

LOCAL CONTENT



Brazil – 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 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 Kathrin Bausch and Thiago Miotto Palo.

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

- Local content in Brazil is addressed in the context of bidding rounds for Concession and Production-Sharing Contracts. Bidders used to have to comply with a minimum threshold of local content requirements to win a bid but as of 2017 they do not.
- Local content requirements are defined on the basis of percentages. Concessionaires have to ensure a specified percentage of goods and services are sourced locally in the execution of their concession and production-sharing contracts. Concessionaires prove compliance with their local content obligations through a local content certificate issued by an independent certifier.
- The 2016 federal decree relaxes some of the local content requirements by increasing the list of activities qualifying for the calculation of local content percentages.
- In September 2017, new rules declare local content commitments are no longer a bid criterion, starting with bid round 14.
- In April 2018, Resolution 726 decreases local content requirements, regulates amendments to the local content clauses of contracts, and stipulates rules for exemptions, adjustments of percentage and transfers of local content excess. Companies that migrate to new requirements are no longer eligible to seek a waiver for noncompliance related to previous commitments and must remain under old rules to maintain use of the waiver. For contracts signed in bid rounds 1, 2, 7-13 it is optional to have the dispositions of this resolution replace the local content clauses, but it is required for contracts signed in and after bid round 14.
- The 2019 Resolution No. 799 amends the Technical Regulation No. 3 of 2015 which establishes the rules for the application of resources of the Research, Development and Innovation Clause. The review increases the alternatives of RD&I expenses and activities. The amendments encourages partnerships between universities and companies, supports partnerships with startups and expands the possibilities of action for research institutions.

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



International Law

Legislation

[National Petroleum Law of 1997](#) (“Law 9478/1997”) – stipulates that competitive bidding for Concession Contracts must include minimum thresholds for local content which is no more relevant and established the National Energy Policy Council which is responsible for local content.

[Law No. 12.351 of 2010](#) (“Law 12.351/2010”) – defines local content for contractual agreements in Pre-Salt and Strategic Area Investments.

[ANP Resolutions No. 37/2007, 38/2007 and No. 19/2013](#) (“ANP Resolution 19/2013”) establishes the local content certification system

[Decree Nº 8.637 of January 15, 2016](#) (the “Decree”) Facilitates the achievement of local content commitments by increasing new types of investment and activities that reward companies with local content units (UCLs) which may be used by companies to satisfy their local content requirements

[Brazil's National Energy Policy Council \(CNPE\) Resolution n.07/2017](#) – Simplifies and reduces the minimum percentages of local content requirements; Removes local content as a bid criterium

[ANP's April 2018 Resolution No. 726/2018](#)

Stipulates the protocol for exemption from local content requirements. Stipulates local content targets to replace existing ones in contracts which are optional for contracts signed in bid rounds 1,2, 7-13 and required for contracts signed in and after bid round 14.

[Resolution No. 799](#) of August 2019 amends the Technical Regulation No. 3 of 2015, increasing the alternatives of RD&I expenses and activities.

[Tender Protocol 2019](#) (“Tender Protocol”) defines the tender protocol for bid round 16.

[Model Concession Contract for Exploration and Production of Oil and Gas of 2019](#) (“Model Contract 2019”) – sets out the benchmarking of local content requirements as well as exemptions and adjustments to them and the penalties for non-compliance.

Regulation

Contract

Key definitions*

- **ANP** means: the National Agency for Petroleum, Natural Gas and Biofuels (Agência Nacional do Petróleo, Gás Natural e Biocombustíveis).
- **Brazilian Company** means: any company incorporated in Brazil, irrespective of the origin of the capital or the nationality of the shareholders, with a few exceptions (Constitutional Amendment No. 6 of 1995, revocation of article 171).
- **Brazilian Supplier** means: any manufacturer or supplier of goods produced or services rendered in Brazil, through business corporations incorporated under Brazilian law or those that make use of goods manufactured in the country under special customs regimes and tax incentives applicable to the Oil and Natural Gas manufacturing industry. (Model Contract 2019, Art. 1.2.18).
- **Certifier** means: an entity duly qualified and accredited by ANP to carry out local content certification activity (ANP Resolution 19/2013).
- **Local Content** means: proportion between the amount of goods produced and the services rendered in the Country for execution of the contract and the total amount of the goods used and the services rendered for that purpose (Law 12.351/2010)
- **Local Content Certification** means: the set of activities carried out by an entity duly accredited by the ANP, with the objective to attest publicly, by means of the issuance of a local content certificate to determine, among others, the goods and services meeting the local content requirements as set out in the ANP-issued Local Content Booklet contained in Annex II of ANP Resolution 19/2013 (ANP Resolution 19/2013).
- **Local Content Certificate** means: the document issued by a Certifier in the form of Annex I to ANP Resolution 19/2013 which states the percentage of local content of, among other things, the goods and services used (ANP Resolution 19/2013).
- **Local Content Report** means: the document to be delivered by the Concessionaire to the ANP detailing the amounts spent for purposes of determining Local Content. (Model Contract 2019, Art.1.2.36).
- **Local Content Surveillance Report** means: Technical opinion issued by the ANP assessing compliance with contractual commitments declared by the Operator in the Local Content Report, prior to the introduction of any sanctioning process. (Model Contract 2019, Art. 1.2.37).
- **Macrogroup** means: the set of goods and services acquired or contracted by the Dealers to perform the activities in the segments defined in this Agreement with specific Local Content commitments. (Model Contract 2019, Art 1.2.21).



Rights application

- Local content requirements no longer are a criterium for winning a bid round as of the 14th bidding round in 2017.

