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LOCAL CONTENT REQUIREMENTS IN WTO LAW: BETWEEN FREE TRADE AND THE RIGHT TO DEVELOPMENT

NATÁLIA DE LIMA FIGUEIREDO

LOCAL CONTENT REQUIREMENTS IN WTO LAW:

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Between Free Trade and the Right to Development

DISSERTATION

to obtain the degree of Doctor at Maastricht University,
on the authority of the Rector Magnificus, Prof. dr. Pamela Habibović and Rector Magnificus Prof. Marco Antonio Zage, Universidade de São Paulo, Brazil in accordance with the decision of the Board of Deans,
to be defended in public
on Wednesday 14 September 2022, at 13:00 hours

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LIST OF ABBREVIATIONS

ACWL	Advisory Centre on WTO Law
BIT	Bilateral investment treaty
BOP	Balance of Payments
BPP	Basic production process
BRICS	Brazil, Russia, India, China and South Africa.
DSB	Dispute Settlement Body
DSS	Dispute Settlement System
ECJ	European Court of Justice
ECLAC	Economic Commission for Latin America and the Caribben
ECtHR	European Court of Human Rights
ESC rights	Economic, social and cultural rights
FDI	Foreign direct investment
FTA	Free Trade Agreement
GDP	Gross domestic product
HLFT	High-level Task force on the Implementation of the Right to Development
ICJ	International Court of Justice
ICT	Information and communication technology
IIA	International investment agreement
ILC	International Law Commission
ILO	International Labour Organization
IMF	International Monetary Fund
LCR	Local content requirement
LDC	Least-developed country
MDG	Millennium Development Goal
NIEO	New International Economic Order
OECD	Organisation for Economic Co-operation and Development
PTA	Preferential Trade Agreement
RE	Renewable Energy
SDT	Special and differential treatment
SGD	Sustainable Development Goal
TRIM	Trade-related investment measure
UN	United Nations
UN Environment	United Nations Environment Programme
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UNIDO	United Nations Industrial Development Organisation
UNITAR	United Nations Institute for Training and Research
USTR	United States Trade Representative
WHO	World Health Organisation
WTO	World Trade Organisation

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1993 Ministerial Decision on Measures in Favour of Least-Developed Countries	WTO. Ministerial Decision on Measures in Favour of Least Developed Countries, Doc. MTN/FA, Part III.I, 15 December 1993
2030 Agenda	UN General Assembly, Transforming our world: the 2030 Agenda for Sustainable Development, 21 October 2015, A/RES/70/1
African Charter on Human and Peoples' Rights	Organization of African Unity (OAU), African Charter on Human and Peoples' Rights, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982)
African Charter on Human and Peoples' Rights	African Charter on Human and Peoples' Rights (signed 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 589
African Youth Charter	African Union, African Youth Charter, 2 July 2006
Agenda for Development	United Nations. General Assembly. Agenda for Development. Resolution A/RES/51/240 adopted on 15 October 1997.
Agreement on Agriculture	Agreement on Agriculture, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 410.
Antidumping Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A,1868 U.N.T.S. 201
Arab Charter on Human Rights	League of Arab States, Arab Charter on Human Rights, 15 September 1994
ASEAN Comprehensive Investment Agreement	ASEAN Comprehensive Investment Agreement (signed 26 February 2009, entered into force 24 February 2012)
ASEAN Human Rights Declaration	Association of Southeast Asian Nations (ASEAN), ASEAN Human Rights Declaration, 18 November 2012.
CETA	Canada-European Union (EU) Comprehensive Economic and Trade Agreement (CETA) (signed 30 October 2016, entered into force 21 September 2017).
Charter of Economic Rights and Duties of States	United Nations. General Assembly, Charter of Economic Rights and Duties of States, 6 November 1974, A/RES/3281.
Charter of the Organisation of American States	Organization of American States (OAS), Charter of the Organisation of American States, 30 April 1948
COMESA Common Investment Area Agreement	Investment Agreement for the Common Market for Eastern and Southern Africa Common Investment Area (adopted 22 and 23 May 2007)
Convention on the Elimination of All Forms of Discrimination Against Women	United Nations. General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13
Convention on the Rights of Persons with Disabilities	United Nations. General Assembly, Convention on the Rights of Persons with Disabilities, resolution adopted by the General Assembly, 24 January 2007, A/RES/61/106
Convention on the Rights of the Child	United Nations. Commission on Human Rights, Convention on the Rights of the Child, 7 March 1990, E/CN.4/RES/1990/74

Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States	United Nations. General Assembly, Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, 24 October 1970, A/RES/2625(XXV)
Declaration on the TRIPS Agreement and Public Health	World Trade Organisation. Declaration on the TRIPS Agreement and Public Health of 20 November 2001, WTO Doc. WT/MIN(01)/DEC/2.
Doha Ministerial Declaration	WTO. Doha Ministerial Conference. Ministerial Declaration, adopted on 14 November 2001, WT/MIN(01)/DEC/1.
Draft convention on the right to development	United Nations. Human Rights Council. Working Group on the Right to Development. Draft convention on the right to development, with commentaries. UN Doc. A/HRC/WG.2/21/2/Add.1, 20 January 2020.
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401.
European Convention on Human Rights	European Convention for the Protection of Human Rights and Fundamental Freedoms (signed 4 November 1950, entered into force 3 September 1953) 213 U.N.T.S. 221
GATS	Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1A, 1869 U.N.T.S. 14.
GATT 1947	General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. pt. 5, 55 U.N.T.S. 194.
GATT 1994	General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1A, 1867 U.N.T.S. 187.
GPA	Agreement on Government Procurement, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organisation, 1869 U.N.T.S. 508.
Guiding principles on human rights impact assessments of trade and investment agreements.	United Nations. Human Rights Council. Report of the Special Rapporteur on the right to food, Olivier De Schutter. Guiding principles on human rights impact assessments of trade and investment agreements. A/HRC/19/59/Add.5, 19 December 2011.
Human rights and international solidarity	United Nations. Human Rights Council, Human rights and international solidarity: resolution adopted by the Human Rights Council, 18 July 2016, A/HRC/RES/32/9.
ICCPR	United Nations. General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.
ICESCR	UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.
ILO Convention n. 169	International Labour Organization, Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention n. 169). Adoption: Geneva, 76th ILC session (27 Jun 1989).
International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families	United Nations. General Assembly, International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 18 December 1990, A/RES/45/158.

Marrakesh Agreement or WTO Agreement	Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154
Millennium Declaration	UN General Assembly, United Nations Millennium Declaration, Resolution Adopted by the General Assembly, 18 September 2000, A/RES/55/2
MPIA	Multi-Party Interim Appeal arbitration arrangement (notified to the WTO on April 30, 2020), WTO Doc. JOB/DSB/1/Add.12
NAFTA	North American Free Trade Agreement (signed 17 December 1992, entered into force 1 January 1994) (1994) 32 ILM 605
Nairobi Ministerial Declaration	WTO. Ministerial Conference. Nairobi Ministerial Declaration, adopted on 19 December 2015, WT/MIN(15)/DEC).
NIEO Declaration	United Nations. General Assembly, 3201 (S-VI). Declaration on the Establishment of a New International Economic Order, 1 May 1974, A/RES/3201(S-VI)
Paris Convention	Paris Convention for the Protection of Industrial Property of March 20, 1883, As Revised at Brussels on December 14, 1900, at Washington on June 2, 1911, at the Hague on November 6, 1925, at London on June 2, 1934, at Lisbon on October 31, 1958, and at Stockholm on July 14, 1967. Geneva: United International Bureaux for the Protection of Intellectual Property (BIRPI), 1968
Permanent sovereignty over natural resources	United Nations. General Assembly, Permanent sovereignty over natural resources, 19 December 1961, A/RES/1720
Proclamation of Teheran	Proclamation of Teheran, Final Act of the International Conference on Human Rights, Teheran, 22 April to 13 May 1968, U.N. Doc. A/CONF. 32/41(1968)
Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa	African Union, Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 11 July 2003.
Rio Declaration	United Nations Conference on Environment and Development. Rio Declaration on Environment and Development (1992) U.N. Doc. A/CONF.151/5/Rev.1, 31 I.L.M. 874
Rio+ Document: The future we want	UN General Assembly, 66/288. The future we want, resolution adopted by the General Assembly on 27 July 2012, A/RES/66/288
SADC Model Bilateral Investment Treaty	Southern African Development Community. Model Bilateral Investment Treaty, 2012
SCM Agreement	Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1A, 1869 U.N.T.S. 14
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 493
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TBT Agreement	Agreement on Technical Barriers to Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 120
TRIMs Agreement	Agreement on Trade-Related Investment Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1A, 1868 U.N.T.S. 186.

