LOCAL CONTENT

Mali – Petroleum

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Columbia Center on Sustainable Investment

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

The project[1] – 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, non-binding policies and frameworks dealing with local content issues in the mining and petroleum sectors.[2] 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[3] – those containing precise language which might be useful as an example to those looking to draft policies to enhance a country's local content.[4] 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 is 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 Tehtena Mebratu - Tsegaye. Research was conducted by Binta Traore.

[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 mining or petroleum sector, or specific local content legislation, regulations, policy and contracts.

[3] Those clauses are framed and singled out by a "thumbs up".

[4] Our criteria for assessment of the quality of the provisions was 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 of 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's (WTO) 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 treaties.[2] 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.

[1] 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.

[2] 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 if the relations between the state and the investor should sour over the course of the investment.

Synopsis

Highlights

- There is no legal definition of what local content is, but related local content clauses are found in the mining law, regulations and model contract.
- Holders of petroleum permits, and their subcontractors must employ in priority the qualified personnel of Malian nationality to comply with the defined quota and give preference to Malian companies for the supply of goods and services.
- Applicants to petroleum production licenses shall submit a community development plan that promotes, among other things, the employment of local populations.
- Holders of petroleum permits shall establish and finance a training program for the Malian personnel they employ and are subject to penalty in the event of non-compliance.
- Holders of petroleum permits shall pay fixed fees to the Ministry in charge of petroleum for the capacity building of the public servants in the petroleum sector.
- Enterprises using at least 60% of raw materials receive extra tax reliefs.
- Our analysis is based on translations of the laws and decrees and not on the original text. We therefore don't guarantee the accuracy of the text.

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

Synopsis

International Law

Legislation

Petroleum Act 2015 ("Law 2015-035")
Investment Law 2012 ("Law 2012-016")
The petroleum act set, among other things, the basic framework for the employment of nationals and the granting preference to Malian enterprises for goods and services supply.

Regulation

Petroleum regulation ("Decree 2016-0372") – this decree emphasizes the provisions stated in the petroleum act.

Contract

The 2017-0392 PSA model complements the provisions in the Law and Decree.

Key definitions

- **Community Development Plan**: A document prepared by the applicant to an exploitation permit with the communities and the regional and local authorities, that indicates the economic and social projects to be carried out for the benefit of the communities. This plan includes, among other things, the training and employment of the local community (Law 2016-035, Art.1.53).

Overview

Rights application & Plans

- Applicants to the petroleum exploitation permit are required to submit with their applications, among other things, a community development plan– a program aiming at employing Malian personnel and giving preferences for Malian suppliers and subcontractors.
- The community development plan shall promote the local employment and hiring mechanism of local populations.

Training and Employment

- Petroleum title holders must hire in priority the Malian personnel.
- They shall implement a training and promotion program of Malian personnel to respect the minimum quota set by the petroleum act.
- Foreigners can be employed when there is no qualified Malian in the market and shall be replaced by Malian personnel in respect with the minimum quota.

Procuring goods and services

- Petroleum title holders shall give preference to Malian companies.

Implementation

- The local authorities establish a Technical Committee.
- The Technical Committee is the appropriate body for the implementation of the community development plan.
- This body shall send a periodic report on the implementation status to the Ministry in charge of petroleum.
- Petroleum license holders shall pay fixed fees to the Ministry in charge of petroleum for the capacity building of the public servants in the petroleum sector.

Monitoring and Enforcement

- The Ministry in charge of petroleum processes and approves the employment and training program within a time limit set by the law.
- The committee in charge of supervising the community development plan meets at least once a year to monitor the progress and update the plan.
- In the event of non-compliance within a limited time of notice, the title holders are subject to fines.

Applications for rights and Plans

- The community development plan intends to promote the employment of local personnel, increase the portion of local procurement in the total procurement made by the title's holder (Law 2015-035 Art.69).

- Any applicant for a petroleum exploitation permit is required to submit a community development plan and a program aiming at, among other things, employing Malian personnel and giving preference to Malian suppliers and subcontractors (Decree 2016 – 0272 Art.105):

"In accordance with articles 67 to 70 of the Petroleum Act, any applicant for an operating license, shall submit, in support of its application, a draft of a community development plan developed on the basis of the community component of the cultural, social and economic development program (PDESC) of the region concerned, and covering the following priority areas of intervention:

- (….)
- the promotion of employment;
- the implementation of a privileged hiring mechanism of subordinate jobs for the local populations;
- the contribution to the training of personnel from local populations and their promotion as skilled workers, supervisors, and executives;
- the development of a preliminary draft of a reconversion program
- (…) (Decree 2016-0272 Art.105)."

