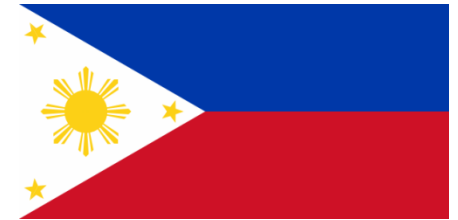




LOCAL CONTENT



Philippines – 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 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 Sophie Thomashausen. Research was conducted by Agnieszka Goliszewska and David Kienzler and reviewed by Christina Tecson.

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.

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 should relations between the state and the investor sour over the course of the investment.

Highlights

- No definition of local content and no comprehensive local content-dedicated legislation.
- The governing principle is sustainable mining, which promotes creation of wealth and improves quality of life by a pro-environmental and pro-people approach.
- Local content provisions center on the development and improvement of mining communities.
- The most comprehensive legislation on local employment, training and procurement of local goods and services are in the Philippine Mining Act of 1995 and in AO 2010-21, the administrative order consolidating the implementing the rules and regulations of the Mining Act.
- Small-scale mining is reserved for Filipino citizens.

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

Legislation

[The Philippine Constitution](#) (the “Constitution”) – Grants full control and supervision of mining rights to the State

[People’s Small-Scale Mining Act of 2011, \(Act no 7076\)](#) (“Small-Scale Mining Act”) – Reserves small-scale mining for Filipino citizens

[Philippine Mining Act of 1995, Act 7942](#) (“Mining Act”) – The primary mining legislation. In line with the Constitution, the Mining Act allows the participation of foreign companies in mining through Financial and Technical Assistance Agreements.

Regulation

[Revised Implementing Rules and Regulations of R.A. 7942, otherwise known as the Philippine Mining Act of 1995, \(June 28, 2010, AO no 2010-21\)](#) (“AO 2010”) – An administrative order promulgating the rules and regulations for compliance with the Mining Act

Contract

AO 2010 requires mineral agreements to incorporate provisions giving preference to goods and services produced and offered in the Philippines of comparative quality and cost and to Filipinos in all types of mining employment for which they are qualified.

Key definitions

- **Contractor:** “means a Qualified Person acting alone or in consortium who is a party to a Mineral Agreement or [Financial or Technical Assistance Agreement]” (AO 2010).
- **Qualified Person:** “means any Filipino citizen of legal age...or a corporation, partnership, association... at least sixty percent (60%) of the capital of which is owned by Filipino citizens” (AO 2010).
- **Small-scale miners:** “Filipino citizens who, individually or in the company of other Filipino citizens voluntarily form a cooperative duly licensed by the Department of Environment and Natural Resources to engage, under the terms and conditions of a contract, in the extraction or removal of minerals or ore-bearing materials from the ground” (Small-Scale Mining Act).
- **Social Development and Management Program (SDMP):** “refers to the comprehensive five-year plan of the Contractor/Permit Holder/Lessee...towards the sustained improvement in the living, standards of the host and neighboring communities by creating responsible self-reliant and resource-based communities capable of developing, implementing and managing community development programs, projects, and activities in a manner consistent with the principle of people empowerment” (AO 2010).
- **Annual Social Development and Management Program:** “refers to a yearly community development programs/ projects/activities based on the approved five-year Social Development and Management Program” (AO 2010).



Rights application

- In order to be a Qualified Person eligible for most mining agreements 60% of a company's capital must be owned by Filipino citizens.
- Small-scale mining is limited to Filipino citizens.

Plans

- Company must adopt a comprehensive five-year Social Development and Management Program (SDMP) to improve living standards of the communities, empower people, and to create resource-based communities.
- The five-year SDMP is the basis for the creation of five Annual SDMPs.

Training and Employment

- Companies must give preference in employment to Filipino citizens in all positions for which they are qualified.
- Foreigners may be employed for highly specialized positions for up to five years, but it is required that Filipinos be trained as understudies for those positions.
- Training and development program for all aspects of the mining operation including management are required for the duration of all mining agreements.

Procuring goods and services

- Companies must give preference to local products and services to the maximum extent if they are available on similar terms as those imported.
- Companies are required to identify self-sustaining income-generating activities in local communities such as the production of relevant goods and services and work to develop them.

Technology Transfer

Companies are required to transfer technology to Filipino citizens and contribute to the development of local mining technology (unspecified).
A fixed percentage of a company's annual operating costs must be put towards a program to advance local mining technology and geosciences.

