

# LOCAL CONTENT

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Tanzania - Mining



Columbia Center  
on Sustainable Investment

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

# The project<sup>1</sup> - 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 sectors<sup>2</sup>. A profile was created for each country, summarizing the provisions in the legal instruments dealing with local content and highlighting examples of high impact clauses<sup>3</sup> – those containing precise language which might be useful as an example to those looking to draft policies to enhance a country’s local content<sup>4</sup>. 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.

- <sup>1</sup> The project was managed by Perrine Toledano, Jacky Mandelbaum, and Sophie Thomashausen. Research was conducted by Elsa Savourey, with input from Shazia Ahmad.
- <sup>2</sup> 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.
- <sup>3</sup> Those clauses are framed and singled out by a “thumb up”.
- <sup>4</sup> Our criteria for assessment of the quality of the provisions were language that is less likely to present a loophole, i.e. less likely to be subject to interpretation due to vagueness and more likely to lead to enforcement because of its clarity in terms of rights and obligations of both parties (state and investor), and reasonable in its obligations on the company. In addition, as mentioned above, we looked for clauses that encourage collaboration between the company and the government in defining local content targets and goals, and those where the government has a role, as well as clauses enabling implementation and monitoring of the requirements and those giving the government strong remedies to enforce companies’ compliance.



## The impact of international law

The World Trade Organization (WTO)'s agreements and investment treaties can present an obstacle to the realization of local content goals by prohibiting some types of local content requirements (a sub-category of “performance requirements”<sup>1</sup>). 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 treaties<sup>2</sup>. 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.

<sup>1</sup>Performance 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.

<sup>2</sup>Countries 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 key objectives of the Mining Policy are: “to strengthen integration of the mineral sector with other sectors of the economy, to maximize the benefits of mining and to facilitate the value addition to minerals.”
- There are local ownership requirements for all mining licenses.
- An employment and training program and a procurement plan are required to be submitted to obtain a licence. However, there are no guidelines as to what these should include.
- The Minister of Energy and Minerals has the discretion to determine the acceptability of the employment and training program and the procurement plans.
- No legal obligations relating to the transfer of technology (just a policy).
- No monitoring and enforcement mechanisms.

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



## International law

### Legislation

The [\*\*Mining Act 2010\*\*](#) (“Mining Act”) is the first step towards implementing the Mining Policy.

### Regulation

The draft ***Mining (Minimum Shareholding and Public Offering) Regulations 2013*** require special license holders to list a minimum of 30% of their shares.

### Policy

[\*\*Mining Policy 2009\*\*](#) (“Mining policy”) evidences a strong Government commitment to develop local content, although these are only voluntary at this stage.

