

LOCAL CONTENT



Senegal – Petroleum



**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 to 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.



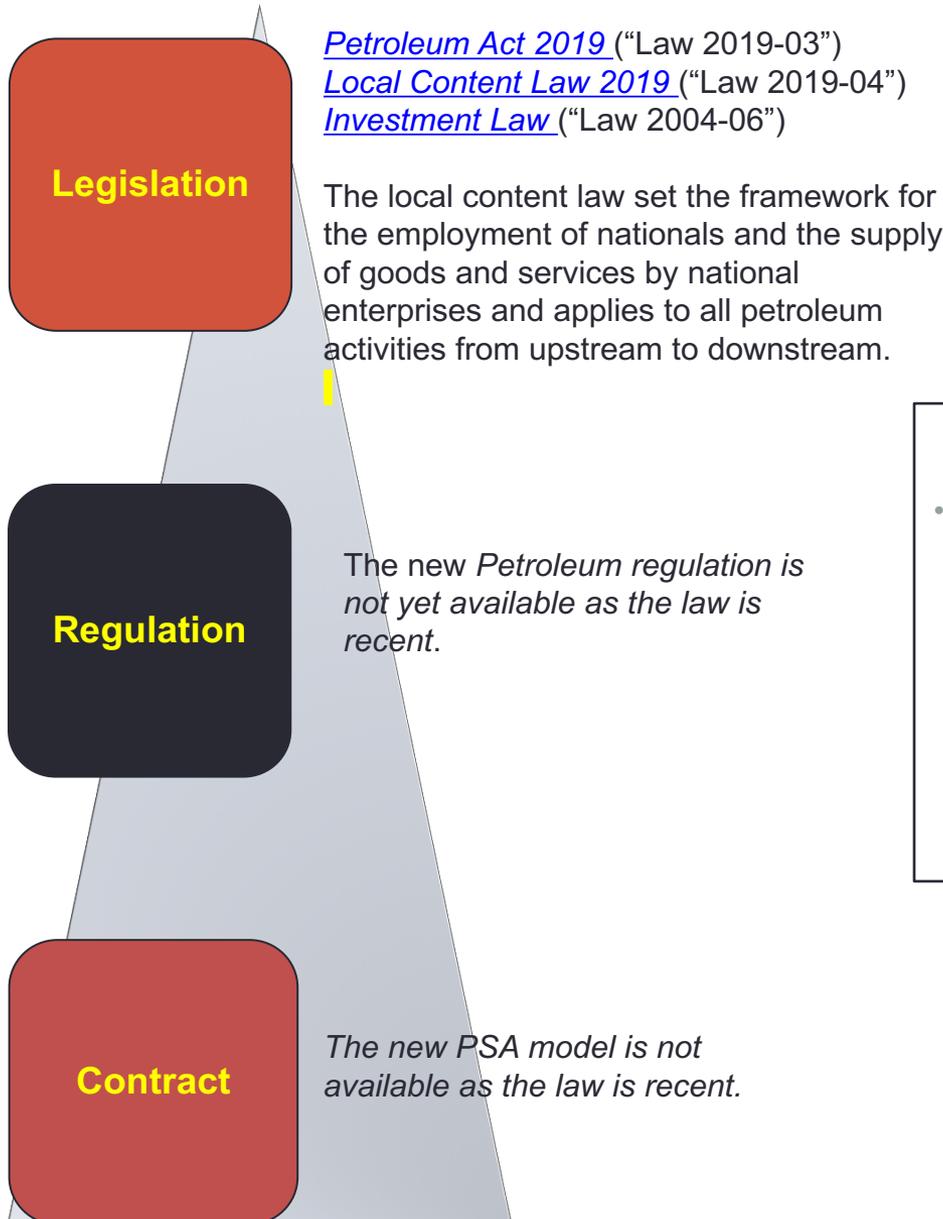
Highlights

- There is a legal definition of the local content. A local content law, and related local content provisions are also contained in the petroleum law.
- Contractors, suppliers and subcontractors employ in priority Senegalese personnel and shall specify in their local content plan the measures to improve their capacities.
- Goods and services in the petroleum sector are provided by Senegalese enterprises, and contractors shall call for competition for supply of goods and services.
- Suppliers and subcontractors in petroleum sector shall be registered in Senegal, and open their enterprises capital to Senegalese investors.
- Any enterprise required to submit a local content plan shall incorporate in their plan a strategy for technology, skills transfer and research development.
- A National Committee for Local Content Monitoring, and supporting funds for the development and implementation of local content are created.
- Failure to comply with local content obligations will expose the companies, suppliers and subcontractors to sanctions.
- 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



Key definitions

- **Local Content:** “Local content in the petroleum sector refers to all initiatives taken to promote the use of national goods and services as well as the development of national labor, technology and capital participation in the entire oil and gas industry value (Law 2019-04 Art.1).”



Rights application & Plans

- All contractors, subcontractors and suppliers establish and submit a local content plan to the National Committee of Local Content Monitoring.

Training and Employment

- Contractors, subcontractors and suppliers employ in priority the Senegalese personnel.
- The non-qualified jobs shall be proposed in priority to local residents.
- Contractors, subcontractors and suppliers shall specify in their local content plan measures to improve the capacities of Senegalese.

Procuring goods and services

- Suppliers and subcontractors in the petroleum sector open their enterprises' capital to Senegalese investors.
- Goods and services related to the petroleum sector are provided by Senegalese enterprises.

Technology transfer

- The National Committee of the Local Content Monitoring develops a strategic plan for technology transfer, skills transfer and research development.
