

LOCAL CONTENT



Ghana – Mining



**Columbia Center
on Sustainable Investment**

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

The project¹ - background

Resource-rich countries are increasingly inserting requirements for local content (“local content provisions”) into their legal framework, through legislation, regulations, contracts, and bidding practices. If successful, a policy to increase local content can lead to job creation, boost the domestic private sector, facilitate technology transfer and build a competitive local workforce. However, local content goals are often unfulfilled and the opportunities are not captured. For example, local content provisions typically require investors to meet targets measured as a percentage of investment, hours worked, equipment supplied, or jobs created. If targets are too high, they may either scare away investment or remain unmet as investors accept the fines or find loopholes. If they are too low, the country will not maximize potential linkages. This shows the importance of the framing of local content provisions. Targets, and other local content objectives, need to be carefully quantified, adapted to the local context and collaborative. Because local content provisions can be key to translating resource investments into sustainable benefits for the local population, this project examines the detail of the existing legal frameworks for local content in a number of countries.

CCSI has conducted a survey of the local content frameworks of a number of countries – identifying the key legislation, regulations, contracts and non-binding policies and frameworks dealing with local content issues in the mining and petroleum sectors². A profile was created for each country, summarizing the provisions in the legal instruments dealing with local content and highlighting examples of high impact clauses³ – those containing precise language which might be useful as an example to those looking to draft policies to enhance a country’s local content⁴. The profiles examine provisions dealing with local employment, training, procurement, technology transfer, local content plans as well as local ownership, depending on the country's approach to and definition of local content. In addition, as key to translating provisions into action, the profiles look at implementation, monitoring and enforcement provisions as well as the government’s role in expanding local involvement. Aside from emphasizing the strong clauses, which may be adaptable across countries, the profiles summarize the provisions but do not provide commentary, because local content is so context specific. The profiles are intended as a tool for policy makers, researchers and citizens seeking to understand and compare how local content is dealt with in other countries, and to provide some examples of language that might be adopted in a framework to achieve local content goals. Hyperlinks are provided to the source legislation, regulations, policies and contracts where available.

¹ The project was managed by Perrine Toledano and Jacky Mandelbaum, with assistance from Sophie Thomashausen. Research was conducted by Elsa Savourey, with input from Shazia Ahmad.

² General legislation with provisions that relate to local content (for example, tax laws with incentives for local procurement or employment in any industry), was not included in the review. The review included dedicated mining or petroleum sector or specific local content legislation, regulations, policy and contracts.

³ Those clauses are framed and singled out by a “thumb up”.

⁴ Our criteria for assessment of the quality of the provisions were language that is less likely to present a loophole, i.e. less likely to be subject to interpretation due to vagueness and more likely to lead to enforcement because of its clarity in terms of rights and obligations of both parties (state and investor), and reasonable in its obligations on the company. In addition, as mentioned above, we looked for clauses that encourage collaboration between the company and the government in defining local content targets and goals, and those where the government has a role, as well as clauses enabling implementation and monitoring of the requirements and those giving the government strong remedies to enforce companies’ compliance.

The project - background

The impact of international law

The World Trade Organization (WTO)'s agreements and investment treaties can present an obstacle to the realization of local content goals by prohibiting some types of local content requirements (a sub-category of “performance requirements”¹). CCSI therefore surveyed the relevant WTO agreements and investment treaties in each country profiled to identify the provisions that may prevent, counsel against and/or shield local content standards. These provisions are quoted in the profile in order to show the potential barriers to implementation of local content so that they can be kept in mind when countries enter into these international investment treaties². Free Trade Agreements other than the WTO agreements, some of which may contain investment chapters, are not included in the scope of the review, but may also be relevant and should be similarly kept in mind.

¹Performance requirements are measures in law, regulation or contract that require investors to meet specified goals when entering, operating or expanding in, or leaving a host country. Some are strictly mandatory; others are imposed as a condition for receiving some sort of added benefit or advantage.