Training and Employment

- The petroleum title holder and his subcontractors must employ in priority the qualified personnel of Malian nationality for the purposes of their petroleum operations in order to comply with the quota defined in table below (Law 2015-035 Art.81).

Malian personnel quota				
Workers categories	Exploration permit duration	Production and Transportation permit duration		
		1st - 4th year	5th - 10th year	11th to closure
Executive	20%	20%	50%	90%
Supervisors	30%	30%	80%	100%
Qualified labors	50%	30%	90%	100%
Non-qualified labors	100%	100%	100%	100%

"To this end, from the beginning of the petroleum operations, the title holder establishes and finances a training program for the personnel of Malian nationality for all qualifications at the conditions set by the present law, its implementing regulations and the petroleum contract. He shall proceed as, and to the extent of, the replacement of expatriate personnel by nationals who have acquired the same training or experience (Law 2015-035 Art.81§2)."

Procuring goods and services

- The petroleum title holder and his subcontractors shall give preference to Malian companies for the contracts of construction, supply and services (Law 2015-035 Art.71).

Implementation

- The administration in charge of mining must ensure the existence of a Technical Committee, composed of representatives of the mining administration and mining title holders. It is the body responsible for the monitoring of the implementation of the community development plan, and the liaison to the Ministry in charge of mines at the time of the periodic report on the implementation status (Law 2012-015 Art.153).

- The Technical Committee members are proposed by the President of the government body of the city or region concerned by the petroleum activity within a maximum period of one (1) month upon the receipt of the draft community development plan (Decree 2016-0272, Art.106&107).

- The Technical Committee approves the community development plan and assure its implementation through periodic meeting:

"The Technical Committee of the community and local development or the inter-communal community development technical Committee shall adopt the final community development plan within a maximum of forty-five (45) days upon its receipt from the head of the Executive of the municipality concerned, the President of the [Council of the Circle] or the President of the region, as appropriate (Decree 2016-0272 Art.108)."

"The Technical Committee of the community and local development, or the inter-communal Technical Committee for community development meets at least once a year for the implementation or update of the development plan community. It shall prepare an annual report to be addressed to the Minister responsible of petroleum no later than 31 March of the following calendar year (Decree 2016-0272 Art.109)."

Implementation

- The enterprises established in Mali are also encouraged to use local raw materials as the investment law gives tax reduction incentives for enterprises using at least 60% of local raw materials (Law 2012-016 Art.21).

- Petroleum license holders shall pay fixed fees annually to the Ministry in charge of petroleum for their contribution to the capacity building of the public servants in this sector.

Monitoring and Enforcement

The licensee shall submit each year a hiring and a training program for Malian personnel. (Decree 2016-0272 Art.75):

"Before October 31st of each year, the licensee shall submit to the Minister in charge of petroleum for the following year:

- a hiring program per level of responsibility, of the Malian personnel;
- a detailed plan of training per level of responsibility of the Malian personnel employed by the licensee with the indication of assigned budget (Decree 2016-0272 Art.75)."

"The Minister in charge of petroleum shall have one (1) month period to decide on the proposed hiring and training program in accordance with the above article 75. In the event of rejection of the programs, the Minister in charge of petroleum must justify his decision.

In the event of no response by the Minister in charge of petroleum after one (1) month period, the proposed hiring and training programs are considered accepted (Decree 2016-272 Art.76)."

"No later than three (3) months after the end of the calendar year, the licensee shall submit to the Minister in charge of petroleum for the past year:

- a report on hiring per level of responsibility of Malian personnel. The licensee shall justify the possible gap with the approved hiring program in accordance with the above article 76;
- a report indicating, per level of responsibility, the type and costs of the training that the Malian personnel employed by the licensee have taken. The licensee shall justify the possible gap with the approved training program in accordance with the above article 76 (Decree 2016-272 Art.77)."

Monitoring and Enforcement

The exploitation licensee is subject to penalties in the event of non-compliance with the approved hiring and training program (Decree 2016-0272 Art.78):

"In the event of non-compliance with the approved hiring program by the licensee in accordance with the provisions of the above article 76, the Minister in charge of the petroleum shall send him a formal letter of notice to comply within two (2) months.

