA can be found on:
http://www.wto.org/english/tratop_e/gproc_e/gp_app_agree_e.htm#revisedGPA

⁵⁸ The EU and its 27 countries are considered as one party, but as 28 members.

⁵⁹ These are Armenia, Canada, EU, Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom, Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovak Republic and Slovenia, Bulgaria and Romania, Croatia, Hong Kong, Iceland, Israel, Japan, South Korea, Liechtenstein, Moldova, Montenegro, Aruba (Netherlands on behalf of), New Zealand, Norway, Singapore, Switzerland, Chinese Taipei, Ukraine, US.

⁶⁰ At present, ten WTO members are in the process of acceding. These are China, New Zealand, Montenegro, Albania, Georgia, Jordan, Kyrgyz Republic, Moldova, Oman and Ukraine. Five other WTO members have undertaken commitments, in their WTO accession protocols, to initiate accession to the GPA. They are the former Yugoslav Republic of Macedonia, Mongolia, the Russian Federation, Saudi Arabia and Tajikistan. An additional 17 countries are observers. These are Argentina, Bahrain, Cameroun, Chile, Colombia, Costa Rica, India, Indonesia, Kazakhstan, Malaysia, Panama, Pakistan, Seychelles, Sri Lanka, Thailand, Turkey, Vietnam.

Preference for locally manufactured goods and services	Goods: GATT Article III.4	Disciplined.	<u>Tenders with quotas</u> : Ghana, Kazakhstan	
	Services: GATS. Art. XVI. 2 (a) – (c)	Prohibited if numerical targets are set; if tendering procedures allocate the market to domestic suppliers based on more favourable conditions	<u>Bid criteria</u> : Brazil; Kazakhstan, Ghana	
Compulsory reporting requirements	GATT Art. III.5	Disciplined Prohibited if reporting relates to the use of products in specific amounts to be sourced locally	Ghana, Nigeria, Indonesia	
Enforcement mechanisms (penalties)	GATT Art. III.5	Disciplined Prohibited if penalties affect the use of specific products	<u>Pecuniary penalty</u> : Nigeria, Ghana, Indonesia	
Ownership requirements				
Local equity participation	GATS Art. XVI. 2(e – f)	Prohibited for service categories scheduled without restrictions Otherwise not disciplined	<u>State participation</u> : Brazil, Tanzania, Saudi Arabia, Kenya, Brazil, Angola, Malaysia, Ghana <u>Equity participation (non-state)</u> : Ghana <u>Max. foreign ownership</u> : Indonesia, Algeria JV: Libya, Uganda <i>Examples for illustration only. None of the countries mentioned has scheduled any commitments in mineral-related sectors</i>	
Employment requirements				
Local employment targets		GATS Art. VI.2 (d)	Prohibited for service categories scheduled without restrictions Otherwise not disciplined	Jobs reserved for nationals: Ghana, Angola, Nigeria, Kazakhstan, South Africa, Brazil, Mexico <i>Examples for illustration only. None of the countries mentioned has scheduled any commitments in mineral-related sectors</i>
Quotas for foreign employment			Prohibited only if countries have taken commitments in their services schedules Otherwise not disciplined	Angola, Tanzania, Ghana, Brazil <i>Examples for illustration only. None of countries mentioned has scheduled any commitments in mineral-related sectors</i>
National participation in management	Prohibited for service categories scheduled without restrictions Otherwise not disciplined		South Africa, Ghana <i>Examples for illustration only. None of the countries mentioned has scheduled any commitments in mineral-related sectors</i>	
R&D requirements				
R&D requirements (quota-related)	Goods: TRIPs Arts 3, 7 and 8; SCM Agreement Arts 2 and 8	Disciplined	<u>Numerical requirements</u> : Norway, Ghana, Malaysia	
Export restrictions				
Minimum export requirements	GATT Art. III.5; GATT Art. XI.1; TRIMs Illustrative List, para. 2(a)	Prohibited	<u>Export taxes</u> : Indonesia, China, Argentina, Bolivia, Vietnam; India, Russia, Malaysia, south Africa, Zambia <u>Export bans</u> : Indonesia, Angola, Burundi, Ghana <u>Export quotas</u> : China, Brazil, Belarus <u>Qualified exporters</u> : Russia, Indonesia, Oman	

			<u>Production control</u> : OPEC countries
Minimum price export requirements	GATT Art. XI.1	Prohibited	Argentina
Domestic sales requirements	GATT Art. III.5; GATT Art. XI: 1; TRIMs illustrative list 2(c)	Prohibited	Russia, Tajikistan, Indonesia
Market reserve policy	GATT Art. III.4	Prohibited	<u>Production sharing agreements</u> : petroleum countries that reserve their stakes for local market <u>SOEs reserving proceeds for domestic use</u> : Brazil, Myanmar, China, Russia, Venezuela, Saudi Arabia, Nigeria <u>Offset Agreements</u> : US, UAE, Turkey
Restrictions on port of entry	GATT Art. III.4; Art. XI.1	Disciplined Prohibited if increase in costs to importers and exporters constitutes restrictions on trade	Russia
Horizontal measures			
State trading enterprises	Article XVII of GATT, applicable when STEs enter into commercial operations.	Disciplined: must operate in accordance with principles of non-discrimination	Most resource-rich countries
Subsidies to support local suppliers	ASCM Art. 3.1(b)	Actionable if specific, otherwise non-actionable	<u>On inputs</u> : Nigeria, Venezuela, Indonesia <u>Tax incentives</u> : Indonesia, Zambia,
Subsidies to R&D and innovation	ASCM Art. 8.2	Actionable if specific, otherwise non-actionable	Finland, Sweden, Brazil
Exceptions for developing countries: Developing countries are permitted to retain TRIMs that constitute a violation of GATT Article III or XI, provided the measures meet the conditions of GATT Article XVIII, which allows specified derogation from the GATT provisions for the economic development needs of developing countries.			

Note: * This list is non-exhaustive.

3.2. Bilateral obligations

In addition to multilateral obligations, resource-rich countries have contractual obligations with their extractive companies and/or have signed up to bilateral treaties, such as investment agreements or free-trade agreements. Those agreements, generally in favour of investors, have attempted to go beyond the scope provisions of the WTO, either by deepening the limitations (WTO plus commitments) or by adding new commitments that currently fall outside the scope of the WTO (WTO-extra commitments). These have, however, significantly constrained the policy space of resource-rich countries to use LCPs.

Although the WTO provides a number of rules regarding LCPs, these are nevertheless seen as not sufficient by investors. Four main reasons are advanced to justify the need for more and stricter rules:

1. To date, there has not been a single dispute case at the WTO pertaining to LCPs in the extractive sector. One of the reasons being that 90% of mineral-rich countries have some form of LCPs (McKinsey: 2013). Many measures can potentially be disputed and therefore countries are not likely to bring a dispute against another WTO member, for fear of retaliation. Investors therefore see the WTO State-to-State dispute mechanism as a weakness;
2. The scope of the TRIMs Agreement is seen as limited, in particular regarding investment rules (TRIMs does not bring any new rules on investment, it only clarifies measures under Article III and IX). Similarly for the GATS coverage, in particular since many countries have not scheduled specific commitments regarding mineral-related services;

3. The WTO is perceived to be too flexible, and the interpretation of rules is not always straightforward. Panel decisions can be upheld or reversed in case of appeal, creating uncertainty over the rulings;
4. WTO does not provide financial compensation to investors in case a country is found in breach of the rules while investors might have incurred business losses and paid financial penalties for non-compliance to domestic rules and LCPs.

For these reasons, in the last decade, there has been a proliferation of bilateral investment treaties (BITs) and free trade agreements (FTAs) in response to the willingness to secure higher levels of protection and design stricter rules to ensure more predictable business environment. In particular, new generation BITs and investment chapters in FTAs between developing and developed countries have expressly constrained flexibilities, otherwise accorded to developing countries at the WTO regarding industrial policies to stimulate linkages and value addition.

3.2.1. Bilateral Investment Treaties (BITs)

Bilateral investment treaties are international agreements between two or more countries that lay down the terms and conditions of foreign private investment between parties to the Agreement. Today, there are about 3,000 BITs in force globally (IISD: 2014), all designed to create and secure a favourable investment environment and set out disciplines and rules regarding the treatment of foreign investments.

Like most developing countries, African countries have been active in entering into BITs. According to the United Nations Conference on Trade and Development (UNCTAD), as of end 2013, 793 BITs had been concluded by African countries, representing 27% of the total number of BITs worldwide (Mohamadieh and Uribe: 2016). More agreements are currently under negotiation.