²Countries implementing local content requirements should be aware of the possibility of a challenge to those provisions either through the WTO (state-to-state dispute settlement) or arbitration under the bilateral investment treaties (which is investor-state dispute settlement). While the potential for such actions may be low, they remain a risk depending on the circumstances, and particularly should relations between the state and the investor sour over the course of the investment.



Highlights

- The local content framework is set out briefly in the mining legislation, with more detail provided in the general mining regulations. Unlike in Ghana's petroleum sector, there are no regulations dedicated to local content.
- The focus of the local content framework is on growing local employment and local procurement.
- Companies must apply for an immigration quota for expatriate employees, which will not be granted if a Ghanaian could occupy the relevant position(s).
- The Minerals Commission is required to establish and maintain a local procurement list, updated annually, which outlines the goods and services that must be procured in Ghana.

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



International law

Legislation

[Minerals and Mining Act 2006 \(Act 703\)](#) (“Act”)
Contains few provisions dealing with to local content.

Regulation

Minerals and Mining (General) Regulations 2012 (LI 2173) (“Regulations” or “Regs”)
Contains the details for provisions in the Act dealing with local content.

Policy

Contract

Key definitions

Citizens means:

- “(a) an individual who is a citizen of Ghana by virtue of a law for the time being in force in Ghana;
- (b) a partnership or association which is composed exclusively of individuals who are citizens of Ghana;
- (c) a body corporate which is incorporated under the Companies Code, 1963 (Act 179), and
 - (i) which is certified by the Minister to be controlled by the Republic,
 - (ii) whose membership is composed exclusively of persons who are citizens;
 - (iii) whose directors are exclusively citizens,
- (d) a public corporation that is established by or under an enactment” (Act, Art. 111).

Commission means “the Minerals Commission established under section 1 of the Minerals Commission Act 1993 (Act 450)” (Act, Art. 111).

Localization means “a training programme designed towards the eventual replacement of expatriate personnel by Ghanaian personnel” (Act, Art. 50).

Localisation programme “includes a procurement plan and means proposals or particulars with respect to the employment or recruitment of expatriates, employment and training of Ghanaians towards the eventual replacement of expatriate personnel by Ghanaian personnel and preference for local products, as the context permits (Regs, Art. 28)

Overview – Ghana mining sector



Rights application

- Applications for mining rights must include a proposal for the training and employment of Ghanaian personnel.
- The proposal forms part of the conditions of the mineral rights or license granted.

Plans

- A local content program for the recruitment and training of Ghanaians to replace expatriate employees must be submitted to the Commission.
- A procurement plan must be submitted and updated annually, outlining targets for local procurement as well as support to be provided to build up local suppliers. The plan should comply with the local content list maintained by the Commission.

Training and employment

- Companies are required to give preference in employment to citizens “to the maximum extent possible and consistent with safety, efficiency and economy”.
- Percentages are prescribed for the maximum number of expatriate staff to the total number of senior staff permitted, at the reconnaissance, prospecting and mining stages as well as for providers of mine support services and exporters of minerals.
- Companies must apply for an immigration quota for expatriates, with the ability to adjust the quota in certain circumstances.

Procuring goods and services

- Preference must be given to materials and products made in Ghana and service agencies located in Ghana and owned by Ghanaians or companies registered in Ghana, “to the maximum extent possible and consistent with safety, efficiency and economy”.
- The Commission must maintain a local procurement list specifying goods and services to be procured in Ghana, updated annually.
- Bids with the highest level of Ghanaian participation must be selected, where bids are within 2% of each other on price.

Monitoring and enforcement

- Companies must submit annual reports on compliance with the localization program and semi-annual reports on implementation of the procurement plan.
- Monetary penalties are prescribed, including a penalty that is to be paid into a fund to be used to train Ghanaians. If a product on the local procurement list is imported, import duty must be paid.

Applications for rights



- An application for mining rights must be accompanied by a proposal with respect to the employment and training in the mining industry of Ghanaians (Act, Art. 11).
- The Regulations provide more detail on the proposal that must be submitted (Regs, Art. 1). The proposal must contain particulars with respect to proposed expatriate employees:
 - CVs;
 - positions they will fill;
 - conditions of service; and
 - duration of contract.

