

LOCAL CONTENT



Trinidad & Tobago – Petroleum

June, 2014



Columbia Center
on Sustainable Investment

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

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 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

- Comprehensive non binding local content framework and guidelines for the oil and gas sector
- The framework puts forth the role of the Government as an enabler of local content and establishes a Permanent Local Content Committee to monitor the implementation of Local Content.
- Bidding regulations require for the bidding proposals to include consideration for Local Content.
- Model PSCs have detailed local content provisions aligned with the framework
- Companies need to bid on a local content program
- Several bilateral and regional treaties limit the ability of the country to impose local content

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

International Law

Legislation

[Petroleum Act and Regulations Chap. 62:01](#) – Both Act and Regulations are in one document that was last updated in 2012 - The only relevant regulations are the Petroleum Regulations 42 (f) and (g) dealing with employment and training (“Petroleum Reg”)

Regulation

[The Petroleum Regulations \(Onshore Competitive Bidding\) Order 2013](#),
[The Petroleum Regulations \(Deepwater Competitive Bidding\) Order 2014](#) (“Bidding Reg”) – All types of bidding include very similar articles related to Local Content

Policy

[Local Content & Local Participation Policy and Framework in energy sector \(Oct 7, 2004\) \[guidelines\]](#) (“Framework”) Comprehensive non-binding local content framework

Contract

[Deep Water Depth Model Production Sharing Contract 2013](#) (“Deep Water PSC”) Model contracts for each level of depth of off-shore field and for onshore fields include detailed local content provisions in line with the Framework. All Model Contracts have similar provisions, we will only refer here to Deep Water PSC

Key definitions

- **Local participation:** means “maximizing the depth and breadth of local ownership, control and financing, in order to increase local value-capture from all parts of the value chain created from the resource, including those activities in which nationals, local business and capital are not currently engaged, at home and abroad.”
- **Local content:** means “maximizing the level of usage of local goods and services, people, businesses and financing.”
- **Local capability development:** means “maximizing the impact of the ongoing sector activities, through the transfer of technology and know-how [...]” (Framework)
- **Local Enterprise:** means “a person, firm or entity performing works, services and/or supplying goods and materials to Contractor, whether as a Subcontractor or otherwise, whose business enterprise is incorporated or otherwise organised under the Laws of Trinidad and Tobago and whose principal place of business is in Trinidad and Tobago and which is effectively owned and controlled by nationals of Trinidad and Tobago.”
- **Local Goods:** means “materials and/or equipment mined, grown, or produced in Trinidad and Tobago, whether through manufacturing, processing, or assembly. An article, which is produced by manufacturing, processing or assembly, must differ substantially in its basic characteristics, purpose, or utility from any of its imported components. Manufactured goods would be considered to be of local origin if the cost of the local materials, labour and services used to produce the item constitute not less than fifty (50) per cent of the cost of the finished product.”
- **Local Services:** means “works or services performed or supplied by a Local Enterprise” (Deep Water PSC).

Rights application

- Bids must include a local content program
- Local content is part of the work program and budget for both exploration and production

Training and Employment

- Nationals need to be trained on value-added and decision making positions with the view to replace expatriates
- The contractor also must train government officials of the Ministry* at its own expense

Procuring goods and services

- The Minister* and the companies together define the list of goods and services that can be procured locally
- Contracts need to be sized to local capabilities
- Tenders need to happen only in Trinidad & Tobago unless authorized by the Minister

Implementation

- The framework establishes a Permanent Local Content Committee (PLCC) with clear responsibilities
- The government commits to provide the PLCC with means and resources

Monitoring and enforcement

- Companies need to maintain records of local content expenditure and submit quarterly a detailed statement of local content

* Minister and Ministry refer to the Ministry of Energy and Energy Affairs

- Any bid proposal must provide for the “maximum utilization of services and facilities available” in the country during both the exploration and production (Bidding Reg, Art.10).
- The exploration and production work programmes and budgets submitted annually should indicate the estimate of the Local Content component of the project. (Deep Water PSC, Arts. 10.4, 14 and 15)

- Operators need to minimize the employment of foreign staff and prepare programs for trainings (Petroleum Reg., Art. 42 (f), (g)) :



“A license shall (....)

42. (f) minimise the employment of foreign personnel, ensure that such employees are engaged only in positions for which the operator cannot, after reasonable advertisement in at least one daily newspaper circulating in Trinidad and Tobago, find available nationals of Trinidad and Tobago having the necessary qualifications and experience; determine the rules of employment including salary scales in such manner as to ensure that all employees in the same category enjoy equal conditions irrespective of nationality;

42. (g) prepare, in consultation with the Minister, programmes for industrial and technical education and training, including the grant of scholarships, and carry such programmes out diligently with a view to training nationals of Trinidad and Tobago to replace foreign personnel as soon as reasonably practicable and to affording nationals of Trinidad and Tobago every possible opportunity for occupying senior positions in the operations of the licensee”.

