

LOCAL CONTENT



Zambia – Mining



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 Sophie Thomashausen. Research was conducted by Agnieszka Goliszewska.

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

- An updated local content policy (the Mineral Resources Development Policy) was adopted in 2013. It has not yet been reflected in law. The Ministry of Mines, Energy and Water Development monitors and evaluates the implementation of the Policy annually.
- There is no legal definition of local content.
- The most comprehensive local content legislation is contained in the Mines and Minerals Development Act of 2008. The Citizens Economic Empowerment Act of 2006 and Statutory Instrument of 2008 also contain local content provisions.
- Companies have annual reporting requirements.
- The Citizens Economic Empowerment Commission was created in 2006 to promote joint ventures and subcontracting services with Zambian nationals.

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



International Law

Legislation

[Mines and Minerals Development Act no 7 of 2008](#) (“Law 7/08”) - Contains local content requirements for granting and holding mining rights.

[Citizens Economic Empowerment Act of 2006](#) (“Law 06”) – Created the Citizens Economic Empowerment Commission. It also prioritizes the granting of licences to investors who promote local content.

Regulation

[Statutory Instrument no 84 of 2008](#) (“SI 84/08”) – Sets forth specific reporting requirements for investors regarding local content.

Policy

[Mineral Resources Development Policy 2013](#) (“Policy 2013”) – Replaced the 1995 Mining Policy. Its objective is to “create a competitive, thriving and sustainable mining industry that benefits Zambians while concurrently rewarding the investors”.

Key definitions

- **Citizen-owned company** means “a company where at least fifty point one per cent of its equity is owned by Zambian citizens and in which the Zambian citizens have significant control of the management of the company” (Law 7/08, Art. 2 (1)).
- **Citizen of Zambia** means “in relation to an individual, an individual who is a citizen of Zambia and in relation to a partnership, a partnership which is composed exclusively of persons who are citizens of Zambia” (Law 7/08, Art. 7 (6)).

Overview



Rights application

- Some mining licences are only granted to companies incorporated in Zambia with an established office in Zambia. These include the prospecting licence, large-scale mining licence, and large-scale gemstone licence.
- Prospecting permit, small-scale mining licence, small-scale gemstone licence and an artisan's mining right can be granted only to a person who is a citizen of Zambia or to a citizen-owned company.
- An application for a prospecting licence and a large-scale mining licence must include proposals for the employment and training of Zambians and local business development.

Plans

- A holder of a mining licence or a mineral processing licence must submit an annual plan which includes a local business development plan, details of an employee-training programme, and information on the number of Zambians and expatriates who will be employed that year.

Training and Employment

- A holder of a mining right or a mineral processing licence must give maximum preference to the employment of Zambian citizens.
- Licence holders must also conduct training programmes to help Zambian employees qualify for advancement.

Procuring goods and services

- A holder of a mining right or a mineral processing licence must give preference to Zambian products and services to the maximum extent possible.

Implementation

- The Ministry of Mines, Energy and Water Development monitors and evaluates annually the implementation of the Policy 2013.
- The Citizens Economic Empowerment Commission was created to promote joint ventures and subcontracting of services from citizens.

Monitoring and Enforcement

- A holder of a mining licence or mineral processing licence submit annual reports on its operations in the mining area, including information on the number of Zambians and expatriates employed in the previous year, compliance with the business development plan, and the training carried out.

Applications for rights and Plans



- In some cases preferential treatment is given to Zambian citizens: a prospecting permit, small-scale mining licence, small-scale gemstone licence, and an artisan's mining right can only be granted to a citizen of Zambia, or to a citizen-owned company (Law 7/08, Art. 7 (3)).
- An application for a prospecting licence or a large-scale mining licence must include proposals for both the employment and training of Zambians and the promotion of local business development (Law 7/08, Art. 14 (2) (e) and (f), Art. 23.3 B, Fourth Schedule, Art. 25 (3) (g) and (h)). In considering the application for a large-scale mining licence, the Director of Mines is required to verify whether the applicant's proposals concerning the employment and training of Zambian citizens are adequate (Law 7/08, Art. 26 (1) (g)).
- An application for a large-scale gemstone licence must include a plan for the processing of gemstones in Zambia (Law 7/08, Art. 36 (3) (j)).
- Licences for foreign investors to engage in "specific businesses" are only granted to foreign investors who have entered into a joint venture or partnership agreement with a Zambian citizen, and to citizen-empowered companies. The term "specific businesses" is loosely defined being a business that is prescribed as a specific business by the President (Law 06, Part II, Art. 21 (2)).

Training and employment



- A holder of a mining right or a mineral processing licence must
 - Give maximum preference to the employment of Zambian citizens; and
 - Offer training programmes in consultation with the Minister for the benefit of employees, to help them qualify for advancement (Law 7/08, Arts. 13 (2) and (3)).

Procuring goods and services



- A holder of a mining right or a mineral processing licence must, during the conduct of his operations, as well as during the purchase, construction, and installation of any facilities, give the maximum preference to:
 - Materials and goods made in Zambia; and
 - Services provided by service providers located in Zambia that are owned by Zambian citizens or citizen-owned companies (Law 7/08, Art. 13 (1)).



- The Ministry of Mines, Energy and Water Development must monitor and evaluate the implementation of the Policy 2013 on an annual basis. The impact of the Policy 2013 is to be reviewed after five years (Policy 2013).
- The Citizens Economic Empowerment Commission was created to promote the procurement of services, materials, and equipment from Zambian citizens and “citizen-empowered companies, citizen-influenced companies and citizen-owned companies.” The Commission promotes business linkages, including joint ventures and partnerships between Zambian citizens and foreign investors in greenfield investments (Law 06, Part II, Art. 6).

Monitoring and Enforcement



- A holder of a mining licence or a mineral processing licence must submit an operations plan to the Director of Mines each year in respect of the upcoming year. Such plan must include:
 1. An estimate of staff and labour requirements, including the number of and category of Zambians and expatriates that will be employed,
 2. The subsequent year's training programme,
 3. The subsequent year's local business development programme (SI 84/08, Art. 44B).

- A holder of a mining licence or a mineral processing licence must also submit to the Director of Mines an annual report on the operations which took place in the previous year. It is to include:
 1. The average number of employees, including the number and position of all Zambian citizens and expatriates employed;
 2. Details of its compliance with the local business development programme; and
 3. A report on the training of employees that occurred in that year (SI 84/08, Art. 44A).



Agreement on Trade-Related Investment Measures (TRIMs)¹

- Zambia 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*.
- Zambia, 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. Zambia’s commitments related to Services Incidental to Mining Exploration can affect the implementation of Law 7/08.

International law – bilateral investment treaties



- As at December 7 2014, Zambia had entered into **11 bilateral investment treaties** (BITs) but only 3 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 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 11 BITS signed by Zambia, six were reviewed (and are available on [UNCTAD's database](#)).
- Aside from the inclusion of National Treatment Obligations and Most Favored Nation clauses, which are included in most BITs, performance requirements are generally not specifically prohibited in the BITs reviewed. The only exception to this is the BIT with Finland (no longer in force), the relevant clause of which is quoted below.

Zambia – Finland

Article 11 (2)

“Each Contracting Party shall, subject to its laws and regulations, grant temporary entry and stay and provide any necessary confirming documentation to natural persons who are employed from abroad as executives, managers, specialists or technical personnel in connection with an investment by an investor of the other Contracting Party, and who are essential for the enterprise, as long as these persons continue to meet the requirements of this paragraph. Immediate family members of such personnel shall also be granted a similar treatment with regard to entry and temporary stay in the territory of the host Contracting Party.”