BITs contain at least four types of provisions that limit the scope of LCP design and the use thereof.⁶¹ These are:

- (i) **Non-discrimination provisions**, prohibiting discrimination against other foreign investors and ensuring national treatment with local investors. These provisions ensure that investors of the country with which the BIT is signed get no less favourable treatment than any other investors. Countries therefore cannot provide any types of incentives/subsidies or impose any given preferences (through licenses to local investors) that would apply only to local investors (GIZ: 2016). State-owned enterprises are also covered by these provisions and new generations of BITs cover pre-establishment rights, hence limiting the capacity of countries to develop indigenisation policies. More importantly, they limit countries' space to impose ownership requirements to foreign investors.
- (ii) **Fair and equitable treatment provisions (FET)**⁶²: This provision protects investors against serious instances of arbitrary, discriminatory or abusive conduct by host states. It is an 'absolute standard of protection'⁶³ and applies to investments in a given situation without reference to how other investments or entities are treated by the host state (UNCTAD: 2012). The FET standard

⁶¹ For a full review of BIT and LCPs, see GIZ. 2016.

⁶² Many tribunals have interpreted them broadly to include a variety of specific requirements including a state's obligation to act consistently, transparently, reasonably, without ambiguity, arbitrariness or discrimination, in an even-handed manner, to ensure due process in decision-making and respect investors' legitimate expectations (UNCTAD: 2012).

⁶³ An "absolute standard of treatment" is a standard that states the treatment to be accorded in terms whose exact meaning has to be determined, by reference to specific circumstances of application, as opposed to the "relative" standards embodied in "national treatment" and "most-favoured nation" principles which define the required treatment by reference to the treatment accorded to other investment (OECD: 2004).

has in fact emerged as a potent tool⁶⁴ used by investors to challenge a range of state conduct that has been adverse to their investment (Malik: 2009).

- (iii) **Measures to restrict performance requirements:** those are the most straightforward restrictions in BITs regarding prohibition of measures pertaining to LCPs. Key provisions that prohibit, condition or discourage the use of LCPs include:
- a) *Pre-establishment rights:* While the WTO does not contain any provisions regarding pre-establishment rights, BITs seek to ensure a level-playing field for the conditions of establishment. This is of particular relevance for the extractive sector. In most cases, sub-surface assets are the property of the state, which regulates access to permits and licences, including prior to investments;
 - b) *Establishment of joint ventures and minimum level of domestic participation:* In recently negotiated BITs, host countries agree not to have any forms of compulsory requirements regarding domestic participation. This may limit learning and transfer of know-how and technology from foreign firms. In the extractive sector, this can limit the development of locally;
 - c) *Employment conditions,* in particular regarding key foreign professional or technical personnel, including restrictions associated with visa requirements, and obligations to hire specific categories of domestic workforce: This type of discipline prevents countries from taking measures to enhance the participation of local workforce in the extractive sector;
 - d) *Location of headquarters in a specific region:* This condition is important for governments to have an oversight on companies' financial reporting, in particular to monitor tax matters, and possible incidence of illicit financial flows, trade mis-invoicing and transfer-pricing. It is a key factor in triggering disputes, and companies incorporated locally may be considered as local companies and therefore may not be able to use the dispute instruments of BITs in case of challenge;
 - e) *Export conditions* and other restrictions on sales of goods or services in the territory where they are produced or provided: Investors are particular wary of restrictions on sales from the proceeds of investments, and have attempted to prohibit those under BITs (although they are not allowed under the WTO);
 - f) *Supply of goods produced or services from a specific region or territory:* Some BITs prohibit the use of measures that encourage local supply chain development, in particular from mining areas. This is a major constraint for industrial development and upstream linkages; and
 - g) *Transfer of technology, production processes or other proprietary knowledge and R&D requirements:* Some BITs even proscribe any form of LCP that may entail companies to share technology or to invest in R&D.
- (iv) **Specific measures relating to nationality of board members and senior management:** In addition to general restrictions regarding conditions of employment, BITs seek to ensure that investments do not face restrictions on foreign labour for senior management and board members.

The scope of application of BITs to LCPs varies significantly across agreements. The stance on LCPs in BITs can be classified in three main categories, essentially determined by the levels of development of parties to the Agreements and the level of interests at stake. Large source countries of FDI for instance,

⁶⁴ In a study considering 19 awards against host states, the host state was sanctioned for unfair or inequitable treatment or for a failure to provide full protection and security in 13 cases; for a failure to provide compensation for expropriation or other deprivation of property in seven cases; for discriminatory treatment in five cases; and for failure to observe contractual or other obligations in two cases. (in A return to the Gay Nineties? The Political Economy of Investment Arbitration, Gus Van Harten, Law Department, LSE, April 2006) (Malik: 2009).

would tend to secure more benefits for their investors, while large recipient countries would tend to negotiate more flexible agreements. The three categories are:

- (i) *BITs that contain implicit prohibition on LCPs*: these are contained in general standards regarding treatment of investors, covered under fair and equitable treatment provisions, national treatment and MFN principles. These are generally found in regional investment arrangements. A case in point is the Treaty Establishing the European Community, where the internal market calls for free movement of persons, services, capital and freedom of establishment of businesses (WTO: 2001).
- (ii) *BITs that discourage LCPs and contain permissive provisions*: this is often the case in BITs between developing countries and in 'old generation' BITs, such as the BIT between US and the then Zaire (D.R Congo) signed in 1984 but entered into force in 1989, which called for parties to "endeavour to avoid imposing' local content or export requirements, or the BIT signed between the US and Turkey⁶⁵ in 1985 and entered into force in 1990 where parties 'shall seek to avoid performance requirements'. These BITs are still in force today.
- (iii) *BITs that condition and prohibit certain mandatory and voluntary LCPs*: The BIT between the US and Senegal, signed in 1983 and entered into force in 1990, refers to employment conditions⁶⁶, including the recruitment of foreign workforce, but does not prohibit the host country to regulate their use. LCPs on local purchasing, export requirements are prohibited⁶⁷. Almost all BITs concluded post-NAFTA (Northern American Free Trade Area) by the US and Canada prohibit most forms of LCPs explicitly. These prohibitions are applicable both to goods and services, going beyond the provisions of the TRIMs. To ensure consistency in its international investment policies, the US Agreements are based on 'model BITs', which provide six key benefits to its investors. These are (i) MFN and national treatment; (ii) expropriation and compensation; (iii) transfers; (iv) performance requirements; (v) dispute settlement; and (vi) senior management and board of directors. Summarised in Box 1, the latest version of the Model⁶⁸ was revised in 2012, where LCP provisions are clearly spelt out in Article 8 and 9. Canadian BITs have similar provisions, such as the ones signed with Tanzania in 2013 and Senegal and Cote d'Ivoire in 2014.

Box 1: Provisions of Article 8 and 9 of the US Model BIT, 2012

Article 8: Performance Requirements

1. Neither Party may, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment of an investor of a Party or of a non-Party in its territory, impose or enforce any requirement or enforce any commitment or undertaking:

(a) to export a given level or percentage of goods or services;

⁶⁵ The BIT between the United States and Turkey (1985) provides in Article II (7) that: "Each party shall seek to avoid performance requirements as a condition of establishment, expansion or maintenance of investments, which require or enforce commitments to export goods produced, or which specify that goods or services must be purchased locally, or which impose any other similar requirements." The BIT is available online: http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_005487.asp

⁶⁶ Article II.6. of the US-Senegal BIT states that "Nationals and companies of either Party shall be permitted to engage, within the territory of the other Party, professional, technical and managerial personnel of their choice, regardless of nationality, for the particular purpose of rendering professional, technical and managerial assistance necessary for the planning and operation of investments. Companies, which are incorporated, constituted or otherwise organized under the applicable laws or regulations of one Party, and which are owned or controlled by nationals or companies of the other Party, shall be permitted to engage, within the territory of the first Party, top managerial personnel of their choice regardless of nationality".