In the event of non-compliance with the approved training program of Malian personnel employed by the licensee in accordance with the provisions of the above article 76, the Minister in charge of petroleum shall send him a formal letter of notice to comply within the current calendar year, without prejudice to the fulfilment of his training obligations during the same year.

If, upon the expiration of the time limit, the notice is not followed, the licensee shall incur a fine equal to five (5) times the costs of the approved and non-completed training, or five (5) times the annual salary of the personnel whose recruitment was approved but who has not been hired, these two fines can be cumulated (Decree 2016-0272 Art.78)."

International law – WTO agreements

Agreement on Trade-Related Investment Measures (TRIMs)[1]

- Mali has been a member of the WTO since May 31, 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.*
- Mali, 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:[2]
  - 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").

International law – WTO agreements

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. Mali has only made commitments related to education, tourism, and travel related services which should not affect the application of the local content provisions in the petroleum sector.

International law – bilateral investment treaties

- As of May 1, 2019, Mali had entered into **22 bilateral investment treaties** (BITs) but only 8 were 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 do not 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,[3] 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

- Among of the 22 BITs signed by Mali, 10 were reviewed (and are available on UNCTAD's database).
- Most BITs include National Treatment, and Most Favored Nation clauses and performance requirements are not specifically prohibited.
- The BIT with Canada limits the types of performance requirements Mali may impose on investors and includes an article on Senior Management, Board of Directors and Entry of Personnel.

Mali – Canada

Article 8: Senior Management, Board of Directors and Entry of Personnel

"8.1: A Party may not require that an enterprise of that Party, that is a covered investment, appoint to senior management positions individuals of a particular nationality."

Article 9: Performance requirements

"9.2: A party may not impose or enforce any of the following requirements, or enforce any commitment or undertaking, 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 goods;
b. to achieve a given level or percentage of domestic content;
c. to transfer technology, a production process or other proprietary knowledge to a person in its territory except when the requirements is imposed or the commitment or undertaking is enforced by a court, administrative tribunal or competition authority to remedy an alleged violation of competition laws or to act in a manner consistent with other provisions or this Agreement; or
d. to supply exclusively from its territory a good that the investment produces or a service it provides to a specific regional market or to the world market."

International law – bilateral investment treaties

The BIT with Algeria authorizes fiscal incentives to boost national and local societies.

Mali – Algeria

Article 3: National and Most-Favored Nation Treatment

"3.1: Each Contracting Party shall ensure in its territory, for investment of investors of the other Contracting Party and for investment-related activities, the equity and equality regime that excludes the application of measures of discrimination that may impede the management and disposition of investments.

3.2: "Activities" are considered to be the Administration's use and enjoyment of an investment, in accordance with the legislation of the Contracting Party in whose territory the investment was made.

3.3: None of the Parties shall impose on its territory, the investments and revenues of nationals or companies of the other Party, less favorable treatment than that which it accords to the investments or revenues of its national or corporate or to investments or revenues of nationals or companies of any third State.

3.4: None of the Contracting Parties may impose on its territory, nationals or companies of the other Contracting Party, in respect to management, maintenance, use, enjoyment or transfer of their investments to less favorable treatment than that accorded to its nationals or companies or to nationals or companies of any third State.

3.5: The treatment does not, however, extend to the privileges which a contracting party grants to nationals or companies of a third State, by virtue of its participation or association with a free trade area, a Customs Union, a common market or any other form of regional economic organization.

3.6: For the purpose of this article, "less favorable" includes: any restriction on supplies of raw materials and consumables, energy and fuel supplies and tools and means of production of any kind, any impediment to the sale of products within and outside the country, as well as any other measure having a similar effect.

Any measure taken as a result of security and public order, public health or morality, does not represent a "less favorable" treatment, in accordance with this article.

3.7: The provisions of article 3 shall not oblige a Contracting Party which, in accordance with its tax legislation, would accord tax relief, exemptions, and tax rebates to nationals and companies resident in its territory, to extend benefits to nationals and companies residing in the territory of the other Contracting Party.

3.8: Each Contracting Party reserves the right to define the sectors and areas of activity in which the participation of foreign investment will be excluded or limited, in accordance with their national regulations."