Employment and Training

- There are no employment or training requirements in the Brazilian legal framework for local content.

Procuring of goods and services

- Concessionaires have to meet local content targets when procuring goods and services. Local content certificates establish whether those local content targets have been met. The Decree expands the list of activities that qualify for the calculation of local content targets.
- The Decree also establishes the framework of incentives and credits for Concessionaires where compliant projects can compensate for non-compliant projects
- Resolution 726/2018 allows contracts from bid rounds 1, 2, 7-13 the option to replace local content clauses with new dispositions and requires it as of bid round 14.
- Tender Protocol 2019 sets the targets for bid round 16.

Technology Transfer

- Concessionaires are required to spend 1% of gross revenues on research and development.
- Pursuant to the Decree, direct investment in technological innovation for suppliers is now considered an activity qualifying for the calculation of local content percentages.
- Resolution 799 in 2019 increases the alternatives of RD&I expenses and activities.

Monitoring and Enforcement

- A Concessionaire has to prove compliance with its Local Content obligations to ANP by presenting a Local Content Certificate.
- Local Content Certificates are issued by independent, ANP-accredited Certifiers.
- Non-compliance triggers a fine that is calculated on the basis of the monetary value of non-compliance.
- Companies can file for exemption from local content requirements in particular cases.

Implementation

- The National Energy Policy Council (CNPE) develops Brazil's Local Content policy and the ANP oversees its implementation.
- The Decree establishes a new committee responsible for adopting regulations on the new credit system, and for formulating recommendations for the ANP to improve existing local content rules.



- The [Resolution n.07/2017](#) reduces the minimum percentages of local content requirements and removes local content as a bid criterium.



- There are currently no employment or training requirements in the Brazilian legal framework for local content.
- However, there were some local employment requirements in previous bid rounds for blocks in the Border Strip area. The requirements were as follows:
 - at least two thirds (2/3) of employees were required to be Brazilian nationals; and
 - the administration or management of the concession had to be assigned to a majority of Brazilian nationals (Tender Protocol 2014, Art. 6.3).



- The Decree No. 8.637 provides that certain activities in strategic areas will obtain a higher percentage (or “bonus”) towards the local content commitments than specified in earlier legislation as an incentive to Concessionaires to increase local content. These include (Art. 2.I):

“Engineering developed locally;
Any development and technological innovation carried out in Brazil;
Activities with a high potential to generate quality jobs; and
Activities which promote exports.”



The Decree No. 8.637 expands the list of activities qualifying for the calculation of local content percentages, which now include:

“The signing of purchase contracts for goods, services and systems that enable the installation of new suppliers in the country;
Direct investment in the expansion of production capacity of suppliers;
Direct investment in technological innovation process from suppliers;
The purchase of goods and systems in Brazil, with local content to service the foreign operations; and
The acquisition of explorative lots of goods and systems developed in Brazil” (Art. 2.II).

- The investments will be converted into local content units (“UCL”) which can be credited towards the local content obligations of Concessionaires for current concessions (Decree No. 8.637 Art. 2.II). These UCL constitute a new system of incentives and credits.



- The Concessionaire must give preference to Brazilian suppliers, whenever their offer is equivalent or more favorable than non-Brazilian suppliers in terms of price and term and quality conditions (Model Contract 2019 Art. 19.2).
- The Model Contract 2019 provides the goods and services procurement procedures, stipulating that Concessionaires must: Invite Brazilian Suppliers to submit proposals; make available the same specifications in English and Portuguese and, if requested by an invited Brazilian company, translate the documentation into Portuguese; and, if the Oil Industry Best Practices are met, they must accept equivalent specifications from Brazilian Suppliers (Model Contract 2019 Art. 19.3).
- The specifications of Art. 19.3 apply to the contracting of goods and services provided by Affiliates, excluding services that are usually performed by Affiliates according to Oil Industry Best Practices (Model Contract 2019 Art. 19.3.1).
- Article 2.3 in the Tender Protocol 2019 (sets targets for bid round No. 16) stipulates that the conditions for compliance with local content are contained in the concession agreement; and that the minimum percentages of global local content to be fulfilled in the exploration phase and in the production development stage are the following percentages that will show in the concession contract with no additional contractual commitment (Tender Protocol 2019 Art. 2.3):
 - Minimum local content percentage for exploration phase: 18%
 - Minimum local content percentage for development stage of production:
 - Construction of well: 25%
 - Collection and disposal system: 40%
 - Stationary production unit: 25%



- The Model Contract 2019 specifies how to measure the achievement of the commitments (Arts. 19.5-19.9):



“19.5. The Local Content of the goods and services must be proven to ANP by presenting the respective Local Content certificates or a document replacing them, pursuant to the Applicable Law.

19.5.1. For measurement purposes, Local Content of goods and services shall be expressed as a percentage of the value of the good or service contracted.

19.6. For the determination of Local Content, the monetary values corresponding to the hiring of goods and services shall be updated for the month and year in which the compliance with this clause is verified, using the IGP-DI or other index that may substitute him.

19.7. Milestones for Local Content benchmarking by ANP will be:

- a) the closure of the Exploration Phase;
- b) the closure of each Development Module; and
- c) the conclusion of the Field Development Phase that does not include Modular Development.

19.8. For purposes of gauging Local Content, the Development Phase will begin on the date of submission of the Declaration of Commerciality and will end for each Development Module with the first of the following occurrences:

- a) ten (10) years after the First Oil Extraction;
- b) Withdrawal by the Concessionaire from the Development of the Development Module; or
- c) Realization of the investments provided for in the Development Plan, except those related to the abandonment of the Field.