TRIPS Agreement	Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299.
UDHR	United Nations. General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III)
Ufa Declaration	VII BRICS Summit, 2015 Ufa Declaration, Ufa, Russia, July 9, 2015
UN Charter	United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI.
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UNCLOS	United Nations. General Assembly, Convention on the Law of the Sea, 10 December 1982.
UNDRD	UN General Assembly, Declaration on the Right to Development: resolution / adopted by the General Assembly, 4 December 1986, A/RES/41/128.
USMCA	United States-Mexico-Canada Agreement (USMCA) (signed 30 November 2018, entered into force 1 July 2020)
VCLT	United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331
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Brazil – Aircraft	Panel Report, Brazil – Export Financing Programme for Aircraft, WT/DS46/R, adopted 20 August 1999, as modified by Appellate Body Report WT/DS46/AB/R, DSR 1999:III, p. 1221
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Brazil – Retreaded Tyres	Panel Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/R, adopted 17 December 2007, as modified by Appellate Body Report WT/DS332/AB/R, DSR 2007:V, p. 1649
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INTRODUCTION

LCRs at the crossroad between trade and development

Local content requirements (LCRs), under a broad perspective, encompass a wide variety of policy instruments targeting industrial development, job creation, value addition, linkage creation and better value chain incorporation.[1] They include, for instance, requirements to: add value to the local production by sourcing inputs locally; employ locally; further process certain raw material domestically; establish or expand local facilities; increase local participation in the form of ownership requirements; and perform research and development in, or transfer technology to, the host country.

Historically LCRs have been used by developed countries as part of their industrial policies to promote their industries and allow them to gain international competitiveness. For instance, in Japan, after Second World War, foreign companies were required to transfer technology and buy at least specified proportions of their inputs locally;[2] in Korea, LCRs were strictly imposed outside the export-processing zones between the 70's and the 90's;[3] in the United Kingdom, foreign companies were obliged to procure a high percentage of value added locally in the 80's.[4]

LCRs were already prohibited under the 1947 General Agreement on Tariffs and Trade (GATT 1947).[5] Article III of this treaty established a non-discrimination rule, which prohibited contracting parties from discriminating in favour of domestic products as compared to like imported products ("national treatment principle"). As LCRs by their very nature discriminate against foreign products in favour of domestic goods, they could be deemed GATT-inconsistent. However, in practice, GATT parties made large use of local content instruments. No party was inclined to point the finger at another in respect of measures that all were implementing. Additionally, it was difficult to challenge LCRs as the GATT dispute settlement mechanism was weak. It required positive consensus from all GATT contracting parties, including the losing disputing party, which had to agree with the adoption of the panel report, as well as with the authorisation of countermeasures against a non-implementing respondent. Therefore, despite prohibitions under GATT 1947, LCRs continued to be used worldwide.

1 Miriam Weiss, "The role of local content policies in manufacturing and mining in low-and middle-income countries," *UNIDO Inclusive and Sustainable Industrial Development Working Paper Series* WP 19 (2016): 1.
2 Ha-Joon Chang, *Bad Samaritans: The myth of free trade and the secret history of capitalism* (Bloomsbury Publishing, 2007), 44.
3 Chang, *Bad Samaritans: The myth of free trade and the secret history of capitalism*, 81.
4 Chang, *Bad Samaritans: The myth of free trade and the secret history of capitalism*, 81.
5 General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. pt. 5, 55 U.N.T.S. 194.

With the transformation of the GATT system into the World Trade Organisation (WTO), the use of LCRs became more constricted as a result of the new agreements entered into under the WTO system. Not only the 1994 General Agreement on Tariffs and Trade (GATT 1994)[6] still contain the national treatment obligation, prohibiting most forms of LCRs, but also other agreements brought a restrictive discipline to these instruments, including the Agreement on Trade-Related Investment Measures (TRIMs Agreement),[7] the Agreement on Subsidies and Countervailing Measures (SCM Agreement),[8] the General Agreement on Trade in Services (GATS)[9] and the Agreement on Government Procurement (GPA).[10] The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement)[11] also allows for restrictive approach to the local working of patents, potentially prohibiting requirements that the patentee must manufacture the patentee product, or apply the patented process, within the patent granting country.
Despite the restrictive WTO discipline, there is no indication that WTO Members abandoned their LCRs.[12] In fact, they moved into the spotlight from 2008 on, when an increase in the number of LCRs was registered as a result of the world financial crisis.[13] Nowadays, such measures continue to be used persistently by countries in the developed and developing world in different sectors.[14] In a time of climate change and environmental issues, LCRs have also gained prominence in the renewable energy sector.

Additionally, 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. Some governments have already started relying on local content instruments to tackle the economic crisis derived from the pandemic. Some argue that LCRs may be helpful to enable industries to buy or produce locally as export restrictions have been imposed abroad and the shutdown of factories due to lockdown measures have prevented the normal flow of imports

6 General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1A, 1867 U.N.T.S. 187.
7 Agreement on Trade-Related Investment Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1A, 1868 U.N.T.S. 186.
8 Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1A, 1869 U.N.T.S. 14.
9 General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1B, 1869 U.N.T.S. 183.
10 Agreement on Government Procurement, 1869 U.N.T.S. 508.
11 Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299.
12 Alisa DiCaprio and Kevin P Gallagher, "The WTO and the shrinking of development space: How big is the bite?," *The Journal of World Investment & Trade* 7, no. 5 (2006): 793.
13 Gary Hufbauer, Jeffrey Schott, and Cathleen Cimino, *Local Content Requirements: Report on a Global Problem*, Peterson Institute for International Economics (2013), 3, http://files.publicaffairs.geblogs.com/files/2014/08/Local-Content-Requirements-Report-on-a-Global-Problem.pdf.
14 More recently, amidst the coronavirus world pandemic, U.S. President, Donald Trump, announced LCRs connected to governmental assistance to small businesses.

and exports.[15] They also see LCRs as an opportunity for maximising local workforces as a practical solution for travel restrictions, visa restrictions, repatriations, etc.[16] Some local authorities have promoted campaigns incentivising citizens to support and buy from small local businesses as small and medium enterprises (SME) have been severely affected.[17]

Given the rules-based dispute settlement system of the WTO with no positive consensus required, it became easier for WTO Members to challenge the LCRs implemented by other Members. Whenever one Member's LCR was harmful to another Member's trade interests, it became feasible to challenge such a measure under the WTO dispute settlement system and require the Member in violation of WTO agreements to bring its measure into conformity with the relevant agreements. In this context, since the inception of the WTO, it is possible to see an increasing number of LCRs challenged under the dispute settlement system. From 1995 to 2021, 67 requests for consultations were made by WTO Members in connection with LCRs, accounting for around 11% of all disputes in the WTO system.[18] However, the number of LCRs actually challenged under the WTO dispute settlement system may be much lower than the measures actually implemented by WTO Members. For instance, between 1995 and 2015, the Committee on Trade-Related Investment Measures discussed 34 local content measures of sixteen WTO members. Only 21% of these measures were challenged in the WTO dispute settlement procedures.[19]

In general, Members only bring their LCRs into conformity with WTO agreements when challenged under the dispute settlement system.[20] Most of their local content measures continue to exist and produce effects despite WTO agreements prohibiting or restricting them. This not only generates doubts as to the efficacy of the WTO system in constraining LCRs but also shows that WTO Members may not be willing to give up their local content measures notwithstanding WTO discipline.

15 "Local content proves useful during Covid-19 crisis." *The Enegy Year*. May 19, 2020. Nigeria. Available at: https://theenergyyear.com/articles/local-content-proves-useful-during-covid-19-crisis/. Accessed on July 17, 2020.

16 Iain Pitt and Sam Scarpa, "The Importance of Local Content at a Time of Crisis – What Covid-19 will Teach the Industry," *Oil&Gas Council* (2020). Available at: https://oilandgascouncil.com/articles/the-importance-of-local-content-at-a-time-of-crisis-what-covid-19-will-teach-the-industry/. Accessed on July 17, 2020.

17 "National 'Go Local First' campaign urges Australians to support small businesses." *Smart Company*. July 10, 2020. Available at: https://www.smartcompany.com.au/coronavirus/cosboa-go-local-first-campaign-small-business/. Accessed on: July 17, 2020; "Miami DDA's "Go Local" Program". 2020. Available at: https://www.miamidda.com/dda-go-local-program/. Accessed on: July 17, 2020.