- Enterprises subject to the local content plan submission shall specify their measures to contribute to the access of patents.

Implementation

- A National Committee for the Local Content Monitoring is created.
- The committee shall coordinate the elaboration of a strategic plan of the local content.
- A supporting funds for the development and implementation of the local content is created and the modalities will be set by decree.
- Enterprises call for competition for supply of goods and services in the petroleum sector.

Monitoring and Enforcement

- Failure to comply with local content provisions is subject to contract cancellations, supply prohibitions or penalties.
- Contractors, subcontractors and suppliers shall update, each year, their local content plan with a detailed report from previous year.



- All contractors, subcontractors and suppliers establish and submit a local content plan to the National Committee of Local Content Monitoring (Law 2019 – 04 Art.6):



“It is updated every year and contains at minimum the following points:

- a) promotion of Senegalese capital and enterprises, employment and training;
- b) promotion and use of local goods and services;
- c) technology and know-how transfer;
- d) promotion of research and development;
- e) promotion of financial services and insurance;
- f) promotion of the supply of national intellectual services (Law 2019-04 Art.6§3).”

- Contractors, subcontractors and suppliers employ in priority the Senegalese personnel (Law 2019-04 Art.7):



“Unskilled jobs are offered primarily to residents of local and adjacent communities of the place where the oil and gas activities occur.

Each contractor, subcontractor, service provider and supplier shall specify in its local content plan, the measures taken to enable citizens to acquire the necessary qualifications and expertise to replace the non-national employees gradually (Law 2019-04 Art.7 §2-3).”

- Petroleum title holders and enterprises working for them must employ in priority Senegalese personnel in oil operations in the territory, and contribute to the professional training of Senegalese executives and technicians through an annual training program defined in the petroleum contract (Law 2019-03 Art.58).
- During the duration of their regime, any approved company shall employ in priority Senegalese personnel with equal skills, and organize the training and the promotion of Senegalese nationals within the company (Law 2004-06 Art.25).