⁶⁷ Article II.8. of the US-Senegal BIT states that "Neither Party shall impose performance requirements as a condition of establishment, expansion or maintenance of investments owned by nationals or companies of the other Party, which require or enforce commitments to export goods produced, or which specify that goods or services must be purchased locally, or which impose any other similar requirements". The Senegal-US BIT is available online: http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_005472.asp

⁶⁸ For 2012, the US BIT Model is accessible online: <http://www.state.gov/documents/organization/188371.pdf>

- (b) to achieve a given level or percentage of domestic content;
 - (c) to purchase, use, or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory;
 - (d) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment;
 - (e) to restrict sales of goods or services in its territory that such investment produces or supplies by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;
 - (f) to transfer a particular technology, a production process, or other proprietary knowledge to a person in its territory;
 - (g) to supply exclusively from the territory of the Party the goods that such investment produces or the services that it supplies to a specific regional market or to the world market; or
 - (h) (i) to purchase, use, or accord a preference to, in its territory, technology of the Party or of persons of the Party; or (ii) that prevents the purchase or use of, or the according of a preference to, in its territory, particular technology, so as to afford protection on the basis of nationality to its own investors or investments or to technology of the Party or of persons of the Party.
2. Neither Party may condition the receipt or continued receipt of an advantage, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment in its territory of an investor of a Party or of a non-Party, on compliance with any requirement:
- (a) to achieve a given level or percentage of domestic content;
 - (b) to purchase, use, or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory;
 - (c) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment; or
 - (d) to restrict sales of goods or services in its territory that such investment produces or supplies by relating such sales in any way to the volume or value of its exports or foreign exchange earnings.
3. (a) Nothing in paragraph 2 shall be construed to prevent a Party from conditioning the receipt or continued receipt of an advantage, in connection with an investment in its territory of an investor of a Party or of a non-Party, on compliance with a requirement to locate production, supply a service, train or employ workers, construct or expand particular facilities, or carry out research and development, in its territory.
- (b) Paragraphs 1(f) and (h) do not apply:
- (i) when a Party authorizes use of an intellectual property right in accordance with Article 31 of the TRIPS Agreement, or to measures requiring the disclosure of proprietary information that fall within the scope of, and are consistent with, Article 39 of the TRIPS Agreement; or
 - (ii) when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal, or competition authority to remedy a practice determined after judicial or administrative process to be anticompetitive under the Party's competition laws.
- (c) Provided that such measures are not applied in an arbitrary or unjustifiable manner, and provided that such measures do not constitute a disguised restriction on international trade or investment, paragraphs 1(b), (c), (f), and (h), and 2(a) and (b), shall not be construed to prevent a Party from adopting or maintaining measures, including environmental measures:
- (i) necessary to secure compliance with laws and regulations that are not inconsistent with this Treaty;
 - (ii) necessary to protect human, animal, or plant life or health; or
 - (iii) related to the conservation of living or non-living exhaustible natural resources.
- (d) Paragraphs 1(a), (b), and (c), and 2(a) and (b), do not apply to qualification requirements for goods or services with respect to export promotion and foreign aid programs.
- (e) Paragraphs 1(b), (c), (f), (g), and (h), and 2(a) and (b), do not apply to government procurement.

(f) Paragraphs 2(a) and (b) do not apply to requirements imposed by an importing Party relating to the content of goods necessary to qualify for preferential tariffs or preferential quotas.

4. For greater certainty, paragraphs 1 and 2 do not apply to any commitment, undertaking, or requirement other than those set out in those paragraphs.

5. This Article does not preclude enforcement of any commitment, undertaking, or requirement between private parties, where a Party did not impose or require the commitment, undertaking, or requirement.

Article 9: Senior Management and Boards of Directors

1. Neither Party may require that an enterprise of that Party that is a covered investment appoint to senior management positions natural persons of any particular nationality.

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

Source: US Department of State

As already mentioned, there is no known dispute settlement case relative to LCPs in the extractive sector brought to the dispute settlement at the WTO. However, in the case of BITs, with over 600 known cases, 25% of them are in the mining, oil and gas sector (IISD: 2014), although not all of them relate to LCPs. Sub-Saharan African (SSA) countries are increasingly subject to investors-state disputes, including regarding mineral resources. For instance, out of all known cases registered under the International Centre for Settlement of Investment Disputes (ICSID), 16% were from SSA. Further, in 2014, 20% of overall new cases under the ICSID were from SSA (Mohamadih and Uribe: 2016).

This reveals the power of BITs as instruments to curb government's ability to the use of LCPs to stimulate the development of local supply chains, downstream industries and employment creation and the resulting challenges to conduct legitimate industrial policies for structural transformation away from commodity dependency.

There have been growing criticisms against BITs. In fact, BITs have an 'in-built dissuasive mechanism', in that arbitral awards to compensate investors' losses against government practices, including regarding the implementation of LCPs, can be very costly. For instance, in 2010, Ecuador lost two cases against Chevron, costing the country the equivalent of 3.3% of its GDP and in 2014, three arbitral awards for a total amount of US\$50 billion were decided against Russia in the cases brought by Yukos oil company (Mohamadih and Uribe: 2016).

In response to the surge of disputes and the consequent financial costs to governments, a number of developing countries are seeking to review their approaches to investment protection treaties. Some have set a moratorium on new agreements pending a review while others like South Africa, Indonesia, Ecuador and Bolivia have chosen to withdraw from all or some treaties. South Africa will replace BITs with a domestic legislation on investment entitled "Promotion and Protection of Investment Bill". Indonesia and India are designing a model BIT, while Ecuador will define its relations with investors on a case-by-case basis, enshrined in investment contracts (Mohamadih and Uribe: 2016).

One of the challenges with current reviews, however, is that some protections provided for in BITs may continue to exist even beyond the legal life of the agreements, as most BITs have 'survival clauses' that can apply for up to 15 years after termination of the agreement. The US BIT Model for instance provides that "*for ten years from the date of termination, all other Articles shall continue to apply to covered investments established or acquired prior to the date of termination, except insofar as those Articles extend to the establishment or acquisition of covered investments*". This implies that, in case investors feel that the new legal arrangements are less favourable than the BITs, they can still invoke BITs to bring countries to arbitration, even after the Agreement has been terminated.

3.3. Free Trade Agreements

Investment chapters contained in Free Trade Agreements (FTAs) contain legal obligations that may affect the use of LCPs. Their scope and coverage vary significantly. By including investment chapters in their FTAs, parties seek to go beyond the GATS provisions. Like with BITs, new generation FTAs have more stringent disciplines that curtail the use of LCPs.

However, few FTAs signed by developing countries include 'WTO plus' disciplines on LCPs. One notable exception is the introduction of explicit disciplines on export taxes, generally allowed under the WTO. In Africa, the inclusion of export taxes was a contentious issue in the context of the Economic Partnership Agreements (EPAs) negotiations with the European Union (EU). The outcome of the recently concluded EPAs regarding export taxes is summarised in Table 5.

Table 5: Export taxes in EPAs in Africa

	Export taxes	Export restrictions
WTO Agreement	Allowed	Prohibited under GATT Art. XI Exceptions to prevent or relieve critical shortages of foodstuffs, including to safeguard the interests of importers of foodstuffs.
ECOWAS EPA (Negotiations completed but not signed yet)	Art. 13 allows existing taxes to be maintained but proscribes new taxes. Exception allows for addition of a limited number of additional goods. In case of exceptional specific needs countries may introduce new taxes to raise income, promote a fledgling industry or protect the environment on a temporary basis.	Art. 34 prohibits export restrictions, including export licensing. No reference made to exceptions as contained in GATT Art XI.
SADC EPA (Agreement signed by all parties, entered into effect on 10 October 2016)	Art. 26 prohibits new taxes and does not allow the increase of existing taxes. Existing taxes can be maintained in exceptional circumstances, on a temporary basis, for limited products and only Botswana, Lesotho, Namibia, Swaziland and Mozambique for: 1. Specific revenue needs; 2. Protection of infant industries; 3. The environment, or; 4. For the prevention or relief of critical general or local shortages of foodstuffs or to ensure food security. All EPA states may introduce export duties on a temporary basis for industrial purposes, after notification, on a total number of eight products, as defined at an HS6 tariff line level, or in case of 'ores and concentrates' at an HS4 tariff line level, per SADC EPA state at any given time and shall not be applied for a period exceeding 12 years in total. This period can be extended or reinstated for the same product in agreement with the EC Party. The ET shall not exceed 10% ad valorem.	Art 39: prohibits export restrictions but makes reference to exceptions as contained in the GATT/WTO Agreement. No mention of export licensing.
EAC EPA (EPA negotiations completed,	(Art. 14) can be applied in the following circumstances, after notifying the EU, for a	Prohibited (Art 19), including export licenses, with exceptions as in GATT Art

but has not been signed yet by EAC parties)	limited period of time (not specified): 1. To foster the development of domestic industry; 2. To maintain currency value stability, when the increase in the world price of an export commodity creates the risk of a currency value surge or; 3. For revenue, food security and environmental protection. Any more favourable treatment consisting in or in relation to taxes applied by the EAC Party to exports of any products destined for any major trading economy shall, from the entry into force of this Agreement, be accorded to the like product destined for the territory of the EU Party. These exceptions will be limited in number and have to be renewed every 48 months by the EPA Council. Prohibits new export taxes.	XI: 2.
ESA EPA (The interim EPA is currently in force)	Existing ET in Annex III maintained (and to be reviewed); No new export taxes to be introduced.	Art. 17 prohibits export restrictions, including export licenses. No reference made to exceptions as contained in GATT Art XI.
Central Africa EPA (Ratified only by Cameroon and is in force)	Article 15: prohibits introduction of new exports taxes or increase in existing taxes. Exceptions exist in the event of a serious public finance problem or the need for greater environmental protection, for a limited number of additional goods.	Art. 22 prohibits export restrictions. No reference made to exceptions as contained in GATT Art XI.