18 For more details, see Chapter 2.

19 Sherzod Shadikhodjaev, *Industrial policy and the World Trade Organization: between legal constraints and flexibilities* (Cambridge University Press, 2018), 149.

20 DiCaprio and Gallagher, "The WTO and the shrinking of development space: How big is the bite?," 794-97.

Members' unwillingness to abandon their LCR policies is in part explained by the fact that LCRs under certain conditions may have an important role in their economic development. LCRs also have a strong public appeal as a source of generation of employment for local people.

Many resource-rich countries use LCRs as a means to share with their societies the benefits arising out of the exploitation of their resources (petroleum, minerals, among others). In Africa, for instance, the adoption of LCRs in the oil and gas industry is very common. South Africa, Nigeria, Ghana, Gabon, Angola, Uganda, Mozambique, Tanzania, Kenya and Liberia have all adopted LCRs in this sector and continue to discuss the best practices, and legal and institutional frameworks to make the most out of their local content policy.[21] Other resource-rich developing countries such as Brazil, Malaysia, Venezuela and Trinidad and Tobago have also implemented them.[22] Norway is a source of inspiration for these developing countries as it represents a successful model for LCRs in the petroleum sector, which generated positive results for the country's social and economic development.

LCRs, however, are not limited to extractive sectors. They are used in a wide range of industries, from automotive to information and communications technology (ICT) sectors. The main idea behind their use is to enhance manufacturing capabilities and magnify spill over effects through job creation, technology transfer and acquisition of new skills.

In this context, LCRs are intrinsically linked to a country's development project. Together with other public policies, LCRs aim to empower a country's industry and people, making the economy more prosperous and diversified and enabling people to gain more opportunities in terms of jobs and skills so that they can improve their living standards.

In the renewable energy sector, the use of LCRs is specifically related to the sustainable development objective. They are used to stimulate the development of local capabilities in the renewable energy sector in order to tackle environmental and climate change issues.[23] Nowadays, especially developed countries are making use of LCRs in these green industries as it is the case for Canada, Spain, Italy, France, Greece, Croatia and the United States.

21 See, for instance, the Angola Oil & Gas 2019 Conference held on June 4-6, 2019 at the Centro de Convenções Talatona (CCTA) in Luanda (Angola), which debated extensively the lessons from African countries with their local content initiatives in the oil and gas sector. The video of the relevant panel on LCRs is available at: https://www.youtube.com/watch?v=jNFBAguUR7w&list=PLI4MdSfQRIhzIdiPe8n-Cm9xRkZy-IlC&index=3. Accessed on February 20, 2020.

22 Silvana Tordo, *National oil companies and value creation*, The World Bank (Washington, 2011), 116-19.

23 Weiss, "The role of local content policies in manufacturing and mining in low-and middle-income countries," 8.

Accordingly, LCRs could be viewed as a policy tool aimed at achieving broader developmental goals. Such measures can stimulate the creation of employment opportunities contributing to the realisation of the right to work; enhance the competitiveness of the domestic industry, ameliorating the standards of living of the local population; contribute to the rights of indigenous people when they involve measures targeting at their integration into the industry supply chain; create conditions for the realisation of the right to health and the right to benefit from scientific progress and its applications, in case of LCRs in the pharmaceutical and medical segments; contribute to the right to a healthy environment when intended to promote the renewable energy sector; contribute to the realisation of the right to take part in cultural life, when designed to promote local cultural initiatives, among others.

Considering this development dimension of LCRs and their potentially beneficial effects on countries' development processes, WTO rules should not raise undue obstacles to the use of LCRs when they are genuinely associated with development goals and related societal concerns.[24] 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.

Despite the development dimension of LCRs, they can also be associated to the interests of groups who seek monopoly rents in an environment with restricted competition and lobby to maintain their privileges. They can also be associated to corruption schemes to benefit politically powerful groups. In this context, they of course do not produce positive economic and societal outcomes and are highly ineffective as a public policy.

So far, all LCR cases (except one) that were ultimately analysed by panels and/or the Appellate Body have been found to be inconsistent with WTO law.[25] In addition, in no WTO dispute involving LCRs a relevant development or societal concern was recognised as prevailing over the trade liberalisation objective. In these cases, there was also a lack of articulation of development arguments by the disputing parties.

24 It is important to stress that not all LCRs contribute to development goals. Depending on how they are designed, they can contribute to the monopolisation of the market and turn into privileges to certain economic groups that lobby their interests with the government. In addition, they can conceal corruption schemes. See section I.2.5 of the thesis.

25 See Chapter 2.

In this scenario, it is important to investigate how WTO rules affecting LCRs could be interpreted to further the development objective and to what extent interpretation could mitigate the rigidness 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.[26]

Ultimately, it is widely accepted that trade is not an end in itself, but an instrument for development.[27] 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 the political compromise of WTO Members with the so called "embedded liberalism", according to which markets should be embedded in their social context and trade agreements should be instrumental for the realisation of social objectives, including better standards of living, employment, etc. Under the notion of embedded liberalism, therefore, international trade rules should be compatible with different kinds of active public management of the economy.[28] In this context, sufficient space should be left in WTO agreements for governments to respond to social and economic needs at the domestic level.[29]

Importantly, Article XX of GATT 1994 as well as Article XIV of the GATS reflect this idea that free trade objectives should not prevail where certain relevant policy interests such as environment, health, among others, are at stake. In other words, trade liberalisation cannot be prioritised over Members' regulatory powers in important areas of public inter-

26 For instance, the SCM Agreement explicitly prohibites local content subsidies (Article 3.1(b)) and the TRIMS Agreement in its Illustrative List explicitly outlaws certain LCRs.

27 Dani Rodrik, *The globalization paradox: democracy and the future of the world economy* (New York: W.W. Norton, 2011), 24; Joseph E. Stiglitz, *Making Globalization Work* (New York - London: W.W. Norton & Company, 2006); Amartya Sen, *Desenvolvimento como Liberdade*, trans. Laura Teixeira Motta (São Paulo: Companhia das Letras, 2010); Denise Prévost, *Balancing Trade and Health in the SPS Agreement: The Development Dimension* (The Netherlands: Wolf Legal Publishers, 2009), 23. See also speeches from the WTO Director General which emphasise the need for trade to work for development and poverty alleviation: "WTO, IMF and World Bank leaders: trade must be an engine of growth for all". Available at: https://www.wto.org/english/news_e/news16_e/dgra_07oct16_e.htm (7 October 2016); "Azevêdo: trade works to create jobs and lift people out of poverty". Available at: https://www.wto.org/english/news_e/spra_e/spra83_e.htm (30 September 2015); "Lamy: it's time for a new "Geneva consensus" on making trade work for development". Available at: https://www.wto.org/english/news_e/sppl_e/sppl45_e.htm (30 October 2006). The instrumental role for trade in the promotion of development is also acknowledged in the Nairobi Ministerial Declaration, WT/Min(15)/Dec), (19 December 2015), paras. 6-8.

28 Eric Helleiner, "The life and times of embedded liberalism: legacies and innovations since Bretton Woods " *Review of International Political Economy* (2019): 2.

29 Emily Reid, "The WTO's purpose, regulatory autonomy and the future of the embedded liberalism compromise," in *The Future of International Economic Integration: The Embedded Liberalism Compromise Revisited*, ed. Gillian; Moon and Lisa Toohey (Cambridge University Press 2018), 229.

est. Moreover, WTO agreements are not to be read in isolation from other international agreements. Systemic interpretation requires that treaties be interpreted together with any relevant rules of international law applicable in the relations between the parties.[30] Accordingly, WTO law can be interpreted in light of an entire normative framework associated with human rights that encourages actions and measures targeted at the realisation of the right to development.

In this context, the International Convention on Economic, Social and Cultural Rights (ICESCR)[31] establishes the State's obligation to respect, protect and fulfill different economic, social and cultural (ESC) rights such as the right to health, right to work, right to adequate standards of living, right to take part in cultural life, among others. The United Nations Declaration on the Right to Development (UNDRD)[32] recognises development as *a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population*. It also recognises the right to development *as an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized*. The Millennium Development Goals (MDG) established in the 2000 United Nations Millennium Declaration[33] and the Sustainable Development Goals (SDGs) adopted in the 2030 Agenda for Sustainable Development (2030 Agenda)[34] are also part of international efforts to operationalise the fulfilment of the right to development. This body of norms relating to and reinforcing the right to development will be referred to as the normative framework for development.

In view of the above, teleological interpretation of WTO agreements, which allows the reading of WTO law through the lens of sustainable development and societal objectives, and systemic interpretation, which enables clarification of WTO agreements in view of non-WTO norms, including those pertaining to the normative framework for development, lay the groundwork for a development-oriented approach of WTO law.