Implementation

- The Government must promote the use and development of local scientific and technical resources when entering into technical or financial assistance agreements for mineral development with foreign-owned companies.
- Social infrastructure and development projects for the use by local communities must go through local governments.

Monitoring and Enforcement

- Companies must create Community Relation Offices which conduct monthly monitoring of the Annual SDMP and provide quarterly progress reports on the Annual Program on Development of Mining Technology.
- Contractors and permit holders who do not implement an approved SDMP pay a fine and mining operations may be suspended.



- The government has full control and supervision over the exploration and development of natural resources. If it chooses to enter co-production agreements, joint venture agreements, or production sharing agreements it must partner with Filipino citizens, or companies whose capital is at least 60% owned by Filipino citizens (Constitution, Art. 12(2)). This does not encompass agreements involving financial or technical assistance which are considered service contracts where foreign-owned companies can be contractors (Constitution, Art. 12(2), Mining Act, Sec. 3(aq)).
- Small-scale mining, mining which relies on manual labor, on “simple implements” and no explosives or heavy mining equipment, is limited to Filipino citizens, either individually or in licensed cooperatives (Small-Scale Mining Act, Sec. 3).
- Contractors and permit holders must, in consultation with local communities, prepare a comprehensive Social Development and Management Program (SDMP). The SDMP will cover and include all programs, projects and activities intended to enhance the development of the local communities. To address the changing needs of local communities an SDMP will need to be submitted every five years. An annual community development program will be submitted based on the five-year SDMP. (AO 2010, Sec. 136-A).

Training and employment



- Contractors and permit holders must give employment preference to Filipino citizens in all mining positions for which they are qualified to work efficiently and safely (Mining Act, Sec. 62).
- Hiring priority should be given to citizens from local and neighboring communities and the province where the mine is located (AO 2010, Sec. 136(d)):



“Give preference to qualified Filipino citizens in the hiring of personnel for its mining operations, the majority of which shall originate according to priority from the host and neighboring communities, the host municipality and province where mine is located: *Provided, That the Contractor/Permit Holder/Lessee shall* organize, at its own expense, skills enhancement programs in the absence of the needed skills: *Provided, further, That it shall give its firm* commitment to skills re-formation and entrepreneurship development for people in the mining communities as an integral part of the mine closure process”.

- Exceptions to the employment preference for Filipino citizens can be made for positions requiring highly specialized training and experience in exploration, development, or utilization of mineral resources, though it must be approved subject to current regulations, including the Philippine Immigration Act of 1940 (AO 2010, Sec. 140). Such exceptions require a program for Filipino citizens to be trained as understudies for those positions (AO 2010, Sec. 39, 56). Each foreign employment position cannot last longer than five years or the length of the payback period. Foreigners employed as mine managers, vice-presidents for operations, or equivalent managerial positions in charge of mining, milling, quarrying or drilling operations must, among others, present proof of qualification or pass a government licensing exam. The director can allow foreigners to work for up to one year in special cases (AO 2010, Sec. 140). Exemptions can be made if reciprocal privileges are given to Filipino citizens working in the foreign employee's home country. (Mining Act, Sec. 62). Each foreigner employed in a position lower than the managerial level shall be hired on a consultancy basis (AO 2010, Sec. 140).
- For the entire term of the mineral agreement, contractors must provide a training and development program for all aspects of the mining operation including management (Mining Act, Sec. 59).



- To the maximum extent compatible with efficient mining operations, preference must be given to local goods and services as well as scientific and technical resources if they are of comparative quality and availability to imported goods. Construction, construction materials, transportation, household equipment, furniture, and food are areas specified for particular preference for local goods and services (Mining Act, Sec. 60, AO 2010, Sec. 138).
- Contractors and permit holders are required to identify or help create self-sustaining, income-generating activities in local communities such as production of goods and services and work with those communities to develop and enhance these activities (AO 2010, Sec. 136-C).

