

LOCAL CONTENT



Uganda – Petroleum



**Columbia Center
on Sustainable Investment**

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

The project¹ - background

Resource-rich countries are increasingly inserting requirements for local content (“local content provisions”) into their legal framework, through legislation, regulations, contracts, and bidding practices. If successful, a policy to increase local content can lead to job creation, boost the domestic private sector, facilitate technology transfer and build a competitive local workforce. However, local content goals are often unfulfilled and the opportunities are not captured. For example, local content provisions typically require investors to meet targets measured as a percentage of investment, hours worked, equipment supplied, or jobs created. If targets are too high, they may either scare away investment or remain unmet as investors accept the fines or find loopholes. If they are too low, the country will not maximize potential linkages. This shows the importance of the framing of local content provisions. Targets, and other local content objectives, need to be carefully quantified, adapted to the local context and collaborative. Because local content provisions can be key to translating resource investments into sustainable benefits for the local population, this project examines the detail of the existing legal frameworks for local content in a number of countries.

CCSI has conducted a survey of the local content frameworks of a number of countries – identifying the key legislation, regulations, contracts 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 Jacky Mandelbaum, with assistance from Sophie Thomashausen. Research was conducted by Elsa Savourey, with input from Shazia Ahmad.

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 project - background

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.

¹Performance 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.

²Countries 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

- A 2011 study into national content in the oil gas sector examined “how Uganda may benefit from the participation of Ugandans and Ugandan firms in the petroleum activities”: [Enhancing National Participation in the Oil and Gas Industry in Uganda, 2011](#) (“National Content Study”), though its findings have yet to be fully implemented into the legal framework. Key findings are set out in Annex 1.
- The National Content Study found that local ownership is not key, as long as value addition is undertaken in Uganda.
- Uganda is in the process of developing a national content policy and plan for the oil and gas sector.
- The focus of the existing framework is predominantly on increasing local employment and training, as well as local procurement.
- The National Oil and Gas Policy, 2008, as well as the National Content Study, envision a role for government in identifying the skills needed for local participation in the industry, and ensuring the availability of training courses to attain those skills.

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



International law

Legislation

[*The Petroleum \(Exploration, Development and Production Act, 2013\)*](#) (“Act”)

Regulates petroleum exploration, development and production in Uganda. Contains few provisions related to local content.

Regulation

Policy

[*National Oil and Gas Policy for Uganda 2008*](#) (“Policy”)

Implemented to guide the development of Uganda’s emerging oil and gas sector following the commercial discovery of petroleum in 2006. Contains only very broad statements related to local content.

Contract

[*Model Production Sharing Agreement, 1999*](#) (“Model PSA”)

Licenses and agreements in force before the commencement of the Act remain in force, Local content provisions in these agreements will therefore remain in force, unless the terms in the Act are more favorable to the investor, in which case the provisions of the Act will apply.

Key definitions

National content: “This study has examined how Uganda may benefit from the participation of Ugandans and Ugandan firms in the petroleum activities. In the literature this is frequently referred to by applying the term local content. Local in this sense, however, refers to national as opposed to international or foreign contributions. Thus, we apply the concept national content to avoid any misunderstanding...it is sensible to define national content in terms of value addition in Uganda, by Ugandans in the oil industry, by the use of Ugandan materials, services produced by Ugandans and Ugandan firms, and the use of facilities in Uganda. This means that the ownership of the company performing the value added activities should not matter. In a globalized industry a local subsidiary of a multinational company can be just as effective in using domestic inputs and developing capacity and competence in Uganda as a company in which Ugandans hold a majority of the shares... national content, measured as value added, should cover value generation in both indigenous and foreign-owned firms. ” (National Content Study, p. 4 and 9).

Overview



Rights application

- An application for an exploration license must include a proposal for training and employment of Ugandans.
- An application for a production license must include a proposal for procurement of local goods and services.

Training and employment

- Licensee must submit a detailed program for recruitment and training of Ugandan citizens annually.
- Licensee must have a detailed program for training of its Ugandan employees.
- Knowledge transfer is a joint responsibility of the Government and the licensee.

Procuring goods and services

- Licensee must give preference to goods produced in Uganda and services provided by Ugandan citizens and companies that have the capacity to add value and to meet health, safety and environment standards.
- Ugandan citizens and companies must be notified of upcoming contracts, and of licensee's health, safety and environment standards.