Besides export taxes, EPAs contain no other disciplines on LCPs, in part because none of the EPAs concluded with Africa to date, contain full fledged investment or services chapters. Unless countries have very tight BITs with European countries, their EPAs do not further constrain their policy space, beyond multilateral commitments.

Elsewhere, however, FTAs have become an additional vehicle to restrict the use of LCPs. For instance, in the latest rounds of FTAs negotiated by the EU and the US, investment chapters have a place of choice, and disciplines include additional features. For instance, the recently concluded Trans-Pacific Partnership (TPP)⁶⁹ contains an extensive list of prohibited performance requirements such as local content or technology localisation requirements. Interestingly, these restrictions apply to all investors and not only to nationals of the treaty Parties, which implies that those countries agreed to eliminate certain forms of LCPs on a multilateral basis.

There are some exceptions in the TPP to ensure that governments retain the flexibility (i) to manage volatile capital flows, including through non-discriminatory temporary safeguard measures (such as capital controls) and (ii) to restrict investment-related transfers in the event of a balance of payments crisis and other economic crises or to protect the integrity and stability of the financial system. Interestingly, the TPP performance requirements are based on the US BIT Model of 2012, as illustrated in Box 2.

⁶⁹ TPP signatories are United States, Canada, Brunei, Chile, New Zealand, Singapore, Australia, Japan, Malaysia, Mexico, Peru, and Vietnam.

Box 2: The Trans-Pacific Partnership: Performance requirements prohibited

Article 9.9 of the TPP Investment Chapter regulates 'performance requirements'. It applies to the '*establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment of an investor of a Party or of a non-Party in its territory*'. In terms of coverage, it therefore pertains to any investor, including those not party to the TPP.

The following performance requirements are **prohibited**:

- a. To export a given level or percentage of goods or services;
- b. To achieve a given level or percentage of domestic content;
- c. To purchase, use or accord a preference to goods produced in the territory of a TTP Party, or to purchase goods from persons in that territory;
- d. To relate the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with the investment;
- e. To restrict sales of goods or services in a Party's territory that the investment produces or supplies by relating those sales to the volume or value of its exports or foreign exchange earnings;
- f. To transfer a particular technology, a production process or other proprietary knowledge to a person in a Party's territory;
- g. To supply exclusively from the territory of the Party the goods that the investment produces or the services that it supplies to a specific regional market or to the world market;
 - (i) To oblige a Party to purchase, use or accord a preference to technology from its territory or
 - (ii) to prevent the purchase, use or to give preference to a particular technology for (a) a given rate or amount of royalty under a licence contract; or (b) a given duration of the term of a licence contract.

The Chapter also prohibits countries to put any particular **conditions** to allow investments or investors to operate in their territories, and in particular to comply with any particular requirement:

- a. To achieve a given level or percentage of domestic content;
- b. To purchase, use or give preference to goods produced in its territory, or to purchase goods from persons in its territory;
- c. To relate in the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with the investment; or
- d. To restrict sales of goods or services in its territory that the investment produces or supplies by relating those sales to the volume or value of its exports or foreign exchange earnings.

With regards to the **appointment of senior management**, the Agreement ensures that investors have the ability to appoint senior managers without regard to nationality, and ensuring that any nationality-based restrictions on the appointment of board members do not impair an investor's control over its investment.

However, the Chapter does not prevent a Party from '*conditioning the receipt or continued receipt of an advantage, in connection with an investment of an investor of a Party or of a non-Party in its territory, on compliance with a requirement to locate production, supply a service, train or employ workers, construct or expand particular facilities, or carry out research and development, in its territory*'.

Source: USTR, 2015.

The TPP coverage is extended to state owned enterprises and includes obligations to address the problem of discriminatory measures that provide advantages and financial support to foreign SOEs and other national champions or to avoid a situation whereby national SOEs would take actions to discriminate against foreign investors (USTR: 2015).

The TPP also covers government procurement – an area thus far largely excluded from previous FTAs. Parties are expected to extend to bidders on certain government procurement contracts, the same treatment that they extend to their domestic firms, and on most-favoured-nation treatment, which requires a TPP party to provide a foreign investor from a TPP party at least as good treatment as it extends to other TPP parties' foreign investors. Interestingly, the TPP allows investors to have resource to investor-state dispute settlement (ISDS) in case of violation of commitments. This is a new dimension in bilateral FTAs similar to those found in BITs.

The EU and the US are engaged in another mega-regional trade negotiations, the Trans-Atlantic Trade and Investment Partnership (TTIP). While negotiations are complicated and far from being completed, one can expect, based on the types of commitments that both the EU and the US have taken in their respective recent FTAs, that LCRs will be completely watertight. It is unclear what types of dispute mechanisms may apply and whether exceptions will be made for strategic sectors.

4. What policy space left for resource-rich countries?

Section 3 demonstrated that resource-rich countries, developed and developing alike, have limitations in the types of domestic policies they can design to foster industrial linkages, due to international trade and investment commitments. Despite those limitations, within the multilateral trading system, guided by WTO rules, developing countries in particular maintain a certain degree of policy space⁷⁰ to pursue legitimate economic objectives, including industrial policies. In effect, although the WTO provides rather clear rules on what types of LCPs are permitted or not, some fundamental policy instruments remain widely available, although in practice, this space may have been eroded and therefore no longer permitted, if countries have entered into more constraining bilateral agreements, through BITs and FTAs, as highlighted in section 3.

Under the WTO, significant flexibilities are available in the multilateral system for the key policy instruments. The section below discusses this in detail.

4.1. Customs duties and charges

Customs duties (i.e. tariffs) are important policy instruments for industrial policy – today's emerging economies in Asia have made good use of them. As mentioned, the GATT does not prohibit the use of tariffs but regulates the level of protection, by requiring countries to 'bind'⁷¹ their tariffs. However, there is no legally binding agreement that sets out the targets for tariff binding and consequently for reductions. Developing countries have very low levels of industrial tariff binding and when they have, the bound rates are higher than what is currently applied in practice. This is the case precisely in order to maintain a certain degree of flexibility to increase tariffs if necessary, to meet development objectives.

As a result, while developed countries have significantly reduced their tariff rates since the WTO entered into force, developing countries, on their part, maintain significant policy space to use their tariff policies to protect their local industries.

Export taxes are not prohibited under WTO rules. In fact, few countries have even bound their export tax rates (as is the case with import duties), with the exception of recently acceded members who were asked to do so during their accession process. The instrument therefore is available to many resource-rich countries.

Interestingly, however, few developing countries have had recourse to tariffs to stimulate their local industries. Instead, a number of them have either unilaterally opened their economies over time, or entered into FTAs with third parties, therefore eroding this space. EPAs are a case in point. African signatories states have committed to reduce tariffs on at least 75% of their trade with the EU, in exchange for a permanent

⁷⁰ The term 'policy space' appeared in literature in 2002 in UNCTAD documents. It was first used in official documents in the São Paulo Consensus of 2004. The Consensus defined the term policy space as '*the scope for domestic policies, especially in the areas of trade, investment and industrial development*' which might be '*framed by international disciplines, commitments and global market considerations*'.

⁷¹ The market access schedules are not simply announcements of tariff rates. They represent commitments not to increase tariffs above the listed rates, i.e. the rates are "bound". For developed countries, the bound rates are generally the rates actually charged. Most developing countries have bound the rates somewhat higher than the actual rates charged, so the bound rates serve as ceilings.

duty-free quota-free access to the EU market. Perhaps one of the reasons for the limited use of tariffs is because the increasing internationalisation of supply chains is dependent on market access, through low trade barriers, including tariffs.

4.2. Provisions of services

In the field of **services**, the GATS provides the widest range of policy space for the use of LCPs for resource-rich countries. As highlighted in section 3, rare are the countries that made extensive commitments to provide market access and national treatment to service providers and natural persons under the GATS. Unless otherwise constrained through BITs and FTA, developing countries who have not made commitments, therefore have sufficient space to design and implement LCPs such as:

- a. Technology-related requirements, including technology transfer, financial contributions to support innovation and R&D;
- b. Training requirements, including through specific spending requirements (such as a percentage of turnover or profits) or a number of people to be trained (e.g. number of scholarships to be financed on an annual basis);
- c. Local employment requirements, including quotas and conditions for foreign labour; and
- d. Ownership requirements, including in the form of joint ventures, state participation or equity ratios or maximum foreign ownership.

