

LOCAL CONTENT



Burkina Faso – 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 definition of local content in law or contract.
- Related local content clauses are found in the mining law, regulations and model contract.
- Mining permit holders and their subcontractors are required to employ in priority Burkina Faso personnel and give preference to Burkina Faso enterprises and goods manufactured in Burkina Faso.
- Applicants to industrial large and small-scale mining permits shall include a training and skills transfer plan in their feasibility study.
- The mining title holders are required to use the services of the national geological service for part of their exploration jobs.
- A fund for geological research and training in Earth sciences is created and financed through taxes paid to government.
- Our analysis is based on translations of the laws and decrees and not on the original text. We therefore cannot 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

Legislation

[Mining Law 2015](#) (“Law 2015-036”) This law contains local content related provisions. It covers, among other things, training and employment requirement and supply preferences.

Regulation

[Mining management](#) (“Decree 2017-036”)
[Geological research and training fund](#) (“Decree 2017-034”). The mining management decree emphasizes the supply, training and employment provisions said in the mining law.

Contract

[The 2017-0035 model contract](#) complements the provisions in the Law and Decree.



Rights application and Plans

- Mining companies seeking exploitation permits are required to submit a feasibility study that includes, among other things, a training and skills transfer plan to local managers and personnel.

Training and Employment

- Mining title holders, their suppliers and subcontractors shall employ in priority Burkina Faso personnel at equal qualifications.
- They shall submit a training and promotion program of Burkina Faso personnel.
- A progressive quota of local jobs for the lifecycle of mining will be set by decree.
- Mining title holders, their suppliers and subcontractors can employ foreigners when it is necessary.
- A fund is created for geological research, training of mining administration personnel and support to Earth Sciences universities.

Procuring goods and services

- Mining title holders and their subcontractors shall give preference to Burkina Faso enterprises for good and services supply.
- Investors, their affiliates and their subcontractors will use services and raw materials from Burkina Faso, and source products manufactured in Burkina Faso.
- The mining title holders are required to subcontract up to 10% of their drilling and samples analysis with the national geological service.

Implementation

- The fund for geological research and training is funded by 15% of the mining taxes.
- The fund for geological research and training is distributed to different organizations of mining administration and universities.

Monitoring and Enforcement

- A framework is set up to develop and monitor the progress of local supply to the mines.
- The administration in charge of mining receives an annual report on the status of the training and employment plan implementation.

- The application for an industrial large or small-scale mine shall enclose a feasibility study that includes, among other things, a training and skills transfer plan (Law 2015-036 Art. 41):



“The application for a large or small-scale industrial license (...) shall be accompanied by documents determined by regulatory means, in particular:

- a feasibility study developed by an accredited firm, including a training and transfer of skills plan to local managers and personnel and a system for the promotion of these executives and personnel. The feasibility study must also define a plan to anchor the mining company's activity to the local and national economy, which indicates the upstream and downstream economic linkages with companies and economic agents (...) (Law 2015-036 Art. 41§1-3).”



- Mining title holders, their suppliers, and their subcontractors shall employ in priority Burkina Faso executives at equal qualifications and without distinction of gender. They shall train and promote them for the gradual replacement of expatriate personnel. They are required to respect the quota of local employment that will be set by a decree taken by the Board of Ministers (Law 2015-036 Art.102).
- Mining title holders, their suppliers, and their subcontractors can employ expatriates when it is necessary (Contract 2017-0035 Art.8).
- A fund to finance geological and mining research and support training on Earth Sciences is created. The funds finance, among other things, the training of the personnel of the administration in charge of mines and contribute to the training in Earth Sciences at universities (Decree 2017-0034 Art.2):



“The fund to finance geological and mining research and support training on Earth Sciences is intended to finance the following activities:

- the geological and mining research of the mining administration and the national geological survey;
- the capacity building of the services of mining administration and national geological survey;
- the implementation of a policy to maintain human resources of mining administration and national geological survey;
- the training of the personnel of mining administration and national geological service;
- the support to the training on Earth Sciences (Decree 2017-0034 Art.2).”




- The mining title holders and their subcontractors give preference for any supply of goods and services at equivalent conditions of price, quality and delivery time to Burkina Faso enterprises (Law 2015-036 Art.101).
- Investors, their affiliates and subcontractors will use services, raw materials and products manufactured in Burkina Faso provided they are available at competitive price, quality and meeting delivery times (Contract 2017-0035 Art.6).
- The mining title holders are required to use the services of the national geological service for part of their exploration jobs (Contract 2017-0035 Art.6§2):



“Licensees are required to have the national geological service carry out, subject to compliance with the conditions of quality, costs and delivery time, part of their exploration work within the production license of at least:


- 10% of the drilling;
- 10% of analysis of rock and soil samples (Contract 2017-0035 Art.6 §2).”

- The fund for geological research and training is funded by part of the mining revenues (Decree 2017-0034 Art.4):

 “The fund of geological and mining research and support for the training in Earth Sciences is funded by 15% of:

- proportionate royalty fees;
- land occupancy taxes;
- fixed taxes of mining titles and authorizations;
- fees of accreditation for purchase and sale of collected gold (Decree 2017-0034 Art.4)”.

- The fund for geological research and training is distributed to different organizations of mining administration and universities (Decree 2017-0034 Art.8):

 “The fund for geological research and training is distributed as follows:

- 65% for the National Geological Service;
- 10% for the Mines and Quarries Equipment Fund;
- 15% for the National Fund for Education and Research;
- 5% for the equipment of public universities and support for the research and training in the field of Earth Sciences;
- 5% for the support of research and training in other fields of science and technology (Decree 2017-0034 Art.8).”



- A framework composed of representatives of the State, mining companies and suppliers of mining goods and services is set up to develop and monitor the local supply in the mining sector (Law 2015-036 Art.101).
- The mining administration receives an annual report from the enterprises on the implementation of the requirements in terms of training, employment, and promotion of local personnel.



Agreement on Trade-Related Investment Measures (TRIMs)¹

- Burkina Faso has been a member of the WTO since June 03, 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*.
- Burkina Faso, 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. Burkina Faso has only made [commitments](#) related to tourism and travel related services which should not affect the application of the local content provisions in the mining sector.



- As of May 2nd, 2019, Burkina Faso had entered into **17 bilateral investment treaties** (BITs) but only 15 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 17 BITs signed by Burkina Faso, 8 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 Burkina Faso may impose on investors and includes an article on Senior Management, Board of Directors and Entry of Personnel.

Burkina Faso – 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 an individual of any particular nationality.”

Article 9: Performance requirements

“9.1: A party may not impose the following requirements in connection with the establishment, acquisition, expansion, management, conduct or operation of a covered investment or any other investment in its territory:

- a. to export a given level or percentage of good or service;
- b. to achieve a given level or percentage, in terms of volume or value, 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.”