

Local Content Requirements in WTO Law

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PROPOSITIONS

1. There has been a strong rhetoric against local content requirements (LCRs), characterising them as trade-distortive and protectionist measures that produce only inefficiencies. However, under certain circumstances, LCRs can have a central role in a country's development process to the extent that they can potentially strengthen the domestic industrial base; create backward linkages; increase domestic value-addition in certain industries; and encourage the dissemination of knowledge and technology to the local economy.
2. WTO Members' policy space to implement LCRs is reduced and the defences available under WTO law are extremely limited. Under the logic of trade liberalisation that pervaded the creation of the WTO, LCRs as instruments that discriminate against imported goods are in general prohibited under WTO agreements.
3. Despite the restrictive WTO discipline, there is no indication that WTO Members abandoned their LCRs. In general, Members only bring their LCRs into conformity with WTO agreements when challenged under the dispute settlement system. Such measures continue to be used persistently by countries in the developed and developing world in different sectors. Amid the current COVID-19 pandemic, there may also be a tendency to use more LCRs as countries have started to look more inwards and became more concerned about strengthening their domestic industry and maintaining jobs.
4. WTO rules should not raise undue obstacles to the use of LCRs when they are genuinely associated with development goals and related societal concerns. Nevertheless, the issue is not so simple, while the country implementing LCRs may have legitimate policy objectives to adopt them, its trading partners affected by the import restrictions generated by LCRs may also be harmed. Ultimately, the need for market access may be closely related to development concerns of the exporting countries and LCRs could cause adverse impacts on their economies. Therefore, ultimately, LCRs involve a balancing between competing values and interests: the right to development of the country implementing LCRs and the right to trade of the other countries, which may be closely associated with their own right to development.
5. It is widely recognised that trade is not an end in itself, but an instrument for development. The objectives of the WTO as stated in the preamble of the WTO Agreement do not equate to free trade exclusively, they also involve full employment, raising people's standards of living, sustainable development and concerns with the different levels of development of WTO Members. Several aspects of WTO law reinforce that there is room for a balanced interpretation of the WTO agreements, in particular, rules affecting LCRs in light of the development objective.

6. The evolution of the concept of development has evolved from a purely economic to a rights-based perspective, which carries a more comprehensive understanding of development as a process entailing the realisation of all human rights and the creation of an environment that is conducive to their realisation. It has been accompanied by the creation of a normative framework. The principles of inherent dignity, of a fair social and international order and of self-determination together with economic, social and cultural (ESC) rights, the right to development, the principle of the State's right to regulate and the notion of sustainable development provide the foundations of the current normative framework for development. As WTO law should not be interpreted in isolation from public international law, the normative framework for development becomes important for interpreting WTO rules, in particular, those affecting LCRs with a development objective.
7. Development has received a limited and *ad hoc* treatment under SDT provisions in several WTO agreements. Nevertheless, WTO Members continue to affirm that it is at the centre of the WTO. Many aspects of the development dimension of the WTO and its agreements require clarification.
8. 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.
9. Interpretation of WTO agreements cannot be dissociated from institutional and political factors. 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.
10. 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.

11. 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.