

# Local Content Requirements in WTO Law

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## IMPACT ASSESSMENT

### **1. What is the main objective of the research described in the thesis and what are the most important results and conclusions?**

The main objective of the research was to investigate how WTO rules affecting LCRs could be interpreted to further the development objective of the WTO Agreement and to what extent interpretation could mitigate the rigidity of rules that (i) were crafted in a time where mainstream economics regarded industrial policies - LCRs included - as highly inefficient and market distortive and therefore (ii) were idealised to restrict them.

It was important to observe that panels and the Appellate Body have made use of interpretative tools that contribute to advancing the development dimension of WTO law. However, not necessarily the adjudicating bodies seize all the opportunities to further a development-oriented approach. In many instances, the interpretative choices made by panels or the Appellate Body restrict the advancement of the development dimension of WTO agreements.

In addition, interpretation of WTO agreements cannot be dissociated from institutional and political factors. Customary rules of interpretation are not the only factor playing a role in the interpretative process. Interpretation choices are also to some extent a function of the environment where judges are located and political circumstances. The current institutional and political challenges of the WTO dispute settlement system and, more broadly, the multilateral system cast doubts on the feasibility of furthering a development-oriented approach to WTO rules applicable to LCRs. In particular, the current crisis of the Appellate Body caused by the political interference of the US and its strong criticism of alleged judicial activism on the part of this organ is a strong indicative that the current times are not conducive to further development in the interpretation of WTO law.

In view of WTO rules prohibiting or restricting LCRs and also those institutional and political challenges, there is limited space to further a development-oriented approach of WTO rules affecting LCRs without adding to or diminishing the rights and obligations of Members, contrary to the prohibition in Articles 3.2 and 9.2 of the DSU. A few opportunities, however, can still be seized by the WTO adjudicatory bodies especially in connection with the interpretation of GATT and GATS's general exceptions, Article III.8(a) and (b) of the GATT 1994 and the provisions of the TRIPS Agreement affecting local working requirements.

WTO rules affecting LCRs were mainly crafted under the idea that this type of policy instrument was inefficient. Nowadays, a growing body of economic work has challenged this general negative view. As a result and considering the limited scope for furthering a development-oriented interpretation, it is necessary to review WTO rules affecting LCRs to reflect a new compromise among WTO Members on the issue. Given current political and economic scenarios, there may be some room to rediscuss LCRs in WTO law, especially because in a context of crisis, deepened by the coronavirus pandemic, WTO Members may be more willing than ever to make use of local content policies to protect their domestic economy and local jobs. Negotiations on new rules on LCRs would prevent that WTO adjudicating bodies have to deal with such sensitive issue without clearer parameters in WTO agreements, being accused of being judicially activist or stepping out of their mandate.

## **2. What is the (potential) contribution of the results from this research to science, and, if applicable, to social sectors and social challenges?**

By making a thorough review of the economic effects of LCRs, this research has concluded that, differently from what is preached by mainstream economic literature, LCRs can, provided that certain circumstances are met, have beneficial impacts on a country's development process, strengthening local manufacturing capabilities, increasing jobs, transferring technology to local companies, and generating spill-overs. Consequently, it adopts a critical view on the general prohibitions and restraints on LCRs in the context of WTO law and on the interpretation of WTO discipline affecting LCRs by panels and the Appellate Body.

By proposing a development-oriented approach to WTO rules on LCRs, the research intends to promote a more balanced-interpretation of WTO law taking into account not only the trade liberalisation aspect of the WTO agreements but also their development dimension. Ultimately, trade should be an instrument for development and not an end in itself. Accordingly, trade rules should be interpreted in a way that foster development and not in a manner that cherishes the free trade goal for its own sake.

In this sense, the social relevance of the proposed development-oriented interpretation to WTO Agreements is not trivial. It represents a renewed way to analyse trade agreements, one that shows sensitiveness to development and human rights, contributing to the creation of a new spirit and culture among the trade law community, negotiators, and public officials.

In particular, it represents a step forward in relation to current interpretation of WTO to the extent that it requires adjudicative bodies to also analyse the impact of trade

measures on development factors and criteria, such as the contribution of a measure to the promotion of the right to work, the right to a healthy environment, the generation of local jobs, the improvements on local population's standards of living and so on. Consequently, it sheds light to a more balanced interpretation of WTO law that takes into account not only free trade interests, but also other legitimate interests connected to the development process, reinforcing the idea that markets are embedded in a social context. Such a development-oriented view also contributes to promoting human rights, as the development factors and criteria which are used to assess trade measures can also be based on human rights considerations.

This may support a new perspective not only for WTO panels and the Appellate Body, but for other trade tribunals and adjudicative bodies, according to which they should be more sensitive to national development policies and to the values and interests they wish to protect. Ultimately, they cannot substitute themselves for domestic democratic processes that have shaped fundamental trade-offs between economic, social, political cost-benefit considerations and values.<sup>1487</sup>

Such development-approach to WTO agreements can also empower States in their negotiations of amendments to WTO law, negotiations of bilateral trade agreements and other international agreements to the extent that it brings more elements to the discussion, especially, a consideration of the effects of the negotiated agreement on the development process of each part and its contribution to the protection and promotion of human rights. Mutual gains in a trade deal may not be the only goal to be pursued, they should be assessed not only in financial terms but also in terms of their contribution to the development process of the involved parties.