Annex 1 provides a quick scan at a few resource-rich countries' schedules of commitments (Ghana, South Africa and Indonesia). It confirms that developing countries have, in general, taken few commitments that may prevent them from implementing LCPs. Ghana for instance, scheduled commitments in very few sectors. No commitments have been made under 'professional services' for instance, which means that the country maintains significant flexibility to enact LCPs relating to service suppliers and employment in those sectors. The only sector that seems relevant in the context of this discussion is the construction sector, where, in respect of construction and related engineering services, Ghana seems to have removed all barriers to foreign investment, although it provides a carve-out in its horizontal commitments for equity participation and joint ventures and limits the participation of expatriates in senior positions. Its LCPs in this regard therefore do not violate its commitments made under the GATS. It is however observed that Ghana did make any reservations regarding unskilled labour. Its LCPs reserving job categories exclusively for nationals are therefore not compatible with its commitments.

South Africa by contrast, has taken numerous commitments in professional services and in construction services. It has been prudent to specify exemptions regarding specific categories of natural persons providing services, which gives the government flexibility with respect to employment of local workforce. However, it removed all market access and national treatment barriers to the provision of services by service suppliers and sub-contractors and therefore has limited scope in designing LCPs to foster the development of mineral-related services in the country, or to give preference to local service suppliers. Some aspects of its Mining Charter may therefore not be compatible with its services commitments.

For its part, Indonesia made specific commitments in certain categories of professional services and construction services. Regarding professional services, Indonesia opened its engineering services, except for those under government funded projects, which may include a number of petroleum-related activities, where the state-owned company Pertamina is heavily involved. Regarding the construction sector, it maintained the requirements for regarding joint ventures and licensing for all foreign companies that wish to establish a commercial presence in the country. The limit is set at 49% of capital share allowed for foreign ownership. Finally, movement of professionals in all its services sectors remain subject to the Labour and Immigration Law, which states that "only directors, managers and technical experts/ advisors, unless mentioned otherwise, are allowed with a maximum of two years, subject to one year extension".

4.3. Subsidies

The other widely used instruments of industrial policy are **subsidies**. Despite clear rules regarding the types of LCPs that are allowed or not under the Agreement, the ASCM provides certain flexibilities for developing countries, while distinguishing among three categories:

- (i) Least-developed countries (LDCs);
- (ii) Countries with a GNP per capita of less than US\$1,000 per year which are listed in Annex VII to the ASCM; and
- (iii) Other developing countries.

In a nutshell, the lower the level of economic development, the more flexibility the countries can have in the use of subsidies and therefore with respect to disciplines thereof. For instance:

- (i) As already mentioned, LDCs and countries with a GNP per capita of less than US\$1,000 per year listed in Annex VII are exempted from the prohibition on export subsidies;
- (ii) Other developing country members had an eight-year period from the entry into force of the Agreement, to phase out their export subsidies (but they could not increase the level of their export subsidies during this period). This transition period expired on 1st January 2003;
- (iii) With respect to local content subsidies, LDCs had eight years and other developing countries five years, to phase out such subsidies. The transition period for LDCs expired on 1st January 2003 and for developing countries on 1st January 2000;
- (iv) Regarding actionable subsidies, developing countries' privatisation programmes are not actionable multilaterally;
- (v) With respect to countervailing measures, developing countries' exporters are entitled to more flexibility with respect to the termination of investigations where the level of subsidisation or volume of imports is small.

Furthermore, other forms of subsidies are permitted, as follows:

- (i) *General or horizontal subsidies*, i.e. subsidies that apply to all economic sectors, are totally exempt for the ASCM provided that these subsidies are not specific to a sector or an industry, i.e. if they are '*neutral, economic in nature and horizontal in application*', as defined in footnote 2 of the ASCM Agreement⁷². Some examples include:
 - Subsidies for infrastructure/corridor development;
 - Financial incentives, in the form of insurance and guarantees;
 - Credit finance, for example to SMEs, irrespective of the economic sector;
 - Fiscal incentives and tax holidays, not target to a specific industry but on categories of inputs; and
 - Stimulus packages to support innovation and R&D;
- (ii) *Subsidies targeting specific sectors* are not prohibited, but may be actionable, which means that they can be subject to countervailing measures, if they are found to have an 'adverse' effect⁷³ on the domestic industry of another WTO member. For this, the burden of proof lies on the country that feels adversely impacted. So long as this adverse effect is not proven, countries can, in theory, provide sector-specific subsidies.

⁷² Footnote 2 of ASCM stipulates "objective criteria or conditions, as used herein, mean criteria or conditions which are neutral, which do not favour certain enterprises over others, and which are economic in nature and horizontal in application, such as the number of employees or the size of enterprise".

⁷³ Article 5 of the ASCM states that "no Member shall cause, through the use of a subsidy, adverse effects to the interests of other members, i.e. (a) injury to the domestic industry of another Member; (b) nullification or impairment of benefits accruing directly or indirectly to another Member under GAT 1994 in particular benefits accruing to concessions bound under Art. II of GATT 1994; and (c) serious prejudice to the interests of another member..."

- (iii) *Subsidies on services* are not regulated under the GATS. Therefore, countries can provide financial support and other forms of incentives to support their local service suppliers.
- (iv) *Finally, government policies supporting R&D and innovation* are however considered as non-actionable, as provided by Article 8.2 of ASCM⁷⁴ and therefore active industrial policies can be designed to encourage companies to innovate in new products and new production processes. By permitting subsidies to cover up to 75% of industrial research costs, governments have considerable flexibility to influence on the technology development of companies.

While subsidies remain an area where substantial policy space exists for developing countries, the main challenge is the capacity to use these flexibilities. In effect, developing countries often lack the financial resources necessary to provide substantive subsidies that can accompany nascent domestic industries long enough, to allow them to reach a critical size to thrive on their own. In this case, the challenge is not policy space, but financial space.

4.4. State-owned companies

Another area loosely regulated by WTO agreements pertains to **state-owned companies and exclusive service providers**. This is particularly relevant for petroleum-rich countries, given the market and ownership structures that surround hydrocarbon production and related downstream activities. As mentioned in Section 3, Article XVII of the GATT addresses conduct of market access obligations, through commercial activities of SOEs, in a manner that they do not create anti-competitive and discriminatory impacts on foreign investors. However, Article XVII does not address ownership structures and does not constrain SOEs to change their market structures. This guarantees significant policy space for national champions, including support of upstream and downstream linkages. Services provided by STEs and SOEs are not covered by the GATS.

4.5. Government procurement

As mentioned already, local content, through **government procurement** is not inconsistent with WTO rules, unless resource-rich countries are parties to the plurilateral Government Procurement Agreement. In this case, countries need to specify what commitments they are willing to make and the threshold value for procurements to be covered by the GPA. The GPA prohibits the use of local content, technology licensing and investment requirements in offsets.⁷⁵

4.6. Special and differential treatment

Article XVIII of the GATT, pertaining to **Government Assistance to Economic Development** is an explicit recognition of the position of developing countries and their need for derogations from some trade measures with respect to the GATT Articles, including the support of Infant Industries and remedying Balance of

⁷⁴ Article 8.2 of ASCM states "Notwithstanding the provisions of Parts III and V, the following subsidies shall be non-actionable: (a) assistance for research activities conducted by firms or by higher education or research establishments on a contract basis with firms if: the assistance covers not more than 75 per cent of the costs of industrial research or 50 per cent of the costs of pre-competitive development activity; and provided that such assistance is limited exclusively; to (i) costs of personnel (researchers, technicians and other supporting staff employed exclusively in the research activity); (ii) costs of instruments, equipment, land and buildings used exclusively and permanently (except when disposed of on a commercial basis) for the research activity; (iii) costs of consultancy and equivalent services used exclusively for the research activity, including bought in research, technical knowledge, patents, etc.; (iv) additional overhead costs incurred directly as a result of the research activity; (v) other running costs (such as those of materials, supplies and the like), incurred directly as a result of the research activity".

⁷⁵ Footnote 7 of the GPA stipulated that "Offsets in Government Procurement Agreement are measures used to encourage local development or improve the balance of payments accounts by means of local content, licensing of technology, investment requirements, counter-trade or similar requirements."

Payments problems. In particular, Article XVIII stipulates that ‘...those contracting parties should enjoy additional facilities to enable them (a) to maintain sufficient flexibility in their tariff structure to be able to grant the tariff protection required for the establishment of a particular industry and b) to apply quantitative restrictions for balance of payments purposes in a manner which takes full account of the continued high level of demand for imports likely to be generated by their programmes of economic development’.

This Article is however a ‘last resort measure’. It contains a number of conditionalities and safeguards to ensure that the ‘right to deviate’ from obligations under the Agreement is strictly limited to cases where no other alternative measure consistent with the Agreement is available. The possibility to modify tariff structures, is therefore subject to negotiations with other WTO members, and potentially, to compensation, in the form of greater market access for other products. This may end up being more costly to developing countries.