30 Article 31.3(c) of the Vienna Convention on the Law of the Treaties (VCLT). United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331.

31 UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.

32 UN General Assembly, *Declaration on the Right to Development: resolution / adopted by the General Assembly*, 4 December 1986, A/RES/41/128.

33 UN General Assembly, *United Nations Millennium Declaration, Resolution Adopted by the General Assembly*, 18 September 2000, A/RES/55/2

34 UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1

In order to promote development, trade policy must be embedded in a broader institutional setting that promotes a positive business environment and encourages investments in human capital (education), infrastructure and the quality of public and private sector governance.[35] Behind-the-border policies should include "efficient regulatory regimes, institutions that support the participation of national firms in international markets, and measures to enhance the competitiveness of these firms by providing access to crucial services inputs." [36]

Consequently, trade policy, as a tool for development, is more adequately assessed when the criteria are based not on its degree of openness to trade, but on how it contributes to the construction of a high-quality institutional environment that is conducive to development. As explained by Rodrik, a "high quality institutional environment has greater economic payoffs than a liberal trade regime."[37] In this context, concerns with national development are more prominent and immediate for countries than concerns with free trade alone. This elucidates, in part, why LCRs continue to be used by WTO Members despite express prohibitions in WTO law. Additionally, it explains why development should play a role when interpreting LCRs under WTO law.

In this context and considering the potential benefits of LCRs for development, this study proposes a new interpretation to WTO law applicable to LCRs – one that is oriented towards the development objective. International trade regime and WTO rules should be thought as being at the service of development and not the contrary.[38] Assuming that LCRs can indeed promote development at least under certain circumstances, then there is a need to further investigate where the WTO system and the normative framework for development should dialogue more and establish a deeper relationship.

As put by Qureshi, "the development dimension in the interpretation of the WTO agreements has been neither sufficiently articulated nor coherently structured in the architecture of international trade agreements."[39] Development under the WTO has so far been discussed more in terms of the transitional periods granted to developing countries for implementation of the agreements, limited development-oriented exceptions and derogations reflected in special and differential treatment (SDT) provisions and unilateral preferences. It has not been considered more broadly as a value and

35 Bernard Hoekman, Aaditya Mattoo, and Philip English, *Development, Trade, and the WTO: A Handbook*, ed. Bernard Hoekman, Aaditya Mattoo, and Philip English (Washington: The World Bank, 2002), xxvii.
36 Hoekman, Mattoo, and English, *Development, Trade, and the WTO: A Handbook*, 1.
37 Dani Rodrik, "Trade Reform as Institutional Reform," in *Development, Trade, and the WTO: A Handbook*, ed. Bernard; Hoekman, Aaditya; Mattoo, and Philip English (Washington: The World Bank, 2002), 3-4.
38 Rodrik, "Trade Reform as Institutional Reform," 4.
39 Asif H Qureshi, *Interpreting WTO Agreements: Problems and Perspectives* (Cambridge University Press, 2015), 181.

principle that should permeate the WTO Agreement and guide the interpretation of its agreements.[40] Indeed, in the disputes involving LCRs, it is observable that in only an insignificant number of cases, the involved Members presented arguments stressing the development dimension of their local content policies.

A development-oriented approach to WTO law is much more than a discussion on carve-outs and SDTs. It is about interpreting international trade law taking into account the developmental dimension of public policies and trade measures and their potential in the realisation of human rights and the improvement of social and economic indicators within the country implementing them. It is about respecting the development needs of each WTO Member, their preferences and social values, and contributing to the promotion of human rights. Equally important, a development-oriented approach is preoccupied with "reducing or alleviating some of the burdens that accompany trade liberalisation; facilitating fair play between the differing membership of the WTO; and facilitating those aspects of the development objective that are enshrined in the WTO agreements or that are established in the relevant international law that the interpretative process is informed by."[41]

As a result, the main purpose of this thesis is to evaluate whether a development-oriented approach to WTO law applicable to LCRs is possible, whether it could mitigate the severity of the WTO rules restricting LCRs and make the use of such policy instruments possible when they actually target development objectives. In assessing the feasibility of a development-oriented approach, it will consider not only the technicalities involving the text of the WTO agreements and their interpretation, but also a broader picture.

It is suggested that interpretation of treaties cannot be dissociated from its institutional and political context. The institutional setup of panels and the Appellate Body matters as well as the social and political context where they are embedded. Current times are of great political turmoil. Debates over the crisis of liberal democracy, crisis of multilateralism, growing multipolarity, increasing inequality, the COVID-19 pandemic crisis, which has caused an "unprecedented disruption to the global economy and world trade"[42] and, more specifically, the paralysis of the Appellate Body have an impact on interpretation and therefore influence the feasibility of adopting a development-oriented approach to WTO law.

40 Sonia E Rolland, *Development at the WTO* (Oxford: Oxford University Press, 2012), 63-64. Rabih Ali Nasser, *A OMC e os países em desenvolvimento* (Aduaneiras, 2003), 132.

41 Qureshi, *Interpreting WTO Agreements: Problems and Perspectives*, 185.

42 "COVID-19 and world trade" (2020). Available at: https://www.wto.org/english/tratop_e/covid19_e/covid19_e.htm. Accessed on: July 17, 2020.

Ultimately, the current crisis of the Appellate Body and of the WTO dispute settlement system is a result of the continued blocking by the United States of the appointment of any new Appellate Body Members, with former US president Donald Trump claiming that the United States has been treated very "unfairly" and that the Appellate Body has used judicial activism to create new obligations through the interpretation of WTO rules. In this context, it is necessary to debate whether it would be possible to adopt a development-oriented interpretation of WTO law or whether it risks being accused of "judicially activist" and, therefore, rejected by WTO adjudicating bodies.

In addition, WTO Members have strong disagreements on the role of development within the WTO. The Doha Development Round, launched in Qatar in 2001, is the longest ever trade round in the history of multilateral negotiations, reflecting strong divergent views among Members from developing and developed countries. Where development is a controversial issue at the WTO, it is necessary to assess whether it is possible to advance a development-oriented approach of WTO rules.

However, these are not the only factors to be considered. The feasibility of a development-oriented approach should also be assessed in light of the broader elements. The world has witnessed a rise of populist leaders which poses severe threats to multilateralism and development concerns. Populist leaders accuse the elite of using multilateral institutions against the interest of the nation and the people. As a result, they favour "taking back the control" from these organisations, adopting isolationist policies.

Populist leaders also deteriorate the development objective by either ignoring development issues or placing them as "security" matters. Under populism, there is a belief that "a particular political and social movement, usually embodied in a specific individual, has a moral monopoly on representation. That movement comprises the 'real citizens' of the country."[43] As populism prioritises the well-being of that "in-group" that comprises a political movement, and is skeptical or even hostile towards policies benefiting immigrants, refugees, minorities, and needy and distant strangers, it is naturally against the development project, which is based on the idea that every life has equal value and everyone is entitled to a decent life.

In addition, the rise of emerging powers and, in particular, China, has created a new balance in geopolitics which has also prevented countries from reaching a consensus in multilateral organisations, including the WTO. Further, the COVID-19 pandemic has

43 Varun Gauri, "Populism and development policy," *Let's Talk Development World Bank Blog*, December 8, 2017, https://blogs.worldbank.org/developmenttalk/populism-and-development-policy.

caused an unprecedented health, social and economic crisis. Protectionists and nationalists have seized upon it as an opportunity to criticise globalisation and trade and to recycle arguments against the world trading system.[44]

The feasibility of a development-oriented approach to WTO law should therefore be assessed in light of these broader political factors.

At least as regards LCRs, it is argued that a development-oriented interpretation of WTO law could deal more appropriately with such policy instruments, providing more policy space for WTO Members to address their developmental concerns. In this sense, a more balanced interpretation of WTO provisions considering not only trade liberalisation aspects but also the development dimension of LCRs may result in a more reasonable application of WTO law and a change in the current perception that the system does not adequately handle LCRs. Where interpretation of WTO law applicable to LCRs is oriented towards the development objective and certain types of LCRs entailing legitimate societal concerns are considered justified under WTO law, WTO agreements can be perceived as more development-friendly and WTO decisions more legitimate.