- Nationals will be trained for all positions, including for the “specific purpose of taking over positions held by expatriate personnel” (Deep Water PSC, Art. 25.6).
- Nationals will be selected and trained consistent with the performance standards of the contractors in relation to the activities of fabrication, information technology support, operations and maintenance support, maritime services, business support services, financing and trading (Deep Water PSC, Art. 39.8 and 39.9).
- In addition, the training needs to ensure that people take more value-added position, analytical and decision-making roles (Deep Water PSC, Art. 39.10).
- The contractor also needs to provide trainings to the Ministry’s personnel at its own expense (Deep Water PSC, Art. 25.7):



“Contractor shall at its own expense as part of Petroleum Operations provide a reasonable number of personnel of the Ministry with on-the-job training and where appropriate and practicable, with overseas training [...]. On-the-job training shall involve the inclusion of representatives of Minister on project teams [...]”.

- The Local Content Framework recommends that the government gives preferential treatment to local suppliers by ensuring that they are given preference and assurances from the principal operator, which is not deferred to primary or other contractors. These assurances will include, access, treatment and reimbursement for goods and services actually provided (Framework, p. 10).
- Sub-contracts need to be sized, when it is economically feasible and practical, in order to match the capability (time, finance and manpower) of Local Enterprises. The Contractor will manage the risk associated with their participation (Deep Water Depth PSC, Art. 39.3).
- Local Enterprises will be given equal treatments and high weighting will be given to local value added in the tender evaluation criteria (Deep Water Depth PSC, Art 39.6).
- The minister and the contractor will agree on a list of projects for local procurement. Tenders will only be advertised in Trinidad unless a derogation is given by the Minister (Deep Water, PSC, Art. 39.4 and 39.5):



39.4 Contractor shall provide to the Minister together with the annual Work Programme and budgets (...) a list of all projects to be undertaken as well as all goods and services that are required for the conduct of Petroleum Operations. The Minister and Contractor shall agree on a list of those projects and goods and services which shall be published in at least two local newspapers and on the Ministry's website.

39.5 All tenders are to be advertised, evaluated and awarded in Trinidad and Tobago. Contractor shall apply to the Minister for prior approval where the circumstances warrant that any part of the tender process be conducted outside of Trinidad and Tobago.

- The Government oversees objectives and policy in order to achieve the goal of maximum local content :
 1. Identify where local-added opportunity capture exists from the sector;
 2. Determine how to enable delivery of maximum local value-added;
 3. Ensure delivery of maximum local value-added. (Framework, p.6-8)



“1. Identifies WHERE local value-added opportunity capture exists from the sector by:

- Selecting, from time to time, specific goods or services for focusing the local content, participation and supply capability development efforts;

2. Determines HOW to enable maximum local value-added by:

- managing the programme of activities in the sector as a portfolio, so that project pace and scheduling enable maximum opportunity for development of local capabilities and their sustainable utilisation;
- targeting local capability development by increasing the amount, depth and breadth of “in country” activities, so as to enable fuller participation of nationals and enterprises in the value chain
- giving preference, firstly, to locally owned, controlled and and financed enterprises, then to those that demonstrate a clear culture, commitment and capacity for maximising local value-added, participation and capability development, consistent with the country's aspirations and vision;
- focusing on improving local skills, business know-how, technology, financing, capital market development, and wealth capture and distribution; know-how, technology, financing, capital market development, and wealth capture and distribution;

3. Ensures DELIVERY of maximum local value-added by:

- aggressively promoting and rigorously applying this policy wherever State controlled resources are involved
- facilitating the development of local capability to enable local value-added;
- removing barriers for local participation;
- setting targets of local content and participation that will be assigned to individual projects, operations and/or operators and supporting these targets with appropriate contract terms;
- measuring and reporting on the performance of operators in the sector;
- periodically comparing the local content and participation performance amongst operators, between projects and operations and with other countries, to establish benchmarks, targets and opportunities for improvement and for the transfer of best practices”.

- A Permanent Local Content Committee is dedicated to the implementation of the Local Content policy (Framework, p.9):



“The Permanent Local Content Committee (PLCC) will be responsible for :

- updating the local content and participation policy, as required;
- developing specific subsidiary policies and strategies, to ensure the transfer of technology and know-how to improve local skills, businesses and the capital market;
- ensuring compliance with these policies; and
- reports to the Minister of Energy and Energy Industries and the Cabinet, as appropriate”.