19.9. In the case of contracting provided for in paragraph 19.1.2, item “c”, the expenses related to the unit's operating rate shall not be accounted for for purposes of determining Local Content.

- In the case that the company exceeds their local content requirement, the excess in local currency may be transferred to the Development modules to be deployed (Art. 19.10); surpluses found in the Development Modules must be transferred between the same macrogroups (Art. 19.10.2); and the excess monetary amount will be updated by the IGP-DI (Brazilian inflation index) or another replacing index (Model Contract 2019 19.11.1).



- The ANP's Resolution No. 726/2018, allows contracts from bidding rounds 1, 2, 7-13 the option to replace local content clauses with the new dispositions in this resolution and requires it as of bidding round 14. It also establishes rules regarding exemptions, adjustments of percentage and transfers of local content excess.
- The Resolution outlines the new minimum targets that will replace contracts' local content clauses (Resolution No. 726/2018 Article 2.1):
 - “2.1.The CONCESSIONAIRE must comply with the following minimum mandatory percentages of Local Content:
 - 2.1.1.In the Exploration Phase for onshore Blocks: Global Local Content of 50% (fifty percent).
 - 2.1.2.In the Exploration Phase for Blocks at Sea: Global Local Content of 18% (eighteen percent).
 - 2.1.3.In the Development Stage or for each Development Module, in the case of Modular Development, for Fields onshore: Global Local Content of 50% (fifty percent).
 - 2.1.4.In the Development Stage or for each Development Module, in the case of Modular Development, for Fields at Sea, for the following Macrogroups:
 - a) Well Construction: 25% (twenty-five percent).
 - b) Production Collection and Flow System: 40% (forty percent).
 - c) Stationary Production Unit: 40% (forty percent) for Engineering, 40% (forty percent) for Machinery and Equipment, 40% (forty percent) for Construction, Integration and Assembly.”
- Companies that migrate to new requirements are no longer eligible to seek a waiver for noncompliance related to previous commitments and must remain under old rules to maintain use of the waiver. In adding the contract, all contracting parties can no longer submit waiver and adjustment requests, and must waive any claim against the ANP relating to local content noncompliance fines.



- The Resolution No. 726 establishes the criteria, requirements and procedures for exemption from compliance with the local content obligation:



CHAPTER II: EXEMPTION

Art. 3º The ANP may, exceptionally, authorize the exoneration of the Local Content commitment in relation to the contracting of a certain good or service, in the following cases:

- I. no Brazilian supplier;
- II. proposals from Brazilian suppliers with excessive prices in relation to non-Brazilian counterparts;
- III. proposals from Brazilian suppliers with excessive delivery times in relation to non-Brazilian counterparts; and
- IV. use of new technology, which does not exist in the country.

Single paragraph. The allegation that there is no Brazilian supplier capable of reaching the percentage of Local Content committed for a given item or sub-item does not constitute an exemption hypothesis.

Art. 4º The excessive price hypothesis, provided for in item II, of art. 3º, when it remains to be demonstrated that the commercial offer of the Brazilian supplier was equal or higher, in percentage terms, to the price practiced in the international market, according to the following levels:

- I. 25% (twenty-five percent) for contracts signed up to the date of publication of this Resolution;
- II. 20% (twenty percent) for contracts signed between the date of publication of this Resolution and December 31, 2022; and
- III. 10% (ten percent) for contracts signed between the dates of January 1, 2023 and December 31, 2027.

§1º After December 31, 2027, the hypothesis of excessive price will be analyzed based on the specific characteristics of the contract.

§2º Requests that do not fall within the levels established in items I to III, may exceptionally be considered, at the discretion of the ANP, based on the analysis of the specific case, studies, evidence and documents contained in the process.

Art. 5º The hypothesis of excessive time, provided for in item III, of art.3º, will be analyzed by ANP according to the characteristics of the contract, and the Operator must demonstrate in its request that the difference in delivery times between the Brazilian supplier and the foreign supplier undertakes to comply with the project's schedule of activities.



Single paragraph. The claim of excessive time will not be accepted when it remains to be demonstrated that the Operator has induced the urgency of the need to deliver the good or service, or has responsibility for the delay in meeting the project schedule.

Art. 6º The Operator must demonstrate in the requests for Exemption based on item IV of art. 3º that the new technology is not available in the country.

Single paragraph. The Local Content Exemption applies only to goods and services replaced by new technology.

Art. 7º The request for Exemption, signed by the Operator, must be filed with the ANP until the deadline for the delivery of the last Local Content Report for each Local Content Measurement Framework, according to the Phase, Stage or Module to which it refers.

Single paragraph. The request for Exemption must be submitted in printed or digital format, duly accompanied by supporting documentation of the signatory's powers of representation.

Art. 8º The request for Exemption must be made in a detailed manner, observing the formal requirements of representation and timing provided for in art. 7º, duly instructed with the following information and documents, without prejudice to the special provisions provided for in Articles 4º, 5º and 6º:

- I. main documents related to the contracting procedure, including the technical and commercial proposals received, including those eventually refused and, when applicable, the contract signed with the chosen supplier;
- II. proof of guarantee of ample and equitable conditions of competition in relation to non-Brazilian counterparts, when invitations to submit proposals for supply and / or attempts to contract with Brazilian suppliers are made, observing the economic, technical and legal requirements of hiring;
- III. proof of condition of preference for hiring Brazilian suppliers, whenever their offers present favorable or equivalent conditions to those of non-Brazilian suppliers; and
- IV. studies and documents of their own or of third parties, updated with related business associations or unions, or entities of notorious knowledge of the subject, which demonstrate the framing of the request in the authorizing hypothesis (s) of Exemption.