More specifically, the development-approach to WTO law can contribute to discussions on the reform of WTO rules. Development has so far been understood in the WTO as flexibilities applied to developing countries to help them to overcome a temporary problem (underdevelopment). The consideration of development as a constituent element of the WTO as set forth in the preamble of the Marrakesh Agreement requires a reconsideration of development in the meta-structures of the WTO. This brings a new perspective on which issues should be negotiated, how rights and obligations should be structured, and the level of inclusiveness required in the negotiations but also in the functioning and operation of the WTO.

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1487 Robert Howse and Kalypso Nicolaidis, "Legitimacy through "higher law": why constitutionalizing the WTO is a step too far," in *The Role of the Judge in International Trade Regulation: Experience and lessons for the WTO*, ed. Patrick Cottier and Petros Mavroidis (The University of Michigan Press, 2003), 332.

Finally, a discussion on the development dimension of the WTO also contributes to strengthening its legitimacy. In the current context of crisis of the multilateral system and rise of nationalist views, overcoming the crisis requires bringing politics back in, and showing deference to substantive domestic regulatory choices. While countries feel that WTO imprison their legitimate national policies, anti-WTO sentiments and ideas against a multilateral trade system will continue to proliferate.

### **3. To whom are the research results interesting and/or relevant? And why?**

The target groups that may be interested in the results of the research involve all stakeholders in international trade and those involved in public policy making.

As seen, the use of LCRs is widespread among countries. Therefore, trade officials from national governments may be interested in this research which brings important parameters according to which LCRs can become defensible from an international trade law perspective. This may be of relevance not only for developing countries which adopt LCRs in various sectors, but also for developed countries which have strengthened the presence of such measures in the renewable energy sector.

Additionally, panellists and adjudicative bodies in the WTO, but also in the context of free trade agreements and investment agreements may also be interested in the thesis as it entails an in-depth discussion on the interpretative process of international treaties.

Businesses operating LCRs in a wide range of sectors, from oil & gas to TV broadcasting, may also be interested in the subject of the research, as LCRs have a strong impact on their operations and they may wish to acquire a deeper knowledge on the aspects involving LCRs from a legal perspective so as to have instruments to deal with governments in the negotiation, design and implementation of such policies.

Further, the study may also be of relevance for parliamentarians drafting laws and regulations on local content policies and other policies carrying a human rights and development dimension. Local communities affected by LCRs may also be interested in this study.

Finally, by analysing the intersection between trade and development, and trade and human rights, the research may be of interest to all of those dealing with these topics in their daily activities, including non-government organizations dealing with the impact of policy decisions on human rights, companies designing and incorporating

bespoke risk assessments addressing potential adverse human rights impacts resulting from business operations, and civil society in general.

#### **4. In what way can these target groups be involved in and informed about the research results, so that the knowledge gained can be used in the future?**

Under a narrow perspective, the thesis contributes to a renewed perspective of interpretation of WTO agreements affecting LCRs. So far, WTO jurisprudence has consistently outlawed LCRs implemented by different Members and has not considered the development dimension of such measures, mostly because WTO Members have not raised arguments in this sense. By proposing a development-oriented interpretation of WTO agreements, the research empowers WTO Members implementing LCRs for legitimate development purposes to defend their policy choices and instruments before the WTO dispute settlement system and provides panels and the Appellate Body with a conceptual base to adopt interpretative techniques that takes into account the development objective of the WTO and the international normative framework for development, which consists of a series of soft law and hard law human rights instruments supporting the right to development.

From a broader perspective, the research, by assessing the relationship between trade rules and the normative framework for development, and by clarifying how human rights can contribute to the interpretation of trade rules, provides subsidies for a more balanced analysis of those themes involving non-trade interests, such as the relationship between trade and environment, trade and public health, trade and labour standards, all of which ultimately entails the relation between trade and human rights.

Also, by highlighting the institutional aspects of the WTO that can have either positive or negative influence on advancing a development-approach to WTO law, this study can contribute to the debate on amelioration of certain institutional features of WTO, by encouraging more diversity among WTO staff dealing with legal interpretation, more inclusiveness and transparency in the decision-making process of WTO adjudicative bodies and capacity-building of development countries in line with the development aspect of the WTO.

In addition, by placing the development debate in the context of the current crisis of the WTO and its dispute settlement system, the thesis seeks to develop arguments that contributes to overcoming the current crisis and the maintenance of the WTO dispute settlement system in the long term.

Finally, the thesis will be available to the targeted audience online and will lead to articles, publications, material for lectures, courses, seminars and webinars, thus contributing to the diffusion of information to a broader audience.