- Petroleum title holders and enterprises working for them must give preference to Senegalese enterprises for all contracts of the construction, supply, or provision with equivalent conditions of quality, quantity, price, payment and delivery time (Law 2019-03 Art.58).
- Goods and services related to the petroleum sector are provided by Senegalese enterprises unless there is no Senegalese company with the necessary qualifications and standards for the project (Law 2019-04 Art.8.1).
- Any investor wishing to intervene as a subcontractor, service provider or supplier, creates and registers a business under Senegalese law of trade and movable credit. The capital of this company is open to Senegalese investors in accordance with the terms set by Decree (Law 2019-04 Art.8.3).
- Contractors, subcontractors, service providers or suppliers use intellectual services established in Senegal (Law 2019-04 Art.11).
- Any company participating in oil and gas activities subscribes to insurance contracts with insurance companies approved in Senegal (Law 2019-04 Art.10):



“For the coverage of risks related to oil and gas activities, any company participating to these activities subscribes to insurance contracts with insurance companies approved in Senegal. However, insurance contracts whose coverage exceeds the financial capacity of insurance companies approved in Senegal may, for their surplus, be subscribed to foreign companies. These provisions apply mutatis mutandis to reinsurance related to these oil and gas activities. Subject to compliance with the requirements of petroleum contracts, the companies involved in oil and gas activities must use the services of financial institutions established in Senegal, as far as the capacity of the latter (2019-04 Art.10).”



- Petroleum title holders as well as companies working on their behalf must contribute to the maximum technological transfer with the Senegalese companies along with support services (Law 2019-03 Art.58).
- The National Committee of the Local Content Monitoring develops a strategic plan for technology transfer, skills transfer and research development (Law 2019-04 Art.9):



“The National Committee for Local Content Monitoring shall develop a strategic plan for the transfer of technologies, skills and research and development with the administrations as well as with the relevant entities.

The enterprises subject to the obligation to submit a local content plan shall specify in that plan the measures they intend to take to contribute to the achievement of the objectives of the strategic plan mentioned in paragraph 1 of this article, particularly through training, partnership, facilitation of access to patents, and any other measures likely to promote local content (Law 2019-04 Art.9).”



- A National Committee for the Local Content Monitoring is created (Law 2019-04 Art. 5):

 “A National Committee for the Local Content Monitoring (CNSCL) is established to coordinate the development of the local content strategy document that defines the implementation of the State's guidelines in this area.
The rules governing the organization and functioning of that Committee shall be specified by Decree (Law 2019-04 Art. 5).”

- A supporting fund for the development and implementation of the local content is created. The modalities will be set by decree (Law 2019-04 Art. 13).
- Enterprise shall call for competition for supply of goods and services in the petroleum sector (Law 2019-04 Art. 8.2):

 “Calls to compete for the supply of goods and services related to oil and gas activities are launched through an electronic platform whose organization and operation are specified by Decree.
Where an enterprise intends not to use a competitive tendering procedure for the supply of certain goods or services, it shall require the approval of the CNSCL before initiating the procedure leading to the provision of such goods and services (Law 2019-04 Art. 8.2).”



- Failure to comply with local content provisions is subject to contract cancellations, supply prohibitions or penalties (Law 2019-04 Art.12):



“Failure to comply with local content obligations, as provided in this law or its implementing decrees, is subject to the following penalties:

- a) termination of the contract under the conditions of the article 65 of the petroleum law;
- b) the application of the fines provided in article 70 of the petroleum law;
- c) for contractors, the non-recovery of the cost of the activities concerned;
- d) for subcontractors, suppliers and service providers, the exclusion of the competitive bidding platform and the prohibition of concluding contracts related to oil and gas activities (Law 2019-04 Art.12).”

- Contractors, subcontractors and suppliers shall update each year their local content plan with detailed report from previous year (Law 2019-04 Art.6).



Agreement on Trade-Related Investment Measures (TRIMs)¹

- Senegal has been a 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*.
- Senegal, 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. Senegal's [commitments](#) related to professional services can affect the implementation of the article 58 of the petroleum law.



- As of May 2, 2019, Senegal had entered into **29 bilateral investment treaties** (BITs) but only 19 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 of the 29 BITS signed by Senegal, 11 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 Senegal may impose on investors and includes an article on Senior Management, Board of Directors and Entry of Personnel.

Senegal – 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 any particular nationality.”

Article 9: Performance requirements

“9.2: A party may not impose or enforce the following requirements, or enforce a 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 or service;
- b. to achieve a given level or percentage 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.”