The Applicant must also state how it intends to train Ghanaians to replace expatriates within a specified timeframe “if available” (Regs, Art. 1(2)).

- Details on the proposals must be updated at intervals of 5 years, and form part of the conditions of the mineral rights agreement or license (Regs, Arts. 1(3) and (5)):



“(3) The particulars shall be submitted:

...(b) at intervals of five years after the application has been granted.

...(5) The approved proposals shall form part of the conditions of the mineral right agreement or the appropriate licence granted under the Act.”

Training and employment



- Companies are required to submit a program for recruitment and training of Ghanaians (Act, Art. 50):



“(1) In pursuance of a localization policy [see definition], each holder of a mining lease shall submit to the [Minerals]Commission a detailed programme for the recruitment and training of Ghanaian personnel as prescribed.

(2) The programme to be submitted under subsection (1) shall be a condition for the grant of a mining lease”.

- The Regulations provide little additional detail on the content of the recruitment and training program. They require “details of ongoing and planned recruitment and training of Ghanaians to replace expatriates” as well as the percentages of expatriate staff to total number of senior staff. Companies were required to submit these programs when the Regulations started, so all companies should comply, including those already operating (Regs, Art. 1(7)(a), (9)(a) and 12(a)).
- Companies are required to give preference in employment to citizens “to the maximum extent possible and consistent with safety, efficiency and economy” (Act, Art. 105(2)).
- The Regulations provide a level for the percentage of expatriate staff to the total number of senior staff allowed.
 - At the exploration stage for holders of reconnaissance and prospecting licenses, and for mining support service providers and exporters of minerals, the level is set out in the Second Schedule (Regs, Art. 1(7)(b), (9)(b) and 12(b)).
 - For reconnaissance and prospecting license holders, no unskilled labor or clerical staff may be expat, 10% of skilled labor may be expatriate for the first two years after which there must be no expatriate staff, 5% of technical and supervisory staff may be expatriate in the first four years after which there must be no expatriate staff and for the life of the project up to two management staff may be expatriate.
 - For mining leases the permitted level is not more than 10% for the first three years from the start of the Regulations or mining operations, whichever is later, and not more than 6% after that, unless this means that the company can hire less than three expatriate staff, in which case it may hire three expatriates and if it results in a fraction, the company is permitted the next whole number (Regs, Art. 1(11)).
- The Regulations require an application to the Commission for a quota for immigration for expatriate employment. The Commission will not approve unless it is satisfied that no Ghanaian has the “requisite qualification and experience” to occupy the position (but no detail provided on how the Commission will make this decision) (Regs, Art. 1(4) and (5)).

Training and employment



- An expatriate shall not be hired in an unskilled or clerical position by companies with a mining lease (Regs, Art. 1(10) - it is not completely clear whether this more broadly or only to holders of mining leases).
- For companies with reconnaissance or prospecting licenses, where the employment of expatriates for skilled labor is “critical”, the company may after two years allocate part or all of the amount of expatriate staff allowed in the technical, supervisory and management category to skilled labor instead, or after four years, allocate part or all of the company’s expatriate staff allowed in the management category to skilled labor instead (Regs, Art. 1(8)).
- For mining support services and companies licensed to export or deal in minerals, where the employment of expatriate skilled labor is “critical for the purposes of training Ghanaian employees”, the company may allocate part of the proportion of expatriate staff allowed in other areas to the required skilled labor instead (Regs, Art. 1(14)).
- For companies engaged in mining support services or licensed to export or deal in minerals, unskilled labor, skilled labor and clerical positions must be reserved for Ghanaians, subject to the percentages of expatriate staff allowed under Schedule 2 (Regs, Art. 1(13)).
- In exceptional circumstances, the Commission may approve additional expatriates (Regs, Art. 1(18):



“The Commission may approve the employment of additional expatriates in exceptional circumstances, upon consideration of justification submitted by the Applicant, including:

- (a) Where specialised technology would be used;
- (b) where training of Ghanaians being carried out would require a longer period than the transition period;
- (c) Where a special project including a new mine development, expansion or rehabilitation is to be undertaken, provided that the duration of the project does not exceed three years; or
- (d) where Ghanaians are transferred to work as expatriates in the company’s operations in other countries.”