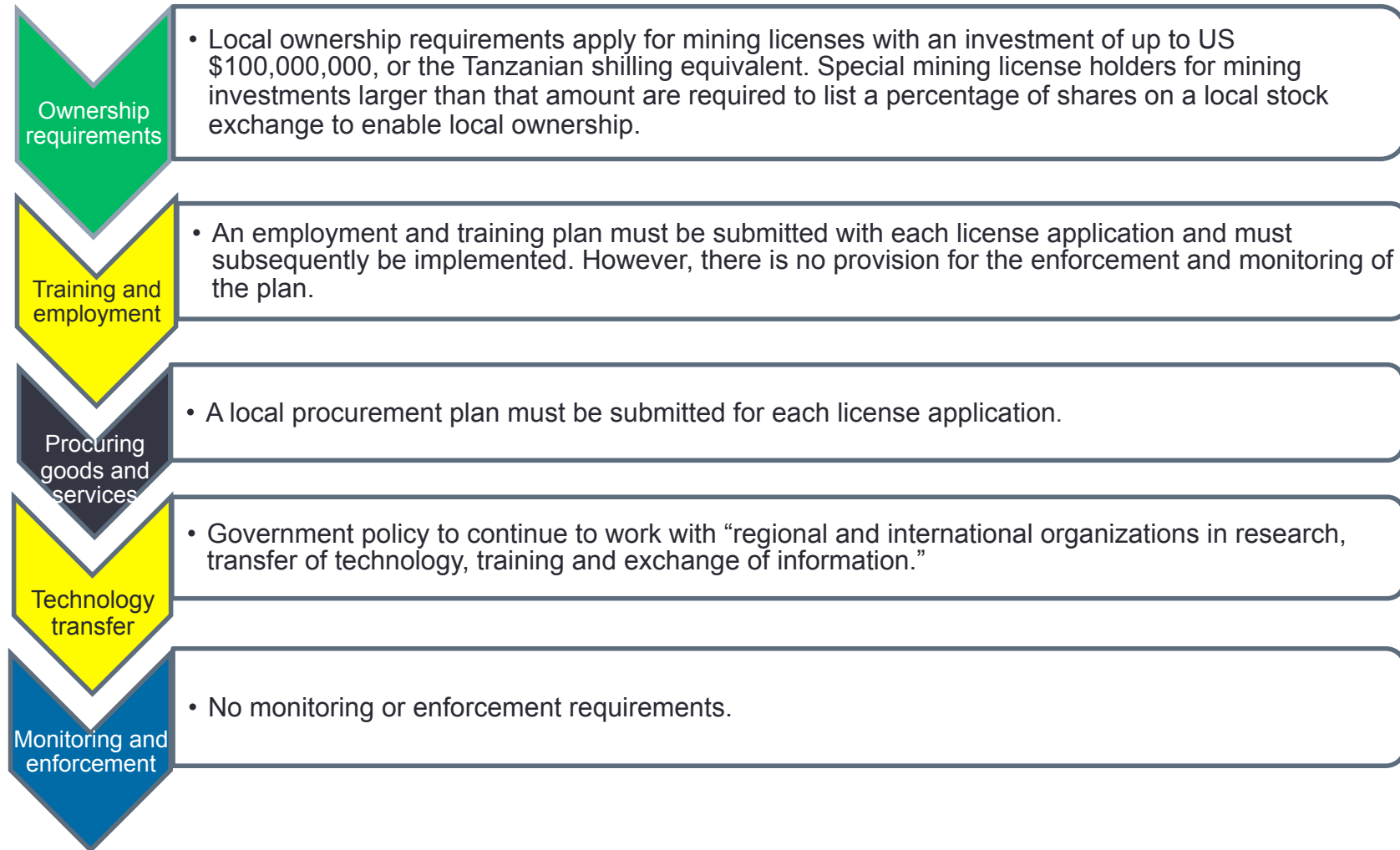
### Contract

***Mining contracts*** can also contain local content provisions (Mining Act, Art. 10(4)(e) and (f))

## Key definitions

No definition of local content.

# Overview



# Ownership Requirements



- A **primary mining licence** will only be granted to Tanzanian citizens or to a company whose members and directors are exclusively citizens of Tanzania, and control over which is exercised within Tanzania by persons who are Tanzanian citizens. (Mining Act, Art. 8).
- A **mining licence** may be granted to a non-Tanzanian citizen, so long as at least 50% of the mining licence is held directly by a Tanzanian citizen (Mining Act, Art 8).
- A **special licence** requires holders to, in consultation with the Minister of Energy and Minerals, offer shares to the public through a listing with the Dar es Salaam stock exchange (Mining Act, Art. 109).
  - The draft Mining (Minimum Shareholding and Public Offering) Regulations 2013 require special license holders to list a minimum of 30% of their shares on either the Main Investment Market or the Enterprise Growth Market Segment of the Dar es Salaam Stock Exchange within two years of the regulations coming into force.

## Definitions:

**Primary mining licence** means “a license for small-scale mining operations, whose capital investment is less than US\$100,000, or its equivalent in Tanzanian shillings”.

**Mining licence** means “a license for medium-scale mining operations, whose capital investment is between US\$ 100,000 and US \$100,000,000, or its equivalent in Tanzanian shillings”.

**Special mining licence** means “a license for large-scale mining operations, whose capital investment is not less than US \$100,000,000 or its equivalent in Tanzanian shillings”.

# Training and Employment



- Applicants for a mining licence and a special mining licence must submit a plan for the employment and training of Tanzanian citizens along with their license applications (Mining Act., Arts. 49.2(f) and 41.4(h)).
- The Minister of Energy and Minerals shall not grant a mining licence if such a plan is not *satisfactory* (Mining Act, Art. 50.1(c)). “Satisfactory” is undefined.
- The Minister of Energy and Minerals shall grant a special mining licence if, among other things, he considers such a plan to be “adequate”, taking into account the size and nature of the proposed mining operations (Mining Act, Art. 42.1(d)). “Adequate” is undefined.
- All mining licence holders are required to employ and train Tanzanian citizens and implement a succession plan on expatriate employees in accordance with the Employment and Labour Relations Act (Mining Act, Art. 52).