In this sense, the opening paragraphs of the GATT 1947 which is now reflected in the preamble of the Marrakesh Agreement Establishing the World Trade Organisation (WTO Agreement or Marrakesh Agreement)[45] make clear that "trade agreements were intended to be an instrument for social objectives that include improved standards of living, employment and effective use of resources. In other words, global markets and trade had no independent role *per se* – they are not an end but, rather, are tools to provide a platform of economic interdependence, stability and community from which all states could benefit. The rationale of a rules-based legal order was that it would discourage states from reverting to armed conflict and, in the economic sphere, short-term self-interest and protectionism – and in-built flexibilities were an essential component."[46]

Therefore, in this context of rising populist and extremist views and crisis of the multilateral system, one should not downplay the importance of policy space for promoting developmental policies and the idea that trade agreements should not be disconnected from the particular domestic concerns facing individual countries. Under this perspec-

44 Daniel J.; Ikenson and Simon Lester, *The Pandemic Does Not Justify Protectionism or Deglobalization*, Cato Institute (15 September 2020), https://www.cato.org/publications/pandemics-policy/pandemic-does-not-justify-protectionism-or-deglobalization?hsCtaTracking=3cb14448-c10c-4f40-9388-1828b624d729%7C26a82ee4-9e24-4ed7-b26f-3762457315b5.

45 Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154.

46 Lisa Toohey, "The Embedded Liberalism Compromise As a Touchstone in Times of Political Turmoil," in *The Future of International Economic Integration: The Embedded Liberalism Compromise Revisited*, ed. Gillian; Moon and Lisa Toohey (Cambridge University Press, 2018), 41.

tive, a development-oriented interpretation of WTO agreements also contributes to the debate of revitalising the compromise for embedded liberalism under the WTO and to fightining anti-globalisation sentiments.

Likewise, a development-oriented approach may be more adequate to deal with an increasing multipolar world to the extent that is it concerned with the differences between countries in terms of their development processes, preferences and values. It can accommodate different interests and perspectives to the extent it does not intend to be a one-size-fits-all solution. Additionally, a development-oriented interpretation of WTO law seeks a closer dialogue with other subsystems of international law, in particular, the normative framework for development.

As a caveat, it is important to stress that the proposed development-oriented approach to WTO law is not intended to create a divide or deepen the gap between developed and developing countries. The modern notion of development relates to a broad economic, social and political process entailing the realisation of all human rights.[47] Under this perspective, the development debate is not only a matter of relevance for developing countries, but it is equally important for developed countries. Ultimately, development involves a process where States should guarantee the respect for, protection and fulfilment of human rights. Of course, developing countries have more immediate and basic needs, but as a human rights theme, development should matter for all countries as most of them, if not all, are somewhere in the development spectrum. It is difficult to affirm that a country has achieved the end of spectrum as development is also a process of social, economic and political struggle varying throughout time.

Also, it is important to note that the focus of this thesis is on the interpretation of WTO law as it currently stands and not on the reform of WTO law. This is because there is a stalemate in WTO negotiations since the Doha Development Round and there is no prospect of negotiations on flexibilities in the use of LCRs. In this sense, the adjudicative bodies of the WTO gain importance, despite the Appellate Body paralysis, in promoting the interpretation of WTO law towards the development objective. As panels continue to operate and certain WTO Members are working on a temporary solution to maintain the viability of a two-step WTO dispute settlement system with the 'Multi-Party Interim Appeal arbitration arrangement' (MPIA),[48] , interpretation of WTO agreements

47 Arjun K. Sengupta, "Conceptualizing the right to development for the twenty-first century," in *Realizing the Right to Development: Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Developmen* (Geneva: United Nations, 2013).

48 Multi-Party Interim Appeal arbitration arrangement, notified to the WTO on April 30, 2020, WTO Doc. JOB/DSB/1/Add.12. Available at: https://trade.ec.europa.eu/doclib/docs/2020/april/tradoc_158731.pdf. Accessed on May 30, 2020.

by adjudicatory bodies remain an important subject. Nevertheless, due to the limits of the interpretative function of the panels and the Appellate Body, which cannot rewrite the law, and considering the rationale under which WTO rules were originally crafted, some modest suggestions on reform of WTO rules affecting LCRs will be made in the last chapter.

Structure of the thesis

In order to develop an answer to the research question, that is, whether a development-oriented approach to WTO law applicable to LCRs is feasible from the legal and political perspectives, and whether it could mitigate the severity of the WTO rules restricting LCRs and make the use of such policy instruments possible when they genuinely incorporate development objectives, the thesis is structured as follows:

Chapter 1 presents a general picture of LCRs, discussing its objectives and economic effects. It also delineates the legal constraints and incentives for their implementation, demonstrating that local content measures are at the crossroads between free trade and development. On one side, WTO rules and international investment agreements (IIAs), by focusing on the trade-distortive effect of LCRs, tend to prohibit or restrict them. On the other side, the normative framework for development, which includes ICESCR, UNDRD, MDGs, SDGs and other development-related human rights instruments, by highlighting the States' right and duty to formulate appropriate national development policies, supports the use of LCRs as legitimate development tools.

Chapter 2 contains a thorough evaluation of all LCR cases that have been submitted to the WTO dispute settlement system. It analyses in more details the WTO disciplines constraining LCRs and evaluates how panels and the former Appellate Body[49] have interpreted them. This type of analysis is important to the extent that it shows what space is left for WTO Members to adopt LCRs under WTO law, considering current interpretation of its rules, and whether panels and the Appellate Body, in interpreting WTO rules affecting LCRs have struck an 'appropriate balance' between the objective of trade liberalisation and that of development.

Chapter 3, in turn, discusses the relevant normative framework for development, and how it relates to LCRs. In laying the groundwork for a development-oriented analysis of WTO rules affecting LCRs, this chapter details the normative and legal content of the human rights instruments related to the right to development. If such human rights

49 It is important to note that by at time of conclusion of the present thesis, the WTO Appellate Body had not been recomposed and has been unable to hear new appeals since 10 December 2019. For further discussion on the Appellate Body crisis, see section V.2.1 of the thesis.

norms are to provide relevant orientation for trade policy, it is necessary to elucidate their normative and legal content and how they could be applicable to the field of trade policy and, in particular, in the field of LCRs.

Chapter 4 discusses the role of development in WTO and the importance of factoring in development in the interpretation of the WTO agreements. In particular, it analysis the mechanisms in WTO law and the customary rules of interpretation that could be used to articulate development in its interpretative process, also examining its limits.

Chapter 5 analyses the development-oriented approach in light of the current institutional and political challenges of the WTO. Considering that the political processes and factors surrounding a dispute settlement system affect its functioning and the discretion left to adjudicators in interpreting and determining the substantive law they are to apply, the chapter will discuss whether current institutional and political factors allow for a development-oriented approach to WTO law.

Lastly, Chapter 6 makes suggestions on possible development-oriented interpretations of WTO rules applicable to LCRs considering the legal, institutional and political challenges identified in Chapters 4 and 5 and make some modest proposals on reform of WTO rules affecting LCRs.

Importance of the thesis

It is worth mentioning that while so far the studies in international trade law involving LCRs have limited themselves to analysing the interpretations of panels and the Appellate Body in the relevant case law, mostly agreeing with their rationale and recommending the end of local content measures,[50] this study makes a critical analysis of such jurisprudence, firstly based on an in-depth review of the objectives and potential economic effects of LCR; and, secondly, based on the idea that the WTO objective is not reduced to trade liberalisation, encompassing a development objective, and its law should be read in light of the such development objective and the normative framework for development.

50 Umberto Celli Junior, *OMC: Jurisprudência e Requisitos de Conteúdo Local como Política Industrial* (Curitiba: Juruá, 2017), 241-44; Holger P Hestermeyer and Laura Nielsen, "The Legality of Local Content Measures under WTO Law," *Journal of World Trade* 48, no. 3 (2014); Jan-Christoph Kuntze and Tom Moerenhout, "Are Feed-In Tariff Schemes with Local Content Requirements Consistent with WTO Law?," in *Frontiers of International Economic Law: Legal Tools to Confront Interdisciplinary Challenges*, ed. Freya Baetens; and José Caiado (Brill, 2014).

Secondly, while some authors have defended the development dimension of the WTO,[51] no work has articulated such development dimension in relation to a concrete case. Besides, the works proposing more coherence and dialogue between trade and human rights present strong theoretical justifications for their argument but lack more practical recommendations on how to articulate human rights into trade.[52] While building upon the theoretical grounds of existing literature on trade and development and trade and human rights, this thesis has a particular concern on the practical operationalisation of the development dimension of WTO law in a concrete case – that of LCRs.

Thirdly, by proposing a development-oriented interpretation of WTO agreements, this thesis makes efforts to articulate more precisely the content and normative force of human rights norms and to explain how they could assist in the interpretation of international trade rules. Such analysis can have a positive impact beyond the current topic of LCRs. It is relevant for other areas where trade may impact legitimate interests such as public health, environment, the right to food, and other human rights.