- Where prospecting operations are being carried out on five or more licenses, or mining operations are carried out on two or more leases, and corporate offices are maintained separately from the exploration site or mine site offices, two more expatriates may be employed in the corporate offices (Regs, Art. 1(19) and (20)).

Procuring goods and services



- Companies are required to “give preference to”:
 - materials and products made in Ghana; and
 - service agencies located in Ghana and owned by:
 - citizens,
 - companies or partnerships registered under Ghanaian law; and
 - corporations,“to the maximum extent possible and consistent with safety, efficiency and economy” (Act, Art. 105(1)).
- The Regulations contain a similar requirement – that companies must procure goods and services “with Ghanaian content” (undefined), “to the maximum extent possible and consistent with safety, efficiency and economy” (including holders of mining rights, companies providing support services and companies holding rights to export or deal in minerals) (Regs, Art. 2(1)).
- When assessing a tender for goods or services which appear on the local procurement list¹, the bid with the highest level of Ghanaian participation in terms of ownership and management by Ghanaians and employment of Ghanaians must be selected, where bids are within 2% of each other on price (Regs, Art. 2(13)).

¹This is a list to be maintained by the Commission, see following page.

Procuring goods and services



- The Regulations also require companies to submit a procurement plan to the Commission, for a five year period, and then a subsequent five year period. The procurement plan must be submitted within one year of the commencement of the Regulations or the start of operations, whichever is later (Regs, Art. 2(2), (3) and (4)).
- The Regulations provide some detail on the required contents of the procurement plan (Regs, Art. 2(5)):



“(5) The procurement plan shall include:

- (a) targets for local procurement covering at least the items specified in the local procurement list as provided in sub-regulation 10;
- (b) prospects for local procurement; and
- (c) specific support to providers or suppliers as well as measures to develop the supply of local goods and services including broadening access to opportunities and technical and financial assistance...”

- The company must revise its procurement plan annually to take account of the requirements in the local procurement list, which is also adjusted annually (Regs, Art. 2(7)).
- The Commission will maintain a local procurement list (Regs, Art. 2(10) and (12)):



“(10) The Commission shall have a local procurement list and specify in the list the goods and services with Ghanaian content which shall be procured in Ghana by the holder of a mineral right, a licence to export or deal in minerals or a person registered to provide mine support services...”

(12) The Commission shall review the local procurement list annually.”

Monitoring and enforcement



Monitoring - reporting requirements

- Companies with an approved localization program must submit an annual report to the Commission showing the level of compliance with the program (Regs, Art. 2(14)).
- Companies must submit reports semi-annually on the implementation of the procurement plan (Regs, Art. 2(8)).

Enforcement - penalties

- Non-compliance with an approved localization program incurs a penalty requiring of one year's salary of the expatriate involved for each month, or part of each month, that the expatriate worked. The penalty is payable to the Commission, into an account to be established by the Commission for training of Ghanaians for participation in the mining sector (Regs, Art. 1(15) and (16)).
- Failure to provide a procurement plan incurs a penalty of US\$10,000 per month for the first six months of the default, and after that, US\$10,000 per day that the default continues, payable to the Commission (Regs, Art. 2(6)).
- Failure to provide the report required on implementation of the procurement plan incurs a penalty of US\$10,00 per month for the first two months of default, and after that US\$10,000 per day that the default continues, payable to the Commission (Regs, Art. 2(9)).
- Companies that fail to procure locally as required under the local procurement list must pay to the Commission the full customs import duty for the goods imported, as well as a penalty which will be set out in the local procurement list (Regs, Art. 2(11)).