Besides specific flexibilities outlined above, the WTO Agreements contain a number of clauses that allow developing countries to derogate from the rules contained in the Agreements. These are contained under:

- (i) **Exception clauses** that cater for particular situations (e.g. Article XX of GATT 1994; Article XIV of GATS) or that may be necessary for security reasons (Article XXI of GATT 1994; Article XIVbis of GATS; Article 73 of TRIPS); and
- (ii) **Special and differential treatment (SDT) provisions**⁷⁶, found in all agreements, that apply to developing countries and in particular to low income countries and LDCs. There are 139 SDT provisions in WTO Agreements for developing countries.⁷⁷

4.7. Other measures

Some other measures, that are not traditionally classified as LCPs, but may have an equivalent effect on protection of domestic industries, are worth highlighting. One such policy domain is the use of exchange rate policies. These fall outside the realm of the WTO, although Article XV of the GATT requires cooperation with the International Monetary Fund (IMF) regarding a broad range of exchange-rate questions such as monetary reserves, balance of payments or foreign exchange arrangements. Article XV has however been narrowly interpreted to cover currency convertibility and liberalisation of payments and is ill-equipped to deal with issues such as “currency manipulations” or deliberate undervaluation of currencies (which can work as an import tax or an export subsidy from an economic perspective). Continuous criticism of the Chinese exchange rate policy in support of domestic industries’ competitiveness illustrates this point.

5. Conclusion

This paper highlights the wide-ranging use of local content policies as a mechanism in support of upstream and downstream linkages. While approaches to the design of LCPs vary across countries, they remain nevertheless a cornerstone of industrial policy in resource-rich countries. Whether they have worked or not is not the focus of this paper. In practice, it is dependent on a host of conditions, which are country and context specific, but which rest on the ability of governments to provide the necessary environment for local businesses to thrive, productively and competitively.

⁷⁶ For a comprehensive analysis of industrial disciplines and WTO see Report of the First Expert Group Meeting on Reinventing Manufacturing: New Industrial Policy and the Trading System.

⁷⁷ See Note by WTO Secretariat for the Committee on Trade and Development on Special and Differential Treatment in WTO Agreements and Decisions. 14 June 2013. [WT/COMTD/W/196](http://www.wto.org/comtd/w/196).

Instead, the paper focuses in particular on the nexus between LCPs and international trade and investment rules. In doing so, it seeks to address the question to which extent the capacity of countries to pursue active local content policies is constrained by international and bilateral rules. Although there are evident issues of incompatibility with many measures, in particular when LCPs take the form of quantitative restrictions or performance requirement for investors, countries nevertheless continue to design and enforce those measures, despite the risk of being taken to dispute by other states at the WTO, or by investors under BITs.

Relevant trade and investment commitments that impact on LCPs are found in the WTO rulebooks, or in bilateral investment or trade agreements. Quota-related LCPs, in particular are prohibited in various agreements, with few exceptions for LDCs, to address specific circumstances. While the WTO is a hallmark for disciplines regarding the treatment of domestic and foreign trade, including producers and suppliers, it nevertheless provides ample flexibilities to developing countries. The challenge is therefore more the capacity of using existing flexibilities.

The most constraining obligations however, are found in BITs and FTAs, where countries have voluntarily agreed to erode their capacity to regulate, generally under pressure from investors who do not feel that multilateral frameworks are sufficient to preserve their interests or to compensate them financially in case of conflicts. New generation BITs, in particular, have attempted to close all the loopholes and restrict all possible special treatment that the WTO provides to developing countries to design and implement any form of LCPs. To that effect, as countries enter into bilateral deals, the multilateral framework (and its related flexibilities) becomes irrelevant vis-à-vis the bilateral partner.

Despite the above, LCPs remain a key instrument of linkages development. But given legal constraints, resource-rich countries may have to find alternative ways to quota-related LCPs to avoid the risk of being challenged. Other strategies that can deliver equivalent effects should be pursued. These include:

1. LCPs that are linked to horizontal or non-specific incentives, to entice companies to deploy efforts to source locally or to employ the local workforce. A 'carrot' approach (i.e. an incentive conditional on an obligation) is more likely to attract support from the private sector than a 'stick' approach (i.e. an obligation, with a penalty for non-compliance). As the paper highlights, subsidies are not always prohibited, and countries can use a whole range of policies, ranging from tax incentives, to risk-guarantees or subsidised credits, to entice mining companies to give preferences to local suppliers, and at the same time, support SMEs to access the highly competitive markets of mining procurement.
2. Institutional frameworks, set up in partnership with the private sector (mining industries and other industries), such as the development of suppliers programmes, aimed at accompanying local suppliers in meeting the requirements of the company, accessing mining procurement, and sustaining supply on a long-term basis. Countries like Chile and Brazil have successfully designed innovative programmes to create a pool of world-class suppliers capable of providing inputs to the mining sector competitively in their countries but also to access global supply chains. Measures to support suppliers and to incentivise mining companies did not necessarily have the traits of traditional LCPs but had equivalent effects in that they managed to create sustainable local supply chains and jobs.
3. More broadly, LCPs are not an end in themselves. They need to be integrated in countries' national development plans or industrial policies. Too often, countries have not succeeded because measures were done to meet expectations regarding insufficient contribution of the extractive sector to the economy, without having regards to the overall role the extractive industry should play in the industrial development of a country. One of the biggest criticism of the industry is that it operates as an 'enclave' and often. Many LCPs are not designed to make the link with other economic activities in order to integrate the industry with the rest of the economy. This is essential to diversify away from commodity dependence. Experience of successful countries, like Finland or Sweden, tell us that the key to this is through knowledge-driven LCPs and, in particular, consistent government support (including state subsidies) to technology and R&D to ensure spillovers in other economic sector.

4. Finally, a regional approach to LCPs is essential to the success of the policies. In fact, most national LCPs contradict the objectives of regional integration, because by design, they only focus on their national interests. This can potentially jeopardise regional integration efforts. A coherent and coordinated effort is therefore needed, not only to preserve regional integration agenda but also to tap market opportunities from neighbouring countries and make use of their comparative advantage to complement national efforts. In addition, developing countries alone have too small markets and therefore not sufficient critical mass to attract investments in suppliers' activities. But this can be partly addressed by designing regional policies specifically aimed at procuring the extractive industries operating in the region or adding value to minerals proceeds. To date, in Africa, for example, regional economic communities have general mining codes or protocols, which essentially provide guidance to countries to harmonise their mining policies, around fiscal issues, to prevent a race to the bottom in attracting FDI. However, none of those frameworks deal with industrial development and regional value chains.

Annex 1 Illustrative services commitments affecting extractive sector

Examples of commitments made in services sectors relevant to the extractive industry (Ghana, South Africa and Indonesia)

Modes of supply: 1) Cross-border supply 2) Consumption abroad 3) Commercial presence 4) Presence of natural persons

Sector or subsector	Limitations on market access	Limitations on national treatment
GHANA (GATS/SC/35 of 15 April 1994)		
1. HORIZONTAL COMMITMENTS		
All sectors included in the schedule	1) None 2) None 3) Foreign-owned enterprises including joint-venture enterprises with Ghanaians must satisfy minimum capital outlay and foreign equity requirements as follows: wholly foreign-owned company requires a minimum equity capital outlay of US\$ 200,000. Joint-venture company should have a minimum foreign equity capital of at least US\$10,000 in cash or kind. Agency establishment must have authority to negotiate and conclude contracts on behalf of foreign parent companies. 4) Automatic entry and work permit is granted to up to four expatriate senior executives and specialised skill personnel in accordance with relevant provisions in the Investment Promotion Law. Approval is required for any additional expatriate workers beyond the automatic level. Enterprises must also provide for training in higher skills for Ghanaians to enable them to assume specialised roles.	1) None 2) None 3) None 4) None
II: SECTOR SPECIFIC COMMITMENTS		
3. Construction and Related Engineering Services (including maintenance and equipment repair services)		
A. General construction work for buildings (CPC 512)	1) None 2) None 3) None 4) Unbound except as indicated under horizontal measures	1) None 2) None 3) None 4) Unbound except as indicated under horizontal measures
B. General construction work for civil engineering (CPC 513)	1) None 2) None 3) None	1) None 2) None 3) None 4) Unbound except as indicated under