By clarifying the nature and scope of application of human rights in the context of trade policy, the research may not only contribute to the legitimisation of development-oriented policies in the context of the WTO but also elsewhere, for instance, other free trade agreements and in bilateral investment agreements. Further, the proposed interpretative approach to the complex relationship between trade liberalisation and the right to development may not only be applied in the context of the WTO dispute settlement system, but may also serve as a reference for the balancing between economic law and human rights conducted by other international and regional courts and tribunals.

Finally, by discussing the development dimension of the WTO amid the current crisis of the multilateral system, the rise of populist governments and the need to revitalise the embedded liberalism compromise in the WTO, the thesis also seeks to discuss the feasibility of a development-oriented interpretative approach considering the current reality of the world trade system.

51 Rolland, *Development at the WTO*; Asif H Qureshi, "International trade for development: The WTO as a development institution?," *Journal of World Trade* 43, no. 1 (2009); Asif H Qureshi, "Interpreting WTO Agreements for the development objective," *Journal of World Trade* 37, no. 5 (2003).

52 Andrew T. Lang, "Re-thinking trade and human rights," *Tulane Journal of International and Comparative Law* 15, no. 2 (2007); Ernst-Ulrich Petersmann, "Human Rights and International Economic Law," *Trade, Law & Development* 4, no. 2 (2012). In contrast, Howse's work presents more practical considerations for addressing human rights into the WTO system. Robert Howse, *Mainstreaming the right to development into international trade law and policy at the World Trade Organization*, UN Commission on Human Rights. UN E/CN.4/Sub.2/2004/2017 (Geneva: United Nations, 2004). See also UN Office for High Commissioner of Human Rights, *Human Rights and World Trade Agreements: Using General Exception Clauses to Protect Human Rights* (New York Office of the UN High Commissioner for Human Rights, 2005).

Methodology

Different methodologies have been used to conduct this research. Chapter 1 follows an interdisciplinary and descriptive approach. It relies on both legal and economic works to describe what LCRs and their objectives are and mainly on economic literature and empirical case studies to assess their economic and social impacts. Such interdisciplinary and descriptive approach was necessary to lay the groundwork for the remaining parts of the thesis. It would only make sense to propose a development-oriented approach to WTO law applicable to LCRs if such instruments had a development dimension, that is, a potentially positive effect on the development process of the country implementing them. To this effect, it was important to review the economic literature on LCRs to evaluate under which conditions LCRs could have a positive outcome on development.

Chapter 2 is based on doctrinal research and extensive research of LCR disputes within the WTO dispute settlement system. The main idea of this chapter is to understand how panels and the Appellate Body have interpreted WTO agreements applicable to LCRs. In addition, from a statistical analysis of WTO disputes involving LCRs, it was intended to verify the profile of these disputes, that is, which Members have been involved, their level of development, what sectors have been affected, which legal rules were questioned, whether development-related arguments have been raised. In order to select those cases involving LCRs, an analysis of all consultations requested by WTO Members was made. The documents containing the Members' request for consultations or request for the establishment of the panel were examined in order to identify those that could be related to LCRs.

Chapter 3 also follows a normative approach, by discussing the concept of development and analysing the relevant norms that form the normative framework for development, detailing their normative scope and potential applicability in connection with LCRs. It also takes a historical approach, by assessing the evolution of development throughout different societal and political contexts.

Chapter 4 is basically concerned with the analysis of the interpretative process conducted by panels and the Appellate Body. It assesses the interpretative techniques used by them in order to verify whether they are open to the proposed development-oriented approach. The interpretative processes adopted by panels and the Appellate Body are evaluated in light of customary rules of interpretation.

In Chapter 5, the thesis relies on socio-legal research by analysing the impacts of social and political events on the legal decision process by WTO adjudicative bodies and how a development-oriented approach dialogues with such events. This chapter has a par-

ticular concern with situating the proposed development-oriented approach within a broader political and social context of the WTO and discussing whether it makes sense in light of current challenges of the international trade system.

Chapter 6, in turn, uses a deductive approach to make suggestions on possible alternatives for a development-oriented approach to WTO law applicable to LCRs in light of the legal, institutional and political limitations analysed in the previous chapters, and to suggest amendments to WTO rules applicable to LCRs.

CHAPTER 1

Overview of local content measures: at the crossroads between more international economic integration and more domestic policy space for development

I.1 INTRODUCTION

Chapter 1 has a primary role of presenting an overview of LCRs, including clarifying their content, economic effects, and their discipline in international law. First it will define what LCRs and their objectives are. Subsequently, in order to assess their impact on development, this study will verify what economic theory says about their effect on production, economic growth, employment, technology and welfare promotion. It will also discuss the experience of a few countries in the implementation of LCRs in their domestic economies. This economic discussion has the purpose to verify whether LCRs can contribute to development or whether they are predominantly disguised protectionism with no relevant positive effects on social and economic welfare. These questions are significant to the extent that they set the appropriate background to discuss the regulation and interpretation of LCRs in international economic law.

Ultimately, this chapter will briefly explain the legal constraints and legal incentives countries face for implementing local content measures, demonstrating that, from a legal point of view, countries face a complex regime where they can find rules that restrict and even outlaw the use of LCRs while others support and justify their implementation.

On one side, several WTO rules, oriented towards the liberalisation of trade, increase of market access and the principle of non-discrimination, limit the adoption of LCRs. Bilateral Investment Treaties (BITs), International Investment Agreements (IIAs) or Preferential Trade Agreements (PTAs) can also restrict their implementation. Conversely, human rights instruments such as the ICESCR and the UNDRD lay the groundwork for a "right to development" and stress the right of self-determination of peoples to pursue their own social, economic, and cultural goals, reinforcing the inherent right of countries to regulate certain domains of crucial importance for their development process. To this effect, they support the use of LCRs to the extent such instruments of industrial policy can potentially be used as development tools. They also shed light on the interconnectedness between human rights and development and on the need for a rights-based assessment of regulations where their impact on the realisation of human rights should be considered. In as much as LCRs can have potential positive effects on employment levels, technological and productive capabilities, among others, a rights-based analysis of rules restricting their use may be adequate.

In this sense, LCRs are also impacted by the phenomenon of fragmentation of international law where different specialised legal regimes have emerged with relatively autonomous rules, legal institutions and sphere of legal practice, but their mutual rela-

tionships remain undefined, lacking a more coherent link and coordination.[53] In the case of LCRs, the frameworks of international trade law, on one side, and human rights and development have developed in independent ways and in the context of different legal institutions and legal practices. The question is how the relationship between these apparently different "boxes" should be conceived and how they should relate to each other.

From the legal standpoint, therefore, countries are faced with potentially conflicting rules either restraining or supporting the adoption of LCRs as policy intruments. In the background of this variety of rules affecting the use of LCRs, there is an increased globalised world where economic governance has been geared towards more liberalising processes of international economic integration. At the same time, there are critiques to this process which has been described as hyperglobalisation[54] and a call for a new compromise of embedded liberalism where markets should be embedded in their social context and trade agreements should be instrumental for social objectives that include improved standards of living, employment and sustainable development.[55] In addition, the surge of popular nationalist movements point out to some degree of popular rejection of deeper economic integration by some sections of the population, which felt they have been left behind while others had profited from globalisation.[56] Also, growing inequality suggests that economic global governance should be more attentive to the social impact of its rules. This reinforces the need for continued debates on the subject of countries' policy space[57] in a scenario of increasing international constraints.

This discussion is of particular relevance to the theme of LCRs. To the extent that it is argued that these requirements can have positive effects on a countries' development process but are largely restrained under international trade rules, countries are left at a crossroads where they must choose between complying with international trade rules (to which they agreed) geared towards more economic integration and liberalisation or pursuing policies whose instruments are outlawed by trade agreements but potentially

53 International Law Commission, *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law. Conclusions of the work of the Study Group.*, ILC Study Group. A/CN.4/L.702 (United Nations, 2006), 11.

54 Rodrik, *The globalization paradox: democracy and the future of the world economy*; Stiglitz, *Making Globalization Work*.

55 Reid, "The WTO's purpose, regulatory autonomy and the future of the embedded liberalism compromise," 229.

56 Reid, "The WTO's purpose, regulatory autonomy and the future of the embedded liberalism compromise," 222.

57 Policy space "is about the [countries'] freedom to choose the best mix of policies possible for achieving sustainable and equitable economic development given their unique and individual social, political, economic, and environmental conditions." Bhumika Muchhala, *The Policy Space Debate: Does a Globalized and Multilateral Economy Constrain Development Policies?*, Woodrow Wilson International Center for Scholars (Washington, 2007), 1.

relevant for their development process and somehow justified by human rights instruments supportive of a right to development.

