

LOCAL CONTENT



Tanzania - Petroleum



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, Jacky Mandelbaum and 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 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. FTAs 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.

Local content in the oil sector – Synopsis



Highlights:

- Draft local content policy for oil and gas published in 2014.
- Regulation of local content by the Petroleum Act, Arts. 220-222 and contractual provisions in Arts. 20 and 21 of the Model Production Sharing Agreement (MPSA) 2013 and in Arts. 18 and 19 of the MPSA 2008.
- Training provisions dedicated to Government and Tanzanian Petroleum and Development Corporation (TPDC) personnel at the exploration license level.
- Development licenses require the transfer of management and operation functions to Tanzanian nationals within a period not exceeding five years from the start of commercial operations.
- The Regulatory Authority for Upstream Activities (PURA) plays an active role in regulating and promoting local content and knowledge transfer is declared as a shared responsibility between the government and the contractor.

✓	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 Petroleum Act 2015](#) (the “Petroleum Act”).

Regulation

No applicable regulations.

Policy

A draft [local content policy for the oil and gas industry](#) 2014 (“Draft Local Content Policy”) has been prepared.

Contract

Model Production Sharing Agreement for Petroleum (“MPSA”) 2008 and 2013 *.

Key definitions

Local content means: “The quantum of composite value added to, or created in, the economy of Tanzania through deliberate utilization of Tanzanian human and material resources and services in the petroleum operations in order to stimulate the development of capabilities indigenous of Tanzania and to encourage local investment and participation” (Petroleum Act).

Local content plan means: “A plan agreed between the Ministry responsible for petroleum affairs, the Contractor and TPDC, which forms an integral part of the approval for an Exploration License, Development License and Operational License, and which guides the activities and eligibility for recovery of costs of Contractor and Lead Contractors in their use and development of Local Content” (Draft Local Content Policy).

Local goods means: “...goods obtained, produced or manufactured and have after-sales services in Tanzania Mainland” (Draft Local Content Policy and MPSA 2013).

Local Companies means: “a company or subsidiary company incorporated under the Companies Act, which is one hundred percent owned by a Tanzanian citizen or a company that is in a joint venture partnership with a Tanzanian citizen or citizens whose participating share is not less than fifteen percent.” (Petroleum Act, Art. 220)

Tanzanian Companies means “companies incorporated in the United Republic of Tanzania and whose shares are wholly or at least 51% owned by in Tanzanian nationals (Art. 20(p) of the MPSA 2013).

Tanzanian Materials means “materials obtained produced or manufactured in the United Republic of Tanzania” (Art. 20(p) of the MPSA 2013).

Tanzanian services means “services provided by Tanzanians or Tanzanian companies or Tanzanian materials” (Art. 20(p) of the MPSA 2013). Note that **local services** are defined as “services provided in Tanzania Mainland” in the Draft Local Content Policy.

* No mining production sharing agreements based on the 2013 model have been entered into yet.

Overview



- An employment and training plan must be submitted for each application for an exploration or development license. Under the MPSA, the Contractor must implement such proposals within six months of the grant of a development license. The Contractor must also ensure that the transfer of management and operation functions to Tanzanian nationals occur within five years of the start of commercial operations.

- The Petroleum Act stipulates preference for local goods and services and for joint venture with local companies when those goods and services are not available
- The MPSA 2013 sets out various local procurement provisions in relation to the tender for or purchase of goods, services and materials.

- Contractors need to ensure that their training program result in transfer of technology and know-how.
- The Petroleum Act stipulates a shared responsibility between contractor and government in enabling technology transfer.

- According to the Petroleum Act, the regulatory authority for upstream activities is responsible for promoting local content and supporting the participation of the local companies in the sector.
- The Draft Local Content Policy also proposes the establishment of a National Local Content Committee to oversee the implementation and enforcement of the local content policy.

- The Petroleum Act and MPSA 2013 sets out certain annual reporting requirements in relation to the Contractor's activities and their impact on promoting local content. This annual reporting is verified by a third party.