§1º The ANP may request additional documents and information for the analysis of the Exemption request.

§2º Requests should, as a rule, be delimited based on the contracting of goods and services covered by the same item or sub-item of Local Content commitment, presented separately for each block or field;



§3º The ANP may, at its discretion, accept the submission of a single order related to the contracting of goods and / or services that include several items and sub-items of commitment for each block or field.

§4º The proof of the allegations contained in the request for Exemption is a burden that is incumbent on the Operator, under the terms provided for in this Resolution, without prejudice to other admitted legal evidence, subject to ANP appreciation.

§5º The requests for Exemption made prior to contracting shall obey the provisions of this article, upon presentation of the documentation available at the time of the request.

Art. 9º A document subscribed by a certification body accredited by ANP will not be admitted, for the purposes provided for in item IV of art. 8º, due to potential conflict of interest.

Art. 10º The ANP may require the translation of documents written in a foreign language.

- Chapter 3 of Resolution No. 726, establishes the administrative exemption process, stipulating that the exemption request can be considered inadmissible if presented untimely, refers to Contracts not covered by Article 1, or relates to items prohibited by the Concession, Transfer of Rights and Production Sharing Contracts. Such inadmissible requests will be dismissed and the operator will be notified and allowed to file an administrative appeal (Resolution No. 726 Arts. 12-14).
- If an exemption is admitted, a public consultation may be held but at the discretion of the ANP it can be waived. At the discretion of the ANP, a public hearing may be held (Resolution No. 726 Article 16).
- During the public consultation, the Operator must produce a public version of documents containing confidential information (Article 17). The investigating body will prepare a Technical Note “with the synthesis of the initial request and the stages of the procedure, and will formulate a decision proposal, objectively justified, forwarding the process to the competent authority for decision” (Resolution No. 726 Article 19).
- The granting of the Exemption request “will result in the recognition, in the commitment line, of the expense allocated as imported in the Local Content Report as national expenditure, in proportion to the Local Content established in the Contract” (Resolution No. 726 Article 23).
- Chapter 5 of the Resolution mandates the ANP to publish the materials related to the exemption request process (Resolution No. 726 Article 33):



“Art. 33 The ANP will publish, on its website, the material related to the consultations and public hearings held, and the extracts of the Exemption requests and respective final decisions.”



- The Model Contract 2019 requires Concessionaires to fund research, development and innovation at the level of 1% of gross revenues (Model Contract 2019, Art. 23):



"23.1. In the event that special participation is due for a Field in any quarter of the calendar year, the Concessionaire will be required to carry out qualified expenses such as research, development and innovation in the areas of interest and relevant themes for the Oil, Natural Gas and Biofuels sector, in an amount equivalent to 1% (one percent) of gross production revenue for such Field.

23.1.1. The amount referred to in this paragraph is due for each Field originated from the Concession Area.

23.1.2. The Concessionaire has until June 30 of the year following the calendar year for calculating gross production revenue to invest these resources.

23.1.2.1. The Concessionaire must provide the ANP with a complete report of expenses qualified as research, development and innovation carried out, within the terms and formats defined in the Applicable Legislation.

23.2. From the resources provided for in paragraph 23.1, the Concessionaire must invest:

- a) from 30% (thirty percent) to 40% (forty percent) in universities or national research and development institutes accredited by the ANP; and
- b) from 30% (thirty percent) to 40% (forty percent) in research and development and innovation activities that aim to result in products or processes with technological innovation with Brazilian companies.

23.3. The remaining balance of expenses qualified as research, development and innovation, in compliance with paragraph 23.2, may be invested in research, development and innovation activities carried out at the facilities of the Concessionaire or its Affiliates, located in Brazil, or in Brazilian Companies, or at universities or research and development institutes accredited by the ANP.


23.4. Eventual expenses qualified as research, development and innovation carried out by the Concessionaire in amounts greater than the equivalent of 1% (one percent) of gross production revenue, or when there is no obligation to carry out such expenses as provided for in paragraph 23.1, may be compensated in favor of the Concessionaire to prove the obligation in future periods of this Contract.

23.4.1. Such compensation will be regulated under the terms of the Applicable Law.

- In August 2019, the ANP board approved [Resolution No. 799](#), amending the Technical Regulation No. 3 of 2015 which establishes the rules for the application of resources of the Research, Development and Innovation Clause. The review clarifies gaps in the provisions and expands the scope of some provisions to increase the alternatives of RD&I expenses and activities. The amendments encourages partnerships between universities and companies, supports partnerships with startups and expands the possibilities of action for research institutions.



- Law 9478/1997 creates the National Energy Policy Council (CNPE, Conselho Nacional de Política Energética), a body responsible for developing Brazil's national energy policy. As modified by Law 12.351 of 2010, this policy – among other objectives – aims to increase Local Content in the oil and gas sector by establishing a minimum threshold of local content in bids (no more relevant), concessions, and production-sharing contracts (Law 9478/1997, Art. 2). The Decree provides for the establishment of a steering committee to, among other things, adopt regulations to govern the newly-created credit system and to formulate recommendations for the ANP to improve existing local content rules (Art. 3):

 “ The program will be coordinated by the Steering Committee, which will have the following skills:

- I - define the goods and industrial segments to be encouraged through subsidies or by raising the percentage of effective local content;
- II - define the technological areas to be stimulated;
- (...)
- V - define the segments in which the bonuses can not be used to fulfill the local content commitments;
- VI - set limits on the use of subsidies to offset contractual obligations of companies or consortia;
- VII - to examine the projects submitted by the Technical Operating Committee and its framework in the program;
- VIII - submit to the ANP, by means of resolutions, conclusions on the eligibility of the projects in the program;
- IX - to propose adjustments in the rates of local content to be applied to contracts for exploration and production of oil and natural gas;
- X - request impact analysis of the measures adopted;
- XI - propose to the National Energy Policy Council guidelines and improvements to Government policies towards competitiveness of the oil and natural gas industry and its supply chain;
- XII - propose guidelines and improvements to rules for implementation by the oil companies and natural gas resources for research, development and innovation laid down in the concession contracts, onerous assignment and sharing of production (....)”