Monitoring and enforcement

- Annual reports required in respect of local training and employment achieved and the level of local procurement of goods and services.

Applications for rights



- An application for a petroleum exploration license must include particulars of the applicant's proposal for training and employment of Ugandan citizens (Act, Art. 56(3)(f)).
- An application for a production license must include particulars of the applicant's proposals for employment and training of Ugandan citizens, and for procurement of goods and services from Uganda. A production license will not be granted unless these proposals are "satisfactory" (Act, Art. 71(3)(k) and (l) and 74(1)(e) and (f)).

Training and employment



- The Policy refers to the promotion of employment of Ugandans in the oil and gas sector, and of the transfer of skills and technology to the country. Further, it recognizes the need to identify the skills and training required and plan for their development, and suggests using the oil and gas activities in the country to provide the necessary training (Policy, Objectives 7(f) and (g) and 8(a) and (b)).
- The licensee must submit a detailed program for recruitment and training of Ugandan citizens, within 12 months of the grant of the license, and annually after that. Once approved by the Petroleum Authority, the program cannot be changed without its permission (Act, Art. 126(1) and (4)).
- The training program must include training in all phases of operations, and take into account gender, equity, persons with disabilities and host communities (Act, Art. 126(2)).
- There must also be a “clearly defined” training program for Ugandan employees, which can include scholarships and other financial support for education, and be carried out in or outside of Uganda (Act, Art. 127(1)).
- A license must include a commitment to transfer knowledge to Ugandans, to establish management and technical capabilities as well as facilities for technical work in Uganda. Requirements for knowledge transfer will be detailed in separate regulations (Act, Art. 127(2) and (3)).
- Knowledge transfer is to be a shared responsibility of government and the licensee (Act, Art. 127(4)):



The technology transfer required under sub-section (2) shall be a shared responsibility between the Government and the licensee.

Training and employment



- Under the Model PSA, the licensee is required to train and employ “suitably qualified” Ugandan citizens, as well as after commercial production starts, to train Ugandan citizens for positions including administrative and executive management positions. The Licensee must also require its sub-contractors to do this (Model PSA, Art. 18.1).
- Under the Model PSA, the licensee must gradually replace its expatriate workforce with “suitably qualified and experienced” Ugandan citizens. The licensee must convince the Advisory Committee established under the PSA for the project that no “suitably qualified or experienced” Ugandan citizens are available for key senior management or technical positions before it can hire expatriate staff (Model PSA, Art. 18.1).
- Under the Model PSA, the licensee must provide an annual programme for training and for phasing in Ugandan citizens to the Advisory Committee for approval. The Licensee must also submit to the Government an annual programme for training government personnel on skilled and technical jobs in petroleum operations, and deposit with the Government fixed monetary amounts for training of personnel selected by the Government (Model PSA, Art. 18.1, 18.2 and 18.3).
- The Policy also envisions training for Government personnel, “as one of the ways to facilitate professional dialogue with oil companies” and lists training Government personnel to monitor petroleum exploration and development as an action to be undertaken (Objective 8(d) and (i)).

Procuring goods and services



- The Policy refers to the promotion of the use of Ugandan goods and services in the industry, of participation of Ugandan entrepreneurs in providing goods and services and of “public private partnerships whose benefits outweigh their cost, and whose costs and benefits are mutually and fairly shared by the partners” (Policy, Objective 7(b) to (d), 8(c)).
- The Licensee must give preference to goods “produced or available in Uganda” and services provided by Ugandan citizens and companies (undefined), which must have the “capacity to add value” and to meet the licensee’s health, safety and environment standards, and meet criteria specified in regulations to be prescribed by the Minister (Act, Art. 125(1) and (4)).
- If the goods and services required are not available in Uganda, they may be provided by a foreign company, but only where it enters into a joint venture with a Ugandan company with a share capital of at least 48% (Act, Art. 125(2)).
- In the Model PSA, preference must be given to Ugandan goods and services unless they “are offered on terms which are not equal to or better than imported goods and services with regard to quality, price and availability at the time and in the quantities required” (Model PSA Art. 17.1).
- Ugandan citizens and companies must be notified of the licensee’s health safety and environment standards, and of upcoming contracts “as early as practicable” (Act, Art. 125(3)).
- In the Model PSA, the company is required to establish “appropriate” procedures for procurement of goods and services to ensure that suppliers and sub-contractors in Uganda are given “adequate” opportunity to compete. Tender procedures must be approved by the Advisory Committee for the project, established under the PSA (Model PSA, Art. 17.2).