Agreement on Trade-Related Investment Measures (TRIMs)¹

- Ghana has been a member of the WTO since January 1, 1995.
- All World Trade Organization (WTO) Members must adopt and abide by the obligations of TRIMs. This can impact a country's ability to impose certain local content requirements (referred to as "investment measures"), to the extent they affect trade in *goods*.
- The following types of local content requirements are covered by TRIMs²:
 - requiring a company to purchase or use products of domestic origin – TRIMs prohibits discrimination between goods of domestic and imported origin;
 - limiting the amount of imported products that an enterprise may purchase or use depending on the volume or value of local products that the enterprise exports;
 - restricting foreign exchange necessary to import (e.g., restricting the importation by an enterprise of products used in local production by restricting its access to foreign exchange); and
 - restricting exports.

¹ The TRIMs Agreement clarifies existing rules contained in Articles III (National Treatment Obligation (NTO)) and XI (Prohibition on Quantitative Restrictions) of the General Agreement on Tariffs and Trade (GATT), 1994.

² It is important to be aware of the types of measures prohibited under the TRIMs Agreement, in order to avoid the potential for dispute settlement under the WTO - a state can bring an action against another state for an alleged violation of the TRIMs Agreement (i.e. "state-to-state action").



General Agreement on Trade in Services (GATS)

- A separate WTO agreement, the General Agreement on Trade in Services (“GATS”), covers investment measures related to services (in Article XVI), including the following which are relevant to local content:
 - Requirements to use domestic service suppliers
 - Limits on the number of service suppliers
 - Limits on the total value of service transactions or assets
 - Limits on the total number of service operations or quantity of service output
 - Limits on the total number of natural persons permitted
 - Restrictions on or requirements for certain types of legal entities (e.g., joint venture requirements)
 - Imposition of domestic equity
- GATS only applies to those service sectors that the country chooses to include in its Schedule of Commitments. Ghana’s [commitments](#)¹ relating to construction and related engineering services, telecommunication services may affect the implementation of Article 105(1) of the Act and Article 2 of the Regulations, and Ghana’s “horizontal [commitments](#)” may affect implementation of aspects of the Regulations dealing with immigration quotas for expatriate employees.

¹ See also [Supplement 1](#) and [Supplement 2](#)

International law – bilateral investment treaties



- As at 1 June 2013, Ghana had entered into 26 bilateral investment treaties (BITs) but only 8 were in force¹.
- Investment treaties are international agreements between two or more countries which establish the terms and conditions of foreign investment within each country and provide rights directly to the investors of each country which is party to the treaty. The treaties can contain restrictions on local content requirements.²
- Investment treaties can contain the following types of provisions, each of which affects a country's ability to impose local content requirements:
 - non-discrimination provisions (“national treatment” and “most-favored nation” obligations), which are relevant in the context of local content when:
 1. host countries require some foreign investors to source from certain goods and service providers but don't impose similar requirements on other investors; and
 2. host countries give an advantage to some domestic or foreign goods and services providers, but not to a foreign provider whose state has a relevant treaty with the host country. (Note that this is relevant only where the foreign provider of goods or services has or, intends to have³, a presence in the host country);
 - restrictions on capital transfers;
 - “pre-establishment” protections, which prevent a state from imposing conditions on foreign investors that are not imposed on domestic investors, such as requirements to transfer technology to local firms, to establish the firm through a joint venture, or to reinvest a certain amount of capital in the host country;
 - incorporation of the TRIMs agreement; and
 - *explicit* prohibition of performance requirements that go beyond what is restricted by the TRIMs Agreement.

¹ According to UNCTAD's [country specific list of bilateral investment treaties](#)

² It is important to be aware of the BITs a country has signed and the types of requirements prohibited under it, in order to avoid the potential for arbitration against the country - the majority of investment treaties allow investors to bring arbitration claims directly against the country in which they have invested (“investor-state arbitration”).

³ I.e., the conditions under which an investor may enter into the territory of a party, not only the conditions once the investment is made.

International law – bilateral investment treaties



- Of the 26 BITS signed by Ghana, 17 were reviewed (and are available on [UNCTAD's database](#)).
- Aside from the inclusion of National Treatment Obligations and Most Favored Nation clauses, which are included in most BITS, none contained specific restrictions on performance requirements.