Training and Employment (1)



- The Petroleum Act requires license holders to develop a recruitment and training program in accordance with their local content plan. These programs need to take into account gender, equity, persons with disabilities, host communities and succession plan in accordance with the Employment and Labour Relation Act (Petroleum Act, Art. 221).
- The MPSA requires the training and employment plan to be approved by the Government and TPDC, and to be implemented within 6 months after the grant of the development licence (MPSA 2013, Art. 21(c) and MPSA 2008, Art. 19(d)).
- The MPSA also requires the Contractor to employ Tanzanian nationals having appropriate qualifications to the greatest extent possible (MPSA 2013, Art. 21(a); MPSA 2008, Art. 19(b)).
- In this regard, the Contractor must, in consultation with the Tanzanian Government and the TPDC, conduct a training program for Tanzanian employees at each phase and level of operations, taking into account the need to maintain reasonable international standards of efficiency throughout the operations (MPSA 2013, Art. 21(a); MPSA 2008, Art. 19(b)).
- The training programs for Tanzanian employees can be conducted in Tanzania or abroad (MPSA 2013, Art. 21(a); MPSA 2008, Art. 19(b)).
- All management and operations functions must be transferred to Tanzanian nationals within 5 years from the start of commercial operations (MPSA 2013, Art. 21(c); MPSA 2008, Art. 19(d)).
- As regards unskilled positions, these must be reserved exclusively for Tanzanian nationals (MPSA 2013, Art. 20(f)).

Training and Employment (2)



- The Contractor must also provide grants of US\$500,000 each year to support training in the petroleum sector within the TPDC and the Tanzanian Government (MPSA 2013, Art. 21(b)). The MPSA 2008 specifies the lower amount of US\$150,000 (MPSA 2008, Art. 19(c)):



“(c) During each year of the term of the Exploration Licence or any renewal thereof the Contractor shall spend a minimum sum of one hundred and fifty thousand United States dollars (US\$ 500,000) [...] for one or more of the following purposes:

- i. to provide a mutually agreed number of Government and TPDC personnel with on-the-job training in the Contractor operations in the United Republic of Tanzania and overseas, and/or practical training at institutions abroad, particularly in the areas of natural earth sciences, engineering, technology, petroleum accounting and economics, economic analysis, contract administration and law as related to the fields of oil and gas exploration and production;
- ii. to send suitable Tanzanian personnel selected by the Government and by TPDC on courses at universities, colleges or other training institutions mutually selected by the Contractor, the Government and TPDC;
- iii. to send Tanzanian personnel selected by the Government and by TPDC to conferences workshops and seminars related to the petroleum industry; and
- iv. to purchase for the Government and TPDC advanced technical books, professional publications, scientific instruments or other equipment required by the Government and TPDC.”

Procuring goods and services (1)



- The Petroleum Act puts forth preference for goods and services available in Tanzania and when those are not available, they should be delivered by a company that is in joint venture with a local company that has a minimum share of 25% or as otherwise stipulated by the regulations (Petroleum Act, Art. 220).
- Art. 3.3 of the Draft Local Content Policy emphasizes the importance of locally produced goods and services. To this end, it states that the Government must ensure:
 - i. The inclusion of a compulsory local content requirement in each invitation to bid;
 - ii. That Contractors and subcontractors manage the risks of local businesses to facilitate their participation as suppliers of goods and services; and
 - iii. Transparency, value for money and competitiveness in every procurement process undertaken by Contractors and subcontractors.
- The MPSA 2013 also sets out detailed local procurement requirements in its Article 20 (for the MPSA 2008, see Art. 18). These include, among others, the requirement for the Contractor to:
 - Maximize the use of local goods and services to the extent they meet the requisite standard and quality requirements as certified by the relevant Tanzanian authority and are available on a competitive basis;
 - Implement an efficient, open, transparent, nondiscriminatory ,and competitive tender process in accordance with Tanzanian law, best international petroleum industry practices for all purchases and services, and a local procurement plan that has been submitted to TPDC for review;
 - Give preference to Tanzanian companies in tenders by ensuring access to all tender invitations and including a high weighting for local value added; and
 - Include local content requirements in contracts with subcontractors.