The lack of a strong coherence between the international trade law system and the legal framework supportive of development does not contribute to a constructive debate on the countries' policy space and polarises a debate (free trade vs development) which should pursue harmony.

I.2 OVERVIEW OF LCRS

LCRs are industrial policy instruments that can comprise a series of measures requiring companies to source inputs or process raw materials locally, employ local people, establish local facilities, transfer technology to local firms, among other goods, labor, ownership or other types of requirements where domestic origin or source is a necessary condition to obtain an advantage.

The use of LCRs has been pervasive. Developed nations have used them to nurture their local industries. In developing nations, these policies have been widespread, cutting across most industrial sectors.[58] During the last few years and especially after the 2008 global financial crisis, the use of LCRs by both developed and developing countries has intensified. Hufbauer, Schott and Cimino were able to identify 117 local content measures proposed or implemented since 2008 and there are reasons to believe that this number may be underestimated.[59] Taken together, they may have had an impact of US$ 2.7 trillion on world trade, i.e. about 17 per cent of world trade in goods and services.[60]

LCRs are not new. They have been traditionally used in a wide range of sectors. For instance, in Japan after Second World War "foreign investment was simply banned in most key industries. Even when it was allowed, there were strict ceilings on foreign ownership, usually a maximum of 49%. Foreign companies were required to transfer technology and buy at least specified proportions of their inputs locally (…)".[61] The government of the United Kingdom, in turn, "used a variety of 'undertakings' and 'voluntary restrictions' regarding local sourcing of components, production volumes and exporting. When Nissan established a UK plant in 1981, it was forced to procure 60% of value added locally, with a time scale over which this would rise to 80%. It is reported that the British

58 Francisco M. Veloso, "Understanding local content decisions: economic analysis and application to the automotive industry," *Journal of Regional Science* 46, no. 4 (2006): 747.
59 Hufbauer, Schott, and Cimino, *Local Content Requirements: Report on a Global Problem*, 3.
60 Sacha Silva, *Local Content Requirements and The Green Economy*, UNCTAD (Geneva, 2014), 4.
61 Chang, *Bad Samaritans: The myth of free trade and the secret history of capitalism*, 44.

government also 'put pressure on [Ford and GM] to achieve a better balance of trade". [62] In addition, fast-growing developing economies such as China, India, Korea and Taiwan have also made use of LCRs as part of their industrial policy.[63]

Their use is particularly notorious in the oil & gas sector, tracing back to the exploration of the North Sea in Europe and the establishment of state-owned companies in many countries around the world.[64]

LCRs have been adopted by countries for purposes related to the development of a domestic industry and creation of jobs. The objectives of LCRs have evolved from creating backward linkages (that is, supplying input to the local economy through transfer of technology, the creation of local employment opportunities, and increasing local ownership and control) to creating forward linkages (that is, processing the sector's output prior to export).[65] Developing countries use them as an argument for developmental policies. [66]

LCRs are allegedly important industrial policy instruments for developing countries to achieve social and economic development, especially in a context where developed countries are first-movers in many sectors and developing countries need to find ways to decrease economic and technology dependence and develop a mature industry to compete in the international market. As mentioned in a study of the United Nations Conference on Trade and Development (UNCTAD), the main rationale for the use of LCRs is either the development or the strengthening of the domestic industrial base, "particularly where a developing country has been historically engaged in enclave and/or low value-added activities, or where weak linkages exist between large industries and the rest of the manufacturing and service sectors."[67] By adopting them, developing countries intend to foster industrial development, economic growth and local employment. However, many developing countries struggle to develop effective local content

62 Chang, *Bad Samaritans: The myth of free trade and the secret history of capitalism*, 81.

63 See also Chang, *Bad Samaritans: The myth of free trade and the secret history of capitalism*, 12; Christopher Tran, "Using GATT, Art XX to Justify Climate Change Measures in Claims Under the WTO Agreements " *Environmental and Planning Law Journal* 27 (2010); Robert Hunter Wade, "What strategies are viable for developing countries today? The World Trade Organization and the shrinking of 'development space'," *Review of International Political Economy* 10, no. 4 (2003).

64 Ulrich H. Klueh, Gonzalo Pastor, and Alonso Segura, "Policies to improve the local impact from hydrocarbon extraction: Observations on West Africa and possible lessons for Central Asia," *Energy Policy* 37, no. 3 (2009).

65 Tordo, *National oil companies and value creation*, 8.

66 Jan-Christoph Kuntze and Tom Moerenhout, *Local Content Requirements and the Renewable Energy Industry - A Good Match?*, International Centre for Trade and Sustainable Development (Geneva: ICTSD, 2013), 18, https://www.ictsd.org/sites/default/files/downloads/2013/06/local-content-requirements-and-the-renewable-energy-industry-a-good-match.pdf

67 Silva, *Local Content Requirements and The Green Economy*, 4.

policies.[68] Sometimes, countries do not design them properly, not considering the countries' specificities in terms of the economy, infrastructure, labour skills, among others, so that ultimately LCRs do not contribute to the creation of backwards linkages with the local economy. Furthermore, the rules can be implemented in a non-transparent or highly politicised manner and linked to corruption schemes. In addition, governments can implement counter competitive rules which may lead to the cartelisation of the industry.[69]

Even though developed countries did and continue to use LCRs, in the political forum of the international trading system, these countries have usually condemned this type of measure[70] whilst emerging economies have advocated for more flexibilities in the WTO disciplines to implement them.[71] This is reflected in the fact that most of the LCR cases questioned in the context of the WTO dispute settlement system are initiated by developed Members against developing Members (except in the renewable energy sector), as will be detailed in Chapter 2. For some developed countries, it is possible to see a disconnection between discourse in international forum and action at the domestic level. The US, for instance, as regards LCRs adopts the "Keynes at home, Smith abroad" approach, making efforts to curb all sorts of localisation barriers adopted by third countries while domestically enacting substantial LCRs in the area of government procurement."[72]

Despite this more explicit critique on LCRs by developed countries, the fact is that this policy instrument remains relevant for developed and developing economies and, as such, both continue to use them. The use of LCRs by developed countries is particularly significant in the renewable energy sector nowadays.

68 Silva, *Local Content Requirements and The Green Economy*, 7.

69 Wade, "What strategies are viable for developing countries today? The World Trade Organization and the shrinking of 'development space'," 3. For negative experience of a local content policy in Brazil in the plastic sector, see Natalia de Lima Figueiredo, "Acordo TRIMS: Flexibilização ou não? Política de Conteúdo Local, Processo Produtivo Básico (PPB) e os Desafios para a Indústria Brasileira e a Integraçao Latino-Americana," *Revista de Direito Internacional* 16, no. 1 (2016), https://doi.org/

70 UNCTAD, *Foreign direct investment and performance requirements: new evidence from selected countries*, United Nations (New York, 2003), 37.

71 See, for instance, the Communication from Brazil and India in which these countries, supported by other developing countries, argued for more flexibilities in the regulation of investment measures under the TRIMS Agreement, including LCRs. According to them, "while developed countries had decades to choose when, how and in which economic sectors to apply such measures, developing countries had their right to choose simply revoked. Besides, the provisions of Article 4 (…) are clearly insufficient in providing the necessary flexibility to make use of investment measures in the context of development policies." Among the proposals formulated by Brazil and India, it is suggested that developing countries should be allowed to use TRIMs in order to promote domestic manufacturing capabilities in high value-added sectors or technology-intensive sectors; stimulate the transfer or indigenous development of technology; promote purchases from disadvantaged regions in order to reduce regional disparities within their territories; increase export capacity in cases where structural current account deficits would cause a major reduction in imports; among others. WTO, Communication from Brazil and India, 3 (2002).

72 Lucas Eduardo Freitas do Amaral Spadano, "Local content requirements: perspectives under WTO law and other international norms" (Doctoral thesis University of Sao Paulo, 2020), 172.

Additionally, as a result of the COVID-19 pandemic and associated economic crisis, countries may possibly increase the use of local content instruments.