- The steering committee is multi-ministerial. It will comprise representatives from (Decree, Art. 4):



I - Civil House of the Presidency;

II - Ministry of Finance;

III - Ministry of Development, Industry and Foreign Trade;

IV - Ministry of Mines and Energy;

V - Ministry of Science, Technology and Innovation;

VI - National Agency of Petroleum, Natural Gas and Biofuels - ANP;

VII - National Bank for Economic and Social Development - BNDES; and

VIII - Financier of Studies and Projects - FINEP.

Single paragraph. At the discretion of the Steering Committee, may be invited representatives of other ministries, organizations, companies and organizations linked to the sector.”

- Articles 5 -9 of the Decree describe additional features of the governance of this Committee:



“Art. 5 Decisions of the Steering Committee will be public and issued through resolutions.

Art. 6 The coordination of the Steering Committee shall be held on a rotational basis between representatives of the ministries that comprise it, for a period of one year.

Art. 7 The Executive Secretary of the Steering Committee will be in charge of the Ministry of Development, Industry and Foreign Trade.

Art. 8 The bylaws of the Steering Committee shall be approved within ninety days from the date of publication of this Decree.

Art. 9. The program will be implemented by Technical and Operating Committee, which will have the following skill(..)”

- Articles 10 -15 of the Decree describe additional features of the governance of the operational and technical Committee

Monitoring and Enforcement



- In 2007, the ANP regulated the certification of Local Content and associated reporting requirements in ANP Resolutions 36, 37, 38 and 39.
- ANP Resolution 19/2013, replacing ANP Resolution 36/ 2007, redefined the criteria and procedures for implementing the Local Content Certification system administered by the ANP. This system provides for the monitoring of the Local Content obligations of Concessionaires (ANP Resolution 19/2013, Preamble, Arts. 24 and 43).



Preamble:

“Considering the clause of the aforesaid contracts provides the commitments of the dealers, assignee and hired parties as for the local purchase of goods and services will be evidenced before ANP by submitting local content certificates;

Considering the clause of the aforesaid contracts provides the dealers, assignee and hired parties should request from their goods and services suppliers the appropriate certifications of their products and that the suppliers may, through their own initiative, get the certification of their products in advance;

Considering the clause of the aforesaid contracts establishes the certification activities are carried out by entities duly qualified and accredited by ANP, based on criteria defined beforehand by the Agency itself;

Considering the clause of the aforesaid contracts provide it is incumbent upon ANP to propose the technical regulations concerning the certification of local content, as well as control and monitor the compliance with the commitments of local content of contracts for the exploration and development activities of the production of petroleum and natural gas;

Considering the need to follow the Government’s Local Content Policy defined by means of the guidelines issued by the National Council of Energy Policy, under the coordination of the Ministry of Mines and Energy, discloses the following act: “

(...)

“Art. 24. The certifier, during the work of certification, should have access to all the information necessary to perform and complete of the certification work contracted.”

(...)

“Art. 43. The certifying agency, after the completion of the work of calculating, must issue a Local Content Certificate according to the model in Annex I of this Resolution, indicating the percentage of local content of the product or service.”

- ANP Resolution 37/2007 establishes the criteria and procedures for the registration and accreditation of Certifiers. The following documentation is part of this Resolution: Annex I – Application for Accreditation for Local Content Certification, Annex II – Confidentiality Agreement, Annex III – Documentation Required for Technical Qualification, Annex IV – Documentation Required for Legal Qualification, Annex V – Documentation Required for Financial Qualification.
- ANP Resolution 38/2007 establishes the criteria and procedures for auditing Certifiers. The following documentation is part of this Resolution: Annex I – Notification of Beginning of Audit, Annex II – Auditor’s Opinion, Annex III – Warning Notice.
- Resolution No. 726/2018 stipulates that the concessionaire “must submit to ANP, for monitoring, Local Content Reports in Exploration and Development, under the terms of the Applicable Legislation.” (Resolution No. 726/2018 Art 2.4).



- The Model Contract 2019 includes accounting requirements (Model Contract 2019, Art 26.1):



“26.1. The Concessionaire shall, pursuant to Applicable Law:

(...)

b) keep the supporting documents necessary for the measurement of Local Content and Government Participations and third parties that support the bookkeeping;

(...)

e) submit to the ANP the Local Content Report pursuant to Applicable Law.

- The Model Contract 2019 includes auditing requirements (Model Contract 2019, Arts. 27.1 27.5):



“26.2.5. The Concessionaire shall keep available to the ANP the respective Local Content certificates, as well as contracts, tax documents and other supporting records, corresponding to the good or service acquired, for a period of 10 (ten) years after the benchmark. of Local Content.”