Monitoring and enforcement



- Annual reports must be submitted to the Petroleum Authority:
 - in respect of procurement of goods and services, to show the licensee's and its contractors' and sub-contractors' achievements in using local goods and services over the past year (Reg, Art. 125(5)); and
 - in respect of recruitment and training, to detail the execution of the licensee's recruitment and training programme (Reg, Art. 126(5)).
- Annual reports are also required under the Model PSA with respect to both procurement of Ugandan goods and services and employment and training of Ugandan citizens (Arts. 17.3 and 18.1).



Agreement on Trade-Related Investment Measures (TRIMs)¹

- Uganda 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*.
- Uganda, 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 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)
 - Imposition of domestic equity
- GATS only applies to those service sectors that the country chooses to include in its Schedule of Commitments. Uganda’s [commitments](#) relate only to tourism and travel related sectors and GATS is therefore unlikely to affect the implementation of Uganda’s local content framework.

International law – bilateral investment treaties



- As at 1 June 2013, Uganda had entered into **15 bilateral investment treaties** (BITs) but only 7 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 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 This will be relevant for “pre-establishment treaties” i.e., those that set conditions under which an investor may enter into the territory of a party, not only the conditions once the investment is made.



- Of the 15 BITS signed by Uganda, 11 were reviewed (and are available on [UNCTAD's database](#)).
- Aside from the inclusion of National Treatment Obligations and Most Favored Nation clauses, which are present in most BITs, performance requirements are more specifically prohibited in the following BIT:

Uganda and France

“Article 3 – Fair and Equitable Treatment

Either Contracting Party shall extend fair and equitable treatment in accordance with the principles of International Law to investments made by nationals and companies of the other Contracting Party on its territory or in its maritime area, and shall ensure that the exercise of the right thus recognized shall not be hindered by law or in practice. In particular though not exclusively, shall be considered as de jure or de facto impediments to fair and equitable treatment any restriction to free movement (sic), purchase and sale of goods and services, as well as any other measures that have a similar effect”.

Annex 1 – national content study highlights



- The National Content Study recognizes that:
 - “for national content ambitions in the petroleum industry to become a success, capacity building and industrial diversity are prerequisites. Thus, it is crucial for Uganda to pursue long term political commitment for capacity building to reap the benefits of national participation”.
 - “It is important however, to emphasize that successful national content development cannot be achieved by regulation and legislation alone. An extensive framework often tends to lead to rules that are too ambitiously and strictly enforced, which easily leads to consumption of wealth, inferior industry development, violation of international obligations and corruption”.
 - “National content should be achieved through capacity building”.
 - “Real contributions to capacity building, by creating a credible atmosphere for industrial collaboration as well as for the transfer of competence and technology, are the only route to create lasting value to society”.

- The National Content Study proposes the following measures (many of which are yet to be implemented in the framework):
 - Institutional framework**
 1. Establish a government body for national content enhancement
 2. Regulate procedures for procurement
 3. Define and operationalize how national content shall be measured
 4. Have the oil companies commit to local content development
 5. Have an Oil and Gas Industry Suppliers Association established
 6. The national content policy should be an integrated part of the National Development Plan
 7. The corruption perception should be reduced
 - Capacity building in people**
 8. Capacity of vocational training has to be strengthened
 9. Training centers should be established by the international oil companies
 10. Uganda should establish institutions of excellence for higher level of education
 - Enterprise development**
 11. An adequate capacity building program for the industry should be developed
 12. Teaming between Ugandan and foreign firms should be encouraged
 13. An SME program for the petroleum sector should be established
 14. Industry projects with a large market potential should be identified
 15. Restructuring of the industry should be encouraged
 - Facilitating national participation**
 16. Contracts should be structured to align with local capacity
 17. A central information office for national content should be established
 18. A national register for prequalified companies should be established
 - Monitoring national content achievements**
 19. Apply a holistic approach to measure and monitor national content
 20. Establish a system for how to evaluate national content performance