# Procuring goods and services



- The Mining Policy sets out that the Government should require mining companies to procure local goods and services to “promote Tanzanians to supply quality goods and services to the mining industry” (Mining Policy, Art. 5(2)).
- The Mining Act requires applicants for a prospecting license, a mining licence, or a special mining license to submit a procurement plan for local goods and services along with their application (Mining Act, Arts. 29(3)(e), 49.2(h) and 41(4)(g)).
- When deciding whether to grant a special mining licence the Minister for Energy and Minerals is required to take into account the adequacy of the procurement plan submitted (Mining Act, Art.42(1)(d)).
- Both a prospecting licence and a mining licence must include the details of the procurement plan (Mining Act, Arts. 34(l)(f) and 44(d)(v)).
- Mining license holders are required to implement their procurement plans (Mining Act, Art 52(f)). No enforcement mechanism is prescribed.
- Any development agreement entered into between the Government and an applicant or holder of a special mining licence *may* contain binding provisions that guarantee the procurement of local goods and services (Mining Act, Art. 10(4)(e)).



## Agreement on Trade-Related Investment Measures (TRIMs)<sup>1</sup>

- Tanzania 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*.
- Tanzania, as a Least Developed Country, is only required to implement TRIMs to the extent consistent with its individual development, financial and trade needs and administrative and institutional capabilities, subject to notification to the General Council.
- The following types of local content requirements are covered by TRIMs<sup>2</sup>:
  - 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.

<sup>1</sup> 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.

<sup>2</sup> 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. Tanzania has only made certain [commitments](#) in relation to the tourism and hotel sector, which should not affect the application of its local content provisions in the petroleum sector.

# International law – bilateral investment treaties



- As of 1 June 2014, Tanzania has entered into 18 bilateral investment treaties (BITs) but only 8 are in force.<sup>1</sup>
- 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.<sup>2</sup>
- 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 have<sup>3</sup>, 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.

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

<sup>2</sup> 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”).

<sup>3</sup> 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.



- Among the 19 BITS, 11 were reviewed.
- Of these, the BIT concluded with Canada specifically limits the types of performance requirements Tanzania may impose on investors, aside from including the National Treatment Obligations and Most Favored Nation clauses, which are present in most BITS.

## **Tanzania – Canada**

### “Article 9.1 – Performance Requirements

A Party may not impose the following requirements in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment of an investor of a Party or of a non-Party in its territory:

- (a) to export a given level or percentage of a good or service;
- (b) to achieve a given level or percentage of domestic content;
- (c) to purchase, use or accord a preference to a good produced or service provided in its territory, or to purchase a good or service from a person in its 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 that investment;
- (e) to restrict sales of a good or service in its territory that the investment produces or provides by relating those sales to the volume or value of its exports or foreign exchange earnings;
- (f) to transfer technology, a production process or other proprietary knowledge to a person in its territory; or
- (g) to supply exclusively from the territory of the Party a good that the investment produces or a service it provides to a specific regional market or to the world market.”

Source: Government of Canada:

<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/index.aspx?lang=eng>



- However 5 BITS (Finland, Italy, Netherlands Sweden, Turkey) allow Tanzania to apply discriminatory incentives to enable its economic development through exceptions made to Article 3: Treatment of Investments. Some conditions may apply though.

### **Tanzania – Turkey (not in force)**

Article 3 (e) Notwithstanding the provisions of Paragraph 2 of this Article, the Contracting Parties may grant special limited incentives to its nationals and the companies for the purpose of development of national entrepreneurs and infant industries in order to stimulate the entrepreneurships without giving the same incentives to a foreign investor provided such incentives do not significantly affect the investment; and activities of investment of the other Contracting Party. In particular the principle of most favored nation treatment shall be observed in case of foreign participation in such businesses. The Contracting Parties shall eliminate progressively such incentives.

### **Tanzania – Sweden**

Article 3 (4) With respect to the United Republic of Tanzania it reserves the right to grant special incentives to its nationals and companies in order to stimulate the creation of local industries. Such incentives shall be considered compatible with this Article provided they do not significantly affect the investment of investors of the other Contracting Party. In particular the principle of most favoured nation treatment shall be observed in case of foreign participation in such ventures.