- The Model Contract 2019 stipulates that fines will be issued for non-compliance with Local Content commitments. The amount of the fine is calculated in accordance with a formula based on the monetary value of the Local Content commitment (Model Contract 2019 Art. 19.12).
- IGP-DI will update the amount of the fine until the payment is made (Model Contract 2019 Art. 19.14).
- In June 2019, ANP [published business guidelines on local content](#) to clarify for contracts from the 14th Concession Round and the 3rd Production Sharing Round (as well as all contracts adhering to the addendum in ANP Resolution 726/2018) how to complete the Local Content Report (RCL).
- According to the Model Contract 2019, in the case of non-compliance, the Concessionaire is subject to a fine that will be calculated on the non-compliant monetary value based on the percentages of unrealized local content* (Model Contract 2019 Art. 19.12).
- Companies must submit Local Content Reports on Exploration and Development to ANP, in accordance with the Applicable Law (Model Contract 2019 Art. 19.4).

**a) if the percentage of unrealized Local Content is less than sixty-five per cent (65%) of the minimum Local Content, the penalty shall be forty per cent (40%) of the amount of unrealized Local Content;

b) if the percentage of unrealized Local Content is equal to or greater than 65% (sixty-five percent), the fine will be increased from 40% (forty percent) to 75% (seventy-five percent) of the minimum Local Content value, in the case of 100% (one hundred percent) of unrealized Local Content, to comply with the formula:

$M (\%) = NR (\%) - 25\%$. Where,

M (%) is the percentage of fine to be calculated on the defaulted monetary value; and

NR (%) is the percentage of unrealized Local Content.”



Agreement on Trade-Related Investment Measures (TRIMs)¹

- Brazil 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*.
- 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. Brazil’s [Commitments](#) relating to engineering services and construction may affect the implementation of the local content commitments stipulated by the tender Protocol and the Model Contract 2015.



- As of February 19, 2020, Brazil has entered into **27 Bilateral Investment Treaties** (BITs) of which only one is in force.¹
- BITs 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 27 BITS signed by Brazil, all are available and were reviewed (and are available on [UNCTAD's database](#)).
- Aside from the inclusion of National Treatment Obligations (NTO) and Most Favored Nation (MFN) clauses, which are included in most BITS, performance requirements are generally not specifically prohibited in the pre-1999 BITS reviewed. The BITS reviewed that were signed post 1999 date back to 2015 till 2019. Those BITS interestingly don't include the usual BITS clauses (NTO and MFN) but clauses that are more conducive to the respect of domestic local content policy. The Corporate Social Responsibility clause is an example. The quoted clause below is from the [2015 Brazil – Malawi BIT](#).

“Article 9

Corporate Social Responsibility

1. Investors and their investment shall strive to achieve the highest possible level of contribution to the sustainable development of the Host Party and the local community, through the adoption of a high degree of socially responsible practices, based on the voluntary principles and standards set out in this Article.
2. The investors and their investment shall develop their best efforts to comply with the following voluntary principles and standards for a responsible business conduct and consistent with the laws adopted by the Host Party receiving the investment:
 - a) Stimulate the economic, social and environmental progress, aiming at achieving sustainable development;
 - b) Respect the human rights of those involved in the companies' activities, consistent with the international obligations and commitments of the Host Party;
 - c) Encourage the strengthening of local capacities building through close cooperation with the local community;
 - d) Encourage the development of human capital, especially by creating employment opportunities and facilitating access of workers to professional training;
 - e) Refrain from seeking or accepting exemptions that are not established in the legislation of the f)Host Party, relating to environment, health, security, work or financial incentives, or other issues;
 - f) Support and maintain good corporate governance principles, and develop and apply good practices of corporate governance;
 - g) Develop and apply effective self-regulatory practices and management systems that foster a relationship of mutual trust between the companies and the society in which the operations are conducted;
 - h) Promote the knowledge of workers about the corporate policy, through appropriate dissemination of this policy, including programs for professional training;
 - i) Refrain from discriminatory or disciplinary action against the employees who submit grave reports to the board or, whenever appropriate, to the competent public authorities, about practices that violate the law or violate the standards of corporate governance that the company is subject to
 - j) Encourage, whenever possible, the business associates, including service providers and outsources, to apply the principles of business conduct consistent with the principles provided in this Article; and
 - k) Respect local political activities and processes. “