- In particular, the PLCC will create and maintain a Local content database (Framework, p.11):



“Projects and operations work programmes, including their needs for the provision of goods and services and their scheduling; Local suppliers of goods and services; People development programmes and initiatives of the operators and their international contractors, including work permits awarded and the related commitments; Business development programmes and initiatives; The progress of activities of ”in country“ operators, State-owned companies and agencies and their contractors, including their: (i) Local content and participation policies, strategies and initiatives, (ii) Targets, benchmarks and performance metrics; Appropriate legislation, regulations and contracts”.

- The Government will ensure that the PLCC has the appropriate resources to act (Framework, p.11):



“In recognition of the importance of local value- added to national development, the Government of the Republic of Trinidad and Tobago will ensure that the Permanent Local Content Committee has the necessary resources (human, financial and technological) to properly deliver on its mandate”.

- Contractor must include a status report on the training programs with its submission of the quarterly status report (Deep Water PSC, Art. 25.6).
- Records need to be maintained to facilitate local content monitoring (Deep Water, PSC, Art.39.11) as stipulated by Annex C, Article 12. Every quarter, the contractor needs to submit a statement of Local Content as described below by Annex C:



12.1 “Contractor shall maintain records to facilitate the determination of the Local Content of expenditure incurred in respect of Petroleum Operations. These records shall include supporting documentation certifying the cost of Local Goods, labour and Local Services used and shall be subject to audit by the Minister.”

12.3 “The Statement of Local Content shall include but not be limited to the following categories:

- (a) Payments made to Local Licensees who supply Local Goods and Local Services.
- (b) Payments to Local Suppliers who supply Local Goods.
- (c) Payments to Local Licensees and Local Suppliers for providing a service in the supply of non-local goods.
- (d) Payments made to non-local Licensees and suppliers who supply Local Goods.
- (e) Payments of salaries, profits, dividends on shares and other tangibles paid to persons who are nationals of Trinidad and Tobago.
- (f) List of all contracts awarded during the quarter and services and/or equipment contracted.”

12.4. “For the purpose of measurement, Local Content shall be comprised of all costs incurred as direct materials, direct sub-contracts, indirect materials, indirect subcontracts, construction management and other costs. Local Content shall not include any taxes or other statutory payments to government including payments made under this Contract.”

- Trinidad and Tobago has been member of the WTO since March 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. Trinidad & Tobago’s [commitments](#) are unlikely to affect the implementation of Trinidad & Tobago’s local content framework.

- As of 1 June 2013, Trinidad & Tobago has entered into **12 bilateral investment treaties** (BITs) and all 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 12 BITS signed by Nigeria, all were reviewed (and are available on [UNCTAD database](#)).
- Aside from the inclusion of National Treatment Obligations and Most Favored Nation clauses, performance requirements are limited or prohibited in the BITs with 3 countries (United States, Canada and France). Clauses are quoted below.

Trinidad & Tobago – France

Article III – Fair and Equitable Treatment

"(...)Any unjustified or discriminatory restriction to the purchase of (...) means of production and exploitation of any kind, any impediment to the sale and transport of products inside the country and abroad, as well as all other measures having similar effect are considered as de jure or de facto impediments to fair and equitable treatment (...)"

Trinidad & Tobago – United States

Article VI Performance requirements

"Article VI prohibits either Party from mandating or enforcing performance requirements in connection with a covered investment. The list of prohibited requirements includes the use of local goods, the export of goods or services, the "balancing" of imports and exports, the transfer of technology, or the conduct of research in the host country. Such requirements are major burdens on investors and impair their competitiveness."

Trinidad & Tobago - Canada

Article V: Other Measures

“1.a. A Contracting Party **may not require** that an enterprise of that Contracting Party, that is an investment under this Agreement, **appoint to senior management positions individuals of any particular nationality.**

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

2. **Neither Contracting Party may impose any of the following requirements** in connection with permitting the establishment or acquisition of an investment or enforce any of the following requirements in connection with the subsequent regulation of that investment:

a. to export a given level or percentage of goods;

b. to achieve a given level or percentage of domestic content;

c. to purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services 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; or

e. to transfer technology, a production process or other proprietary knowledge to a person in its territory unaffiliated with the transferor, except when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal or competition authority, either to remedy an alleged violation of competition laws or acting in a manner not inconsistent with other provisions of this Agreement.”

- In addition, Trinidad & Tobago is a member of the Caribbean Community (CARICOM) and signatory to the treaty. Some provisions of the CARICOM treaty will limit the ability to impose local content requirements:

ARTICLE 7 Non-Discrimination

“1. Within the scope of application of this Treaty and without prejudice to any special provisions contained therein, **any discrimination on grounds of nationality only shall be prohibited.**”

ARTICLE 37 - Removal of Restrictions on Provision of Services

“1. Subject to the provisions of this Treaty, **Member States shall abolish discriminatory restrictions on the provision of services within the Community in respect of Community nationals.**”