

LOCAL CONTENT



Mali – Mining



**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, 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 clauses³ – 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 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.

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 mining permits are required to give preference to Malian personnel, implement a training program and promotion plan of Malian personnel.
- Applicants to mining production licenses shall submit a community development plan that promotes, among other things, the employment and training of local populations.
- A Technical Committee is established to approve and monitor the implementation of the community development plan.
- Holders of mining permits benefit from free choice of suppliers but benefit from tax relief if they use services and raw materials from Malian source and products manufactured or sold in Mali.
- A Fund dedicated to the training of public servants was created in 2012 and financed by taxes levied on mining.
- Our analysis is based on translations of the laws and decrees and not on the original text. We therefore do not 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

International Law

Legislation

[Mining Law 2012](#) (“Law 2012-015”)
[Investment Law](#) (“Law 2012-016”)
The mining law includes local content related provisions.

Regulation

[Mining regulation](#) (“Decree 2012-311”)
– this decree emphasizes the provisions stated in the mining law.

Contract

[The 2012-490 model contract](#)
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, 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 2012-015, Art.1.40).

Rights application and Plans

- Mining companies seeking exploitation permits are required to submit a community development plan along with the feasibility study.
- The community development plan shall promote the local employment and hiring mechanism of local population.

Training and Employment

- Mining production title holders shall give preference to Malian personnel.
- They shall implement a training and promotion program of Malian personnel.
- Companies can employ a reasonable number of foreigners when it is necessary to the success of the operation.

Procuring goods and services

- Mining title holders have free choice of suppliers and subcontractors for the purchase of good and services.
- Mining title holders and their suppliers and subcontractors will use as much as possible the services and raw materials from Malian source and products manufactured or sold in Mali.

Implementation

- The Ministry in charge of mines shall ensure the existence of a Technical Committee for the community development plan.
- 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 mines.
- A Fund dedicated to the training of public servants was created in 2012 and financed by taxes levied on mining.
- Enterprises using at least 60% of raw materials benefit from tax reliefs.

Monitoring and Enforcement

- The Technical Committee approves the community development plan and its updates.
- The community development plan shall be revised every two (2) years.
- The small mining title holder and operating permit holder are required to submit each year the status of the employment and the personnel.

Applications for Rights and Plans

- The exploitation permit is given to a mining exploration title holder after presentation of an approved feasibility study, a community development plan and a rehabilitation plan (Law 2012-015 Art.63&64).
- In accordance with article 63 of this law, any applicant for an operating license or a small mine operating permit, is required to provide the mining authority, among other documents, a community development plan (Law 2012-015 Art.150)
- The community development plan shall cover among other priority areas of intervention, the promotion of employment. This promotion of employment shall:
 - plan a privileged recruitment mechanism of subordinate jobs for the local populations;
 - promote the professional training of employees (Decree 2012-311 Art.141).


Training and employment

- Mining companies and their subcontractors are required to give preference to Malian personnel and implement a training and promotion program for their employment in all mining phases, and to replace expatriates with nationals when they have acquired the same training and experience during their job. (Law 2012-015 Art.137)
- Mining companies and their subcontractors can employ a reasonable number of foreigners when it is necessary to the success of the operation. (Model contract 2012-490 Art.19).

- During the period of validity of each mining title, the holder benefits from the several advantages, among them, the free choice of suppliers and subcontractors for the purchase of goods and services. However, they are encouraged to use as much as possible the services and raw materials from Mali and products manufactured or sold in Mali (Law 2012-015 Art.116).

Implementation

- The administration in charge of mining must ensure the existence of a Technical Committee composed of representatives of 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 approves the community development plan which is updated every two (2) years (Law 2012-015 Art.151):

 “The community development plan, developed in consultation with communities and local and regional authorities, is produced by the company. It is updated every two (2) years. The modalities of this consultation are defined by a regulatory act. This community development plan must be harmonized and integrated into the PDESC of the three (3) levels of local authorities (Law 2012-015 Art.151).”

- 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).

- A funding fund for the research, training and promotion of mining activities was created in 2012 with the resources for training paid by mining companies and an allocation from the gold trust fund (Law 2012-015 Art.72):



“A funding fund for research, training and promotion of mining activities is created to enable the optimal exploitation of mining potential.

This fund, set up at the beginning of each fiscal year, is managed in accordance with the requirements of the Finance Law.

The fund is funded by:

- the allocation, from the special trust account of gold resources, of an amount intended to finance mining research;
- resources for training, paid by mining companies at the signing of contract or the transfer of the mining titles (Law 2012-015 Art.72§1-5).”



- The small mining title holders and operating permit holders are required to submit to the National Director of Geology and Mines in the first quarter of each year, the situation and the evolution of the workforce (Law 2012-015 Art.41).



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").



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, travel related services which should not affect the application of the local content provisions in the mining sector.

- 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.

- Among 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.”

The BIT with Algeria authorizes fiscal incentives to boost national and local societies within the clause of national treatment and most-favored nation.

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, 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.”