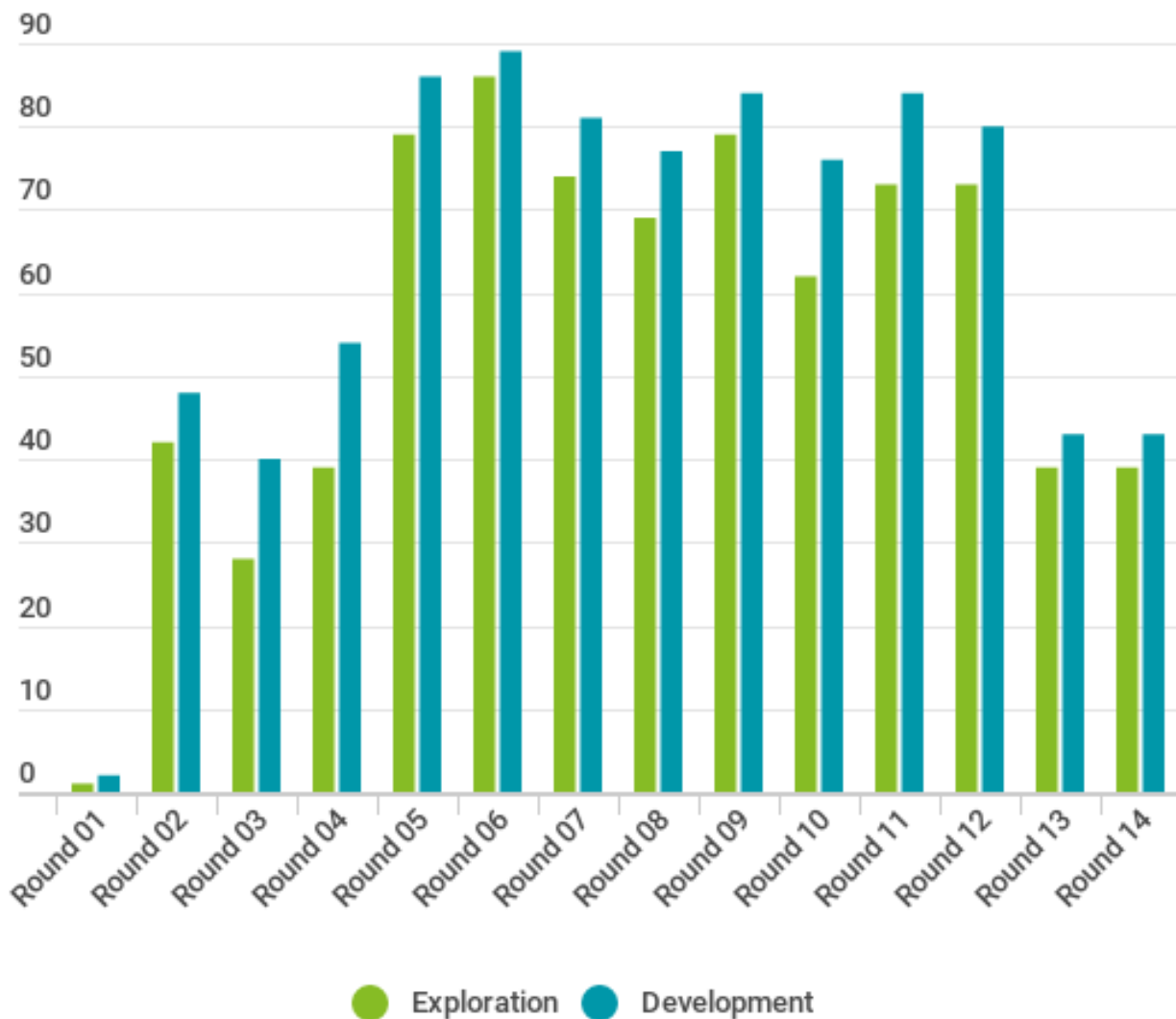


Deloitte, Local Content Policy Upstream Guide, 2018, available at: <https://www2.deloitte.com/br/en/pages/energy-and-resources/upstream-guide/articles/local-content.html>, (last visited February 7, 2020).

Regulatory model	Round	Year	Local content rules	Weight in the award criteria	Evidence
	1	1999	No minimum requirements for local content commitment. Maximum percentages for purposes of award criteria (50% for exploration and 70% for development). Bidders offer global percentages for each phase (exploration and development).	15%(3% exploration and 12% development)	Required Declaration of Origin by supplier.
	2	2000			
	3	2001			
	4	2002			
	5	2003			
	6	2004			
Concession contract	7	2005	Minimum global percentages defined by block location. Maximum percentages for purposes of award criteria defined by block location. Bidders must offer local content percentages for each item and sub-item in accordance with minimum requirements. The global percentage, object of computation in the offering, will be calculated from the offer for each item and sub-item.	20%(5% exploration and 15% development)	Required local content certificates issued by certifying entities accredited by ANP.
	8	2006			
	9	2008			
	10	2013			
	11	2013			
	12	2015			
	13	2016			
	14	2017			
Production Sharing Agreement	1st Pre-Salt	2013	Local content minimum requirements were set for exploration phase, and in the development stage, it was defined for modules with first oil until 2021 and for modules with first oil after 2022.	Local content percentages were not included as award criteria.	
	2nd Pre-Salt	2017	The minimum local content required in each unitized non-contracted area of the second round of bids under the PSA in the Pre-salt area was equal to the conditions required for this purpose in contracts in adjacent areas.		
	3rd Pre-Salt	2017	Local content was relaxed, the commitments were aggregated and its minimal percentage lowered.		
	4th Pre-Salt	2018	Local content was relaxed, the commitments were aggregated and its minimal percentage lowered.		