	4) Unbound except as indicated under horizontal measures	horizontal measures
C. Installation and assembly work (CPC 514, 516)	1) None 2) None 3) None 4) Unbound except as indicated under horizontal measures	1) None 2) None 3) None 4) Unbound except as indicated under horizontal measures
SOUTH AFRICA		
1. HORIZONTAL COMMITMENTS	4) Unbound, except for the temporary presence for a period of up to three years, unless otherwise specified, without requiring compliance with an economic needs test, of the following categories of natural persons providing services: A. Services Salespersons - natural persons not based in South Africa and acquiring no remuneration from a source located within South Africa, who are engaged in activities related to representing a services provider for the purpose of negotiating for the sale of the services of that provider, without engaging in making direct sales to the general public or supplying services. Temporary presence for Services Salespersons is limited to a 90-day period B. Intra-corporate Transferees – natural persons of the following categories who have been employed by a juridical person that provides services within South Africa through a branch, subsidiary, or affiliate established in South Africa and who have been in the prior employ of the juridical person outside South Africa for a period of not less than one year immediately preceding the date of application for admission: Executives - natural persons within the organisation who primarily direct the management of the organisation or establish goals and policies for the organisation or a major component or function of the organisation, exercise wide latitude in decision-making, and receive only general supervision or direction from higher-level executives, the board of directors, or stockholders of the business. Managers - natural persons within an organisation who primarily direct the organisation, or a department or subdivision of the organisation, supervise and control the work of other supervisory, professional or managerial employees, have the authority to hire and fire or recommend hiring,	3) Local borrowing by South African registered companies with a non-resident shareholding of 25 percent or more is limited 4) Unbound, except for measures concerning the categories of natural persons referred to in the market access column

	firing, or other personnel actions and exercise discretionary authority over day-to-day operations at a senior level. Specialists - natural persons within an organisation who possess knowledge at an advanced level of continued expertise and who possess proprietary knowledge of the organisation's product, service, research equipment, techniques, or management. Professionals - natural persons who are engaged, as part of a services contract negotiated by a juridical person of another member in the activity at a professional level in a profession set out in Part II, provided such persons possess the necessary academic credentials and professional qualifications, which have been duly recognised, where appropriate, by the professional association in South Africa. C. Personnel Engaged in Establishment - natural persons who have been employed by a juridical person for a period of longer than one year immediately preceding the date of application for admission and who occupy a managerial or executive position and are entering South Africa for the purpose of establishing a commercial presence on behalf of the juridical person	
II. SECTOR-SPECIFIC COMMITMENTS (selected, with relevance to the mineral sector)		
1. BUSINESS SERVICES		
A. Professional Services		
a) Legal services (advisory services in foreign and international law only) (CPC 861 +)	1) Unbound 2) Unbound 3) None 4) Unbound except as indicated in the horizontal section	1) Unbound 2) Unbound 3) None 4) Unbound except as indicated in the horizontal section
b) Auditing (CPC 862 +)	1) Unbound 2) Unbound 3) None 4) Unbound except as indicated in the horizontal section	1) Unbound 2) Unbound 3) Citizenship requirement for accreditation 4) Unbound except as indicated in the horizontal section
c) Taxation services (excluding legal services)	1) None 2) None	1) None 2) None

(CPC 863)	3) None 4) Unbound except as indicated in the horizontal section	3) None 4) Unbound except as indicated in the horizontal section
d) Architectural services (CPC 8671)	1) For building plans of 500m ² and over the services of a locally registered architect have to be utilised 2) For building plans of 500m ² and over the services of a locally registered architect have to be utilised 3) None 4) Unbound except as indicated in the horizontal section	1) None 2) None 3) None 4) Unbound except as indicated in the horizontal section
e) Engineering services (CPC 8672)	1) None 2) None 3) None 4) Unbound except as indicated in the horizontal section	1) None 2) None 3) None 4) Unbound except as indicated in the horizontal section
f) Integrated engineering services (CPC 8673)	1) None 2) None 3) None 4) Unbound except as indicated in the horizontal section	1) None 2) None 3) None 4) Unbound except as indicated in the horizontal section
F. Other Business Services c) Management consulting services (CPC 865)	1) None 2) None 3) None 4) Unbound except as indicated in the horizontal section	1) None 2) None 3) None 4) Unbound except as indicated in the horizontal section
d) Services related to management consulting (CPC 866)	1) None 2) None 3) None	1) None 2) None 3) None 4) Unbound except as indicated in the

	4) Unbound except as indicated in the horizontal section	horizontal section
e) Technical testing and analysis services (CPC 8676)	1) None 2) None 3) None 4) Unbound except as indicated in the horizontal section	1) None 2) None 3) None 4) Unbound except as indicated in the horizontal section
h) Services incidental to mining (CPC 883) (CPC 5115)	1) Unbound 2) Unbound 3) None 4) Unbound except as indicated in the horizontal section	1) Unbound 2) Unbound 3) None 4) Unbound except as indicated in the horizontal section
i) Services incidental to manufacturing (CPC 884) (CPC 885)	1) Unbound 2) Unbound 3) None 4) Unbound except as indicated in the horizontal section	1) Unbound 2) Unbound 3) None 4) Unbound except as indicated in the horizontal section
k) Placement and supply services of personnel (CPC 872)	1) None 2) None 3) None 4) Unbound except as indicated in the horizontal section	1) None 2) None 3) None 4) Unbound except as indicated in the horizontal section
m) Engineering related scientific and technical consulting services (CPC 8675)	1) None 2) None 3) None 4) Unbound except as indicated in the horizontal section	1) None 2) None 3) None 4) Unbound except as indicated in the horizontal section
n) Maintenance and repair of	1) None	1) None

equipment (CPC 633)	2) None 3) None 4) Unbound except as indicated in the horizontal section	2) None 3) None 4) Unbound except as indicated in the horizontal section
o) Building-cleaning services (CPC 874)	1) Unbound* 2) None 3) None 4) Unbound except as indicated in the horizontal section	1) Unbound* 2) None 3) None 4) Unbound except as indicated in the horizontal section
3. CONSTRUCTION AND RELATED ENGINEERING SERVICES		
A. General Construction Work for Buildings (CPC 512)	1) Unbound* 2) None 3) None 4) Unbound except as indicated in the horizontal section	1) Unbound* 2) None 3) None 4) Unbound except as indicated in the horizontal section
B. General Construction Work for Civil Engineering (CPC 513)	1) Unbound* 2) None 3) None 4) Unbound except as indicated in the horizontal section	1) Unbound* 2) None 3) None 4) Unbound except as indicated in the horizontal section
C. Installation and Assembly Work (CPC 514 +) (CPC 516)	1) Unbound* 2) None 3) None 4) Unbound except as indicated in the horizontal section	1) Unbound* 2) None 3) None 4) Unbound except as indicated in the horizontal section
D. Building Completion and Finishing Work (CPC 517)	1) Unbound* 2) None	1) Unbound* 2) None

	3) None 4) Unbound except as indicated in the horizontal section	3) None 4) Unbound except as indicated in the horizontal section
INDONESIA		
Horizontal commitments:	1), 2) As specified in each sector 3) Commercial Presence of the foreign service provider(s) may be in the form of joint venture and/or representative office, unless mentioned otherwise. Joint venture should meet the following requirements: i) should be in the form of Limited Liability Enterprise (Perseroan Terbatas/PT), ii) not more than 49% of the capital share of the Limited Liability Enterprise (Perseroan Terbatas/PT), may be owned by foreign partner(s) .	1), 2) As specified in each sector 3) The Income Tax Law provides that non-resident taxpayers will be subject to withholding tax of 20% if they derive the following income from Indonesian source: a) interest; b) royalties; c) dividend d) fee from service performed in Indonesia Land Acquisition Undang-Undang Pokok Agraria (Land Law) No. 5 of 1960 stipulates that no foreigners (juridical and natural persons) are allowed to own land. However, a joint venture enterprise could hold the right for land use (Hak Guna Usaha) and building rights (Hak Guna Bangunan), and they may rent/lease land and property. Any juridical and natural persons should meet professional qualification requirements. 4) Expatriate Charges: Any foreign natural persons supplying services are subject to charges levied by National, Provincial and Municipal Governments. Labour Laws and Regulations: Any expatriate employed by a joint- venture

	4) Subject to Indonesian Labour and Immigration Laws and Regulations, only directors, managers and technical experts/advisors, unless mentioned otherwise, are allowed with a maximum stay of two years subject to one year extension. Manager and technical experts (intra corporate transfer) are allowed based on an economic needs test	enterprise, representatives office, and/or other types of juridical person and/or an individual services provider must hold a valid working permit issued by the Ministry of Manpower. Immigration Laws and Regulations: Any expatriate must meet immigration requirements and procedures to enter the territory of the Republic of Indonesia
1. BUSINESS SERVICES: Professional services		
Engineering design services for industrial processes and production (CPC 86725)	1) Unbound for government funded project 2) Unbound for government funded project 3) Joint operation through a representative office in Indonesia 4) Unbound except for director and technical expert	1) Unbound 2) Unbound 3) The Indonesian participant in joint operation must be member of Indonesian Consultant Association 4) As specified in the Horizontal Measures
Project management services other than for construction	1) Unbound for government funded project 2) Unbound for government funded project 3) Joint operation through a representative office in Indonesia 4) Unbound except for director and technical expert	1) Unbound 2) Unbound 3) The Indonesian participant in joint operation must be member of Indonesian Consultant Association 4) As specified in the Horizontal Measures
Technical Testing and Analysis Services (CPC 8676)	1) Unbound for government funded project 2) Unbound for government funded project 3) Joint operation through a representative office in Indonesia 4) Unbound except for director and technical expert	1) Unbound 2) Unbound 3) The Indonesian participant in joint operation must be member of Indonesian Consultant Association 4) As specified in the Horizontal