- Contractors and permit holders who have a Mineral Agreement, Financial or Technical Assistance Agreement, or Mining Processing Permit are required to transfer technology to Filipino citizens and contribute to the development of local mining technology (Mining Act, Sec. 57; AO 2010, Sec. 39, 56, 113).
- Contractors and permit holders are required to develop a program to advance mining technology and geosciences and annually expend a percentage of their operating costs on implementing the program (AO 2010, Sec. 134-135):



- a. The Contractor/Permit Holder/Lessee shall assist in the development of the host and neighboring communities in accordance with its SDMP to promote the general welfare of the inhabitants living therein. Host community refers to the barangay(s) where the mining area is located, and neighboring community refers to the barangay(s) adjacent to the host community;
- b. The Contractor/Permit Holder/Lessee shall develop a program for the advancement of mining technology and geosciences to build up resources and mineral discoveries, improve operational efficiency and resource recovery, and enhance environmental protection and mine safety;
- c. The Contractor/Permit Holder/Lessee shall develop and institutionalize an Information, Education and Communication (IEC) Program for greater public awareness and understanding of responsible mining and geosciences; and
- d. The Contractor/Permit Holder/Lessee shall allot annually a minimum of one and a half percent (1.50%) of the operating costs necessary to implement Subsections (a), (b) and (c) of this Section: *Provided, That of this amount, 1.125% (75% of 1.50%) shall be apportioned to implement the SDMP in Subsection (a) hereof, 0.150% (10% of 1.50%) for the implementation of Program for the Development of Mining Technology and Geosciences in Subsection (b) hereof and 0.225% (15% of 1.50%) for the implementation of IEC Program in Subsection (c) hereof: Provided, further, That any unspent amount and/or savings, for any given year, allotted for the implementation of the various programs shall be added to the succeeding year's allotment and may be re-programmed after consultations with host and neighboring communities.*

- Contractors and permit holders must create Community Relations Offices (CRO) headed by a Community Relations Officer who reports to the highest on-sight company official. The Officer must have graduated from a social science course or have training or experience with community development, and preferable, with strong knowledge of the local culture. During exploration Contractors and permit holders can hire community development professionals and liaison officers to monitor implementation of development programs (AO 2010, Sec. 136C).
- The CRO will coordinate program implementation and monitoring (AO 2010, Sec. 136D):



“Monthly internal monitoring of the Annual SDMP (ASDMP) shall be done jointly by the CRO and representatives of the host and neighboring communities to determine the level of implementation of the P/P/As in accordance with the ASDMP.

The CRO shall provide the Regional Office concerned with the quarterly reports of accomplishments on the implementation of ASDMP, Annual Program on the Development of Mining Technology and Geosciences and Annual Program on IEC. It shall likewise prepare and submit annual report to the Regional Office concerned, copy furnished the Bureau.

The Regional Office concerned shall conduct semi-annual monitoring of the implementation of the approved programs and submit its monitoring report(s) to the Bureau as basis for periodic audits.

An annual status report on the implementation of the CDP shall be submitted to the Regional Office concerned, subject to periodic monitoring/audit”.

- Contractors and permit holders who do not implement approved SDMP pay a fine not exceeding five thousand pesos for the first offence. For the second offence, in addition to the fine, mining operations may be suspended (AO 2010, Sec. 136-F). Approved Programs shall be deemed revoked if the mining operation of the Contractor is suspended or stopped for a period of at least 2 consecutive years.
- Contractors and permit holders, the Regional Office, and the Central Office of the Mines and Geosciences Bureau can all initiate reviews and revisions of the SDMP, IEC and Programs on Development of Mining and Mineral Processing Technologies and Geosciences to take account of changes in costs or types of activities. These programs are subject to performance review prior to the end of their five-year term to measure their impact and serve as a guide for preparing new programs (AO 2010, Sec. 136-E).



- When entering into financial or technical assistance agreements for mineral development with foreign-owned companies, the government must promote the use and development of local scientific and technical resources (Constitution, Art. 12(2)).
- Local governments will be the recipients of social infrastructure and development projects to be put to use for local mining communities (AO 2010, Sec. 8(g)).



- Philippines has been member of the WTO since January 1, 1995.
- All World Trade Organization (WTO) Members must adopt and abide by the obligations of TRIMs. This can impact a country's ability to impose certain local content requirements (referred to as "investment measures"), to the extent they affect trade in *goods*.
- 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); and
 - Imposition of domestic equity.
- GATS only applies to those service sectors that the country chooses to include in its Schedule of Commitments. Philippines’ [commitments](#) are unlikely to affect the implementation of the Philippines’ local content framework.



- As of 29 January 2015, the Philippines has entered into **37 bilateral investment treaties** (BITs), 31 of which 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.

- Of the 37 BITS signed by the Philippines, 27 BITS were reviewed (and are available on [UNCTAD database](#)).
- Aside from the inclusion of National Treatment Obligations and Most Favored Nation clauses, which are included in most BITS, performance requirements are limited or prohibited only in the BIT with Canada. Clauses are quoted below.

Philippines - 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.”