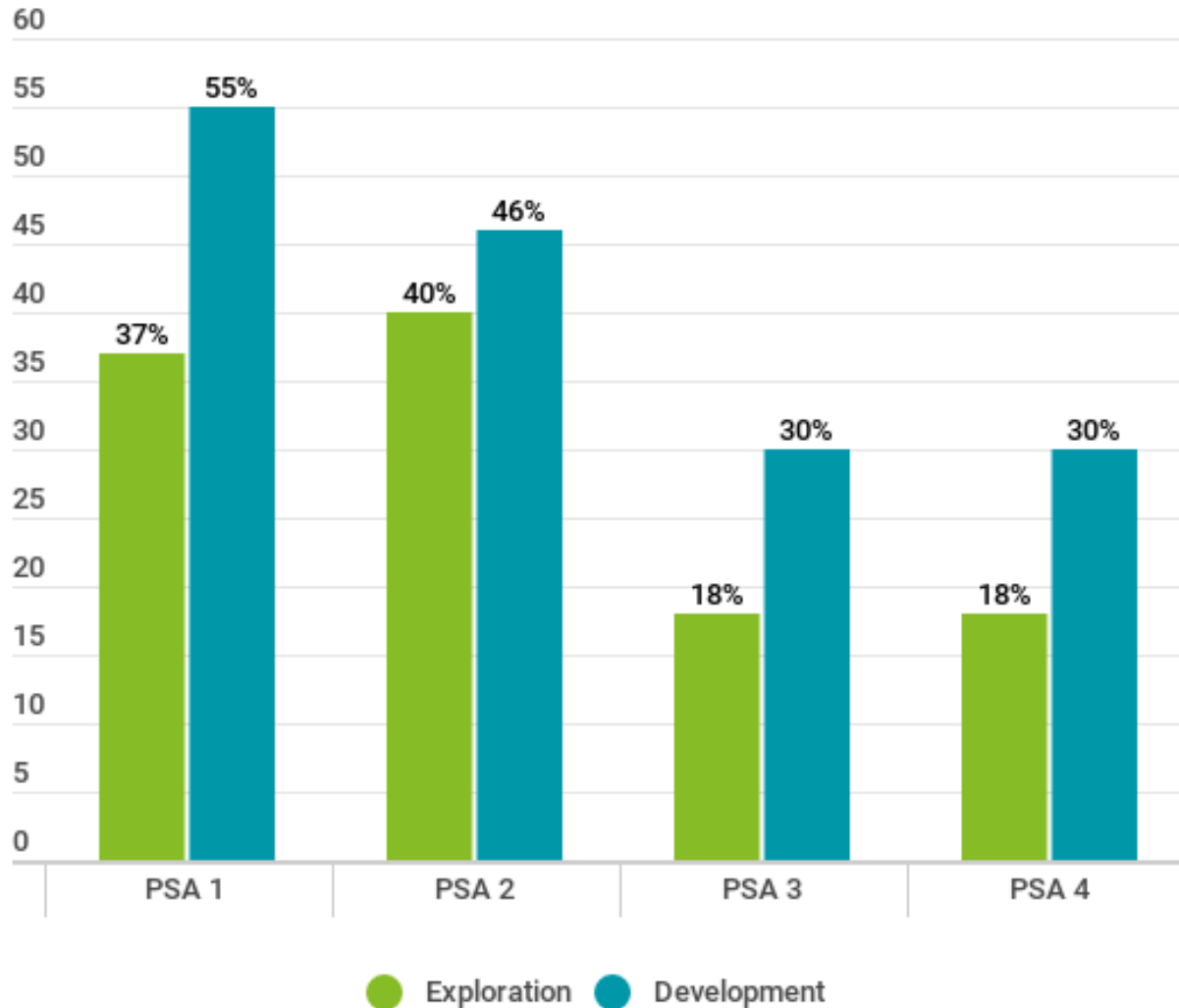


Average LC offered by Bidding Round (Concession)



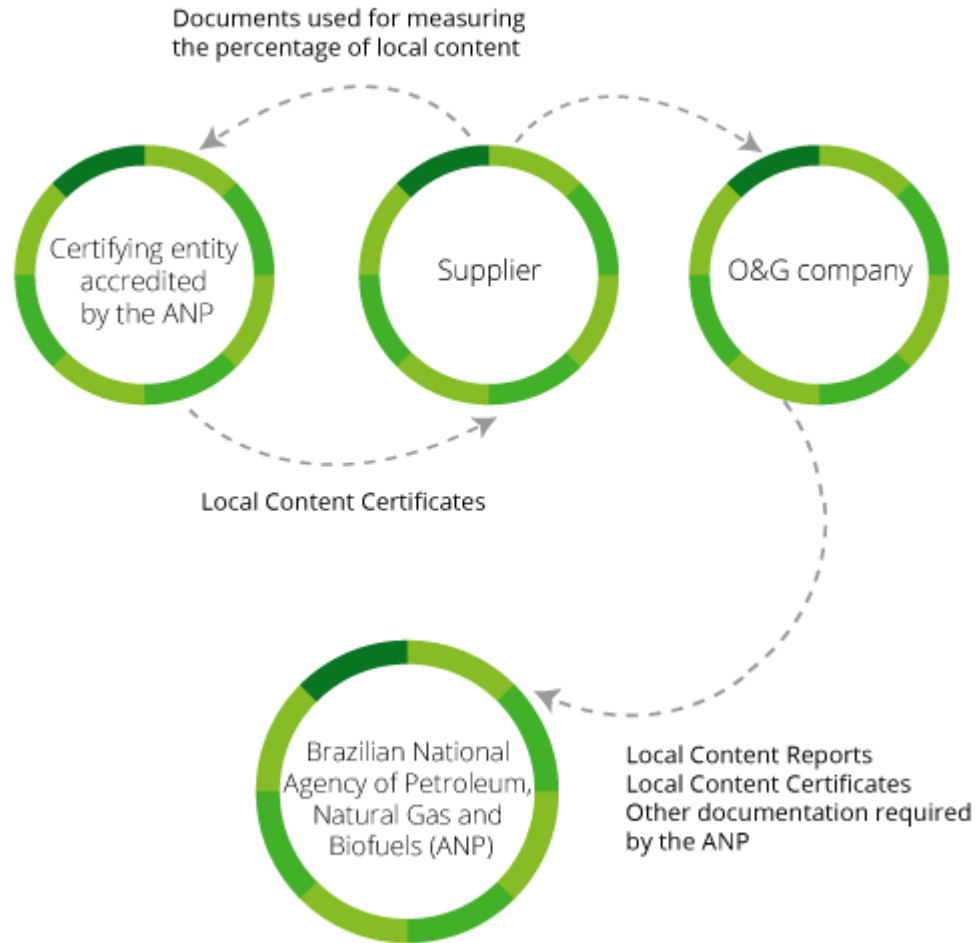


Average LC offered by bidding round (PSA)





Local content: from certification to audit (case 01)





Local content: from certification to audit (Case 02)