		Measures
Services incidental of manufacturing (CPC 884 & 885)	1) Unbound for government funded project 2) Unbound for government funded project 3) Joint operation through a representative office in Indonesia 4) Unbound except for director and technical expert	1) Unbound 2) Unbound 3) The Indonesian participant in joint operation must be member of Indonesian Consultant Association 4) As specified in the Horizontal Measures
Maintenance and repair of equipment (not including maritime vessels, aircraft or other transport equipment) (CPC 633 + 8861 + 8866)	1) Unbound for government funded project 2) Unbound for government funded project 3) Joint operation through a representative office in Indonesia 4) Unbound except for director and technical expert	1) Unbound 2) Unbound 3) The Indonesian participant in joint operation must be member of Indonesian Consultant Association 4) As specified in the Horizontal Measures
Engineering Service (CPC 8672 - except CPC 86721-86725-86726)	1) Unbound 2) None 3) a) Joint operation: To form a joint operation by establishing a representative office b) Joint venture: to establish a joint venture company by fulfilling the requirements as specified in the Horizontal Measures and the Foreign Capital Investment Law	1) Unbound 2) Unbound 3) a) Joint operation: 1. Registration fee requirement 2. Licence for representative office shall be valid for 3 years and can be extended 3. Registered foreign company shall form a joint operation with local partner(s) which is (are) member(s) of the Indonesian Consultant Association having qualification A b) Joint venture: Local partner(s) in joint venture shall be member(s) of the Indonesian Consultant Association and having qualification A

	4) As specified in the Horizontal Measures	4) As specified in the Horizontal Measures
Integrated Engineering Services (CPC 8673)	1) Unbound 2) None 3) a) Joint operation: To form a joint operation by establishing a representative office b) Joint venture: to establish a joint venture company by fulfilling the requirements as specified in the Horizontal Measures and the Foreign Capital Investment Law 4) As specified in the Horizontal Measures	1) Unbound 2) Unbound 3) a) Joint operation: 1. Registration fee requirement 2. Licence for representative office shall be valid for 3 years and can be extended 3. Registered foreign company shall form a joint operation with local partner(s) which is (are) member(s) of the Indonesian Consultant Association having qualification A b) Joint venture: Local partner(s) in joint venture shall be member(s) of the Indonesian Consultant Association and having qualification A 4) As specified in the Horizontal Measures
3. CONSTRUCTION AND RELATED ENGINEERING SERVICES		
Construction work for Building (CPC 512 except CPC 51210)	1) Unbound* 2) None 3) a) Joint operation: To form a joint operation by establishing a representative office b) Joint venture: to establish a joint venture company by fulfilling the requirements as specified in the Horizontal Measures and the Foreign Capital Investment Law	1) Unbound* 2) Unbound 3) a) Joint operation: 1. Registration fee requirement 2. Licence for representative office shall be valid for 3 years and can be extended 3. Registered foreign company shall form a joint operation with local partner(s) which is (are) member(s)

	4) As specified in the Horizontal Measures	of the Indonesian Consultant Association having qualification A b) Joint venture: Local partner(s) in joint venture shall be member(s) of the Indonesian Consultant Association and having qualification A 4) As specified in the Horizontal Measures
Construction work for civil engineering (CPC 513)	1) Unbound* 2) None 3) a) Joint operation: To form a joint operation by establishing a representative office b) Joint venture: to establish a joint venture company by fulfilling the requirements as specified in the Horizontal Measures and the Foreign Capital Investment Law 4) As specified in the Horizontal Measures	1) Unbound* 2) Unbound 3) a) Joint operation: 1. Registration fee requirement 2. Licence for representative office shall be valid for 3 years and can be extended 3. Registered foreign company shall form a joint operation with local partner(s) which is (are) member(s) of the Indonesian Consultant Association having qualification A b) Joint venture: Local partner(s) in joint venture shall be member(s) of the Indonesian Consultant Association and having qualification A 4) As specified in the Horizontal Measures
Assembly and erection of prefabricated construction (CPC 514 - 5140)	1) Unbound* 2) None 3) a) Joint operation: To form a joint operation by establishing a representative office b) Joint venture: to establish a joint venture company by fulfilling the requirements as specified in the Horizontal Measures and the Foreign Capital Investment Law	1) Unbound* 2) Unbound 3) a) Joint operation: 1. Registration fee requirement 2. Licence for representative office

	4) As specified in the Horizontal Measures	shall be valid for 3 years and can be extended 3. Registered foreign company shall form a joint operation with local partner(s) which is (are) member(s) of the Indonesian Consultant Association having qualification A b) Joint venture: Local partner(s) in joint venture shall be member(s) of the Indonesian Consultant Association and having qualification A 4) As specified in the Horizontal Measures
Renting Services related to equipment for construction or demolition of building or civil engineering works, with operator (CPC 518)	1) Unbound* 2) None 3) a) Joint operation: To form a joint operation by establishing a representative office b) Joint venture: to establish a joint venture company by fulfilling the requirements as specified in the Horizontal Measures and the Foreign Capital Investment Law 4) As specified in the Horizontal Measures	1) Unbound* 2) Unbound 3) a) Joint operation: 1. Registration fee requirement 2. Licence for representative office shall be valid for 3 years and can be extended 3. Registered foreign company shall form a joint operation with local partner(s) which is (are) member(s) of the Indonesian Consultant Association having qualification A b) Joint venture: Local partner(s) in joint venture shall be member(s) of the Indonesian Consultant Association and having qualification A 4) As specified in the Horizontal Measures

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About ECDPM

ECDPM was established in 1986 as an independent foundation to improve European cooperation with the group of African, Caribbean and Pacific countries (ACP). Its main goal today is to broker effective partnerships between the European Union and the developing world, especially Africa. ECDPM promotes inclusive forms of development and cooperates with public and private sector organisations to better manage international relations. It also supports the reform of policies and institutions in both Europe and the developing world. One of ECDPM's key strengths is its extensive network of relations in developing countries, including emerging economies. Among its partners are multilateral institutions, international centres of excellence and a broad range of state and non-state organisations.

Thematic priorities

ECDPM organises its work around four themes:

- Reconciling values and interests in the external action of the EU and other international players
- Promoting economic governance and trade for inclusive and sustainable growth
- Supporting societal dynamics of change related to democracy and governance in developing countries, particularly Africa
- Addressing food security as a global public good through information and support to regional integration, markets and agriculture

Approach

ECDPM is a "think and do tank". It links policies and practice using a mix of roles and methods. ECDPM organises and facilitates policy dialogues, provides tailor-made analysis and advice, participates in South-North networks and does policy-oriented research with partners from the South.

ECDPM also assists with the implementation of policies and has a strong track record in evaluating policy impact. ECDPM's activities are largely designed to support institutions in the developing world to define their own agendas. ECDPM brings a frank and independent perspective to its activities, entering partnerships with an open mind and a clear focus on results.

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ECDPM Discussion Papers

ECDPM Discussion Papers present initial findings of work-in-progress at the Centre to facilitate meaningful and substantive exchange on key policy questions. The aim is to stimulate broader reflection and informed debate on EU external action, with a focus on relations with countries in the South.

In addition to structural support by ECDPM's institutional partners The Netherlands, Belgium, Finland, Ireland, Luxembourg, Portugal, Sweden, Switzerland and Austria, this publication also benefits from funding from the Department for International Development (DFID), United Kingdom.

ISSN 1571-7577

The logo for ECDPM, featuring the lowercase letters "ecdpm" in a white, sans-serif font on a blue rectangular background.

HEAD OFFICE SIÈGE

Onze Lieve Vrouweplein 21
6211 HE Maastricht
The Netherlands *Pays Bas*
Tel +31 (0)43 350 29 00
Fax +31 (0)43 350 29 02

BRUSSELS OFFICE
BUREAU DE BRUXELLES
Rue Archimède 5
1000 Brussels *Bruxelles*
Belgium *Belgique*
Tel +32 (0)2 237 43 10
Fax +32 (0)2 237 43 19

info@ecdpm.org
www.ecdpm.org
KvK 41077447