(See next slide for full text).

Procuring goods and services (2)



“The Contractor shall:

- a) Comply with the Government’s Local Content Policy in force and as modified from time to time;
- b) purchase Tanzanian goods, services and materials provided such goods and materials are of certified standard and quality in accordance with Tanzania authorities namely Tanzania Bureau of Standards, Tanzania Foods and Drugs Authority or any other relevant authority established and operating under the Law;
- c) give assurance to Local Enterprises in respect of prompt payment for goods and services actually provided for Contractor and its Sub Contractors both foreign and Local;
- d) (...)
- e) Upon purchase of goods, services or materials, follow an efficient, open, transparent, nondiscriminatory and competitive purchasing and award procedure in accordance with the Law and Best International Petroleum Industry Practices and submit the relevant procurement plan to TPDC for review;
- f) Ensure that the unskilled manpower requirement is reserved for Tanzanian nationals only.
- g) ensure that provisions in terms of sub-articles (a) to (f) of this Article are contained in contracts between Contractor and its subcontractors;
- h) (....)
- i) ensure that sub-contracts are scoped, as far as it is economically feasible and practical to match the capability (time, finance and manpower) of Local Enterprises and shall manage the risk to allow their participation” (Art. 20(a)-(i), MPSA 2013)”.

Technology Transfer



- The Petroleum Act requires the licence holder to commit to maximizing knowledge transfer to Tanzanians, establish management and technical capabilities, and if need be, any necessary facilities for technical work, including interpretation of data (Petroleum Act, Art. 222).
- The Petroleum Act stipulates that the Minister can make regulations prescribing requirements technology transfer and skills relating to petroleum and gas industry (Art. 222):



“The technology transfer shall be a shared responsibility between the Government, licence holder and contractor”



- The Draft Local Content Policy envisages the establishment of a National Local Content Committee to oversee and ensure the full implementation of the local content policy (Draft Local Content Policy, Art. 5.2).
- The Petroleum Act charges the regulatory authority for upstream activities (PURA) to support local content and national companies in their participation in the sector (Petroleum Act, Art. 13)

Monitoring and Enforcement (1)



- Under the Petroleum Act, Contractors must annually submit a report on the execution of their employment, training and procurement and local supplier development programs, steps taken by licensee to close any identified learning gaps to the regulatory authority. Contractors are also responsible for the reporting on the procurement program by their sub-contractors (Petroleum Act, Art. 220, 221).

- Under the MPSA 2013, Contractors must submit an annual local content plan, which must be submitted along with the annual work program and budget for petroleum operations and must include:
 - i. details of the procurement of Tanzanian goods, materials and services;
 - ii. a detailed plan and program for recruitment, employment and training of Tanzanian nationals; and
 - iii. a plan for the transfer of skills, knowledge, competence and know-how to Tanzanian nationals (MPSA 2013, Art. 21(f)).

Monitoring and Enforcement (2)



- Under the MPSA 2013, the Contractor must also submit an annual report that will be verified by a competent and independent third party* and must include details of the Contractor's activities (other than its production sharing and fiscal obligations) and their impact on local content and local value adding in Tanzania (MPSA 2013, Art. 21(g)):



“The Contractor shall, together with the annual report on Petroleum Operations in the Contract Area, submit and publish an annual report, which shall be verified by a competent and independent third party*, describing the Contractor's activities and results on Tanzanian content and the local value adding other than the production sharing and fiscal obligations”.

* In the absence of a mechanism to qualify and/or certify the competence of such third party, the third party should be reasonably acceptable to TPDC.



Agreement on Trade-Related Investment Measures (TRIMs)¹

- 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 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. 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 July 2015, Tanzania has entered into 19 bilateral investment treaties (BITs) but only 10 are in force.¹
- 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.



- 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.