The COVID-19 has exposed fragilities in the functioning of global value chains (GVC), which are characterised by high interdependencies between leading firms and suppliers located across several continents and has re-ignited an old debate on the trade-offs between GVCs and "nationalisation". There is now a trend towards more "self-sufficient economic systems, at least in strategic sectors such as medical equipment and drugs, or the production of inputs for assembling sophisticated machines, the final production of which still occurs in high-wage countries."[73] In this context, "most analysts concur that the current pandemic will reinforce relocation and reshoring trends."[74]

As a sign of increasing resort to LCRs as a result of the pandemic, in March 2020, the US implemented LCRs associated with the government's assistance programme to small business. In particular, former US president Donald Trump signed a $2 trillion stimulus package aimed at helping small businesses, among others, during the crisis. The stimulus package allocated $350 million to the Paycheck Protection Program (PPP), to fund small business loans to pay for payroll and operating costs. However, any business seeking PPP loans shall sign a form where they agree to purchase American-made products and equipment. Specifically, a provision on the form states that a small business owner agrees "[t]o the extent feasible, to purchase only American-made equipment and products."[75]

In addition, in Nigeria, state governments have provided support to small businesses in the fashion industry to produce masks and other personal protective equipment (PPE) and experts defend the use of LCRs across different sectors.[76] The Nigerian House of Representatives has passed for the second reading a bill to enforce the participation of the Nigerian workforce in all the sectors of Nigeria's economy.[77]

73 Piergiuseppe Fortunato, "How COVID-19 is changing global value chains?," (2020). https://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=2460.

74 Fortunato, "How COVID-19 is changing global value chains?."

75 Simon Lester, "A Short History of Buy American Content Requirements in SBA Loans," *International Economic Law and Policy Blog*, May 13, 2020, https://ielp.worldtradelaw.net/2020/04/a-short-history-of-buy-american-content-requirements-in-sba-loans.html.

76 Adewole Ojo. "COVID-19 pandemic – Lessons for local content practice in Nigeria". May 13, 2020. Available at: https://businessday.ng/opinion/article/covid-19-pandemic-lessons-for-local-content-practice-in-nigeria/. Accessed on Oct 6, 2020.

77 Levinus Nwabughiogu. "COVID-19: Reps seek enforcement of local content in all sectors of economy." 25 May 2020. Available at: https://www.vanguardngr.com/2020/05/covid-19-reps-seek-enforcement-of-local-content-in-all-sectors-of-economy/. Accessed on Oct 6, 2020.

The African Energy Chamber has also stated that African local content has become a key priority for government, regulators and industry stakeholders in established markets like Nigeria or Angola and frontier energy markets such as Senegal or Uganda.[78] Indonesia, in turn, is planning a new local content regulation to determine the local procurement rate for pharmaceutical products.[79] The World Health Organisation (WHO) and the United Nations Conference on Trade and Development (UNCTAD) stress that COVID-19 heightens need for pharmaceutical production in poor countries.[80] Therefore, with COVID-19, the use of LCRs may be accentuated at least in some sectors.

I.2.1 Definition of LCR

Before detailing the economics of LCRs, it is important to understand the meaning and scope of the term. For the purposes of this research, the terms "LCR", "local content measure" and "local content rule" will be used interchangeably.

Although there is no agreed definition for these terms, it is possible to identify definitions which encompass narrower or broader scopes in the economic and legal literatures.

Narrower views of LCRs identify them as requirements that a certain percentage of domestic intermediate goods be used in the production of final products.[81] Grossman contends that local content rules have arisen as a response to an increasing number of imports of parts and subassemblies in a context of tariff escalation.[82] With the decline in the imports of more value-added goods as a result of greater tariff protection, and the increase of imports of intermediate goods, local content has evolved as a means to protect the intermediate levels of production. In this regard, Grossman asserts that "a content protection scheme requires that a given percentage of domestic value added or domestic components be embodied in a specified final product".[83] Failure to meet the requirement most commonly results in the payment of higher tariff rates on the

78 African Energy Chamber. "First Local Content Committee Meeting Calls for Local Content as an Enabler of Africa's Economic Recovery". 1 Sep 2020. Available at: https://energychamber.org/2020/09/01/first-local-content-committee-meeting-calls-for-local-content-as-an-enabler-of-africas-economic-recovery/. Access on Oct 6, 2020.

79 Ait-Allah Mejri. "Local content regulation for pharma not the panacea". 17 June 2020. Availble at: https://www.thejakartapost.com/academia/2020/06/17/local-content-regulation-for-pharma-not-the-panacea.html. Accessed on Oct 6, 2020.

80 UNCTAD. "COVID-19 heightens need for pharmaceutical production in poor countries". 27 May 2020. Available at: https://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=2375. Accessed on Oct 6, 2020.

81 W. Gu and Shigemi Yabuuchi, "Local content requirements and urban unemployment," *International Review of Economics & Finance* 12, no. 4 (2003).

82 Gene M. Grossman, "The Theory of Domestic Content Protection and Content Preference," *The Quarterly Journal of Economics* 96, no. 4 (1981).

83 Grossman, "The Theory of Domestic Content Protection and Content Preference," 583.

intermediate goods or other sanctions or disadvantageous terms to the producer of the final goods.

LCRs under this narrower perspective comprise a local content protection scheme in physical terms or in value added terms. Under the former, a certain percentage of the total quantity of the intermediate inputs used in the final goods is required to be of domestic origin. Under the latter, which are most commonly present in industries with complex production processes, the requirement involves a minimum ratio of domestic to gross value-added measures at domestic prices.[84]

Under broader definitions, the concept of local content is expanded to include not only the requirement to add value to the local production by sourcing inputs locally, but also by employing local people of different levels of know-how in the company's structure (local employment requirements); providing local services and materials; requirement to further process certain raw material domestically; establishing or expanding local facilities; local participation in the form of ownership requirements (e.g. restrictions on the foreign ownership of companies in specific sectors, requirement that certain forms of partnership between national and foreign companies are established); and requirements to perform research and development in or transfer technology to the host country.[85] Quantitative local measures involve those requirements that are set in terms of volume or value (e.g. number of local employees to be hired or percentage of domestic value-added content) whilst qualitative local content rules comprise qualitative requirements such as transfer of technology or training obligations.[86]

The forms in which such requirements can be implemented are multifaceted. Tordo mentions, for instance:

> (i) simple contractual requirements that favor the use of local goods and services or impose training obligations; (ii) regulation and taxation that discriminate in favour of local industries (…) (iii) regulation or contractual obligations that foster the transfer of technology from international to

84 Grossman, "The Theory of Domestic Content Protection and Content Preference." 583.

85 Isabelle Ramdoo, *Unpacking Local Content Requirements in the Extractive Sector: What Implications for the Global Trade and Investment Frameworks*, E15Initiative (Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum, 2015), 2; UNCTAD, *Foreign direct investment and performance requirements: new evidence from selected countries*; UNCTAD, *Global Investment Trends Monitor no. 18*, United Nations (New York and Geneva, 2015); Abolfazl Kazzazi and Behrouz Nouri, "A conceptual model for local content development in petroleum industry," *Management Science Letters* 2, no. 6 (2012).

86 Ramdoo, *Unpacking Local Content Requirements in the Extractive Sector: What Implications for the Global Trade and Investment Frameworks*, 2.

> domestic companies; (iv) bidding parameters that include local content among the criteria (…); (v) incentives to foreign investors to reinvest their profits domestically; (vi) investment in infrastructure and education; (vii) the mandatory incorporation of foreign companies; (viii) local ownership requirements; and (ix) direct government intervention through state owned enterprises.[87]

Governments may impose local content measures by means of mandatory requirements or encourage their adoption by granting advantages to enterprises in the form of tax exemptions, better financing terms, preferential treatment in government procurement, import licencing, among others.[88]

The term "local content requirement" is not defined in any WTO Agreement. The only occasion where this expression appears is in the GPA,[89] a plurilateral agreement. It is included in a broad category of measures that encourage local development or improve the balance-of-payments accounts along with the licensing of technology, investment, countertrade and similar action or requirement. Other WTO agreements, although they do not use the nomenclature "local content", do refer to LCRs at least in the narrow sense. This is the case of Art. III:5 of GATT 1994;[90] paragraph 1(a) of the Illustrative List annexed to the TRIMs Agreement;[91] and Art. 3.1(b) of the SCM Agreement.[92]

In the context of WTO disputes, panels and the Appellate Body have generally referred to the term "local content measures" in instances where there was requirement to partially

87 Tordo, *National oil companies and value creation*, 8.

88 Hufbauer, Schott, and Cimino, *Local Content Requirements: Report on a Global Problem*; Ramdoo, *Unpacking Local Content Requirements in the Extractive Sector: What Implications for the Global Trade and Investment Frameworks*; Tordo, *National oil companies and value creation*; UNCTAD, *Foreign direct investment and performance requirements: new evidence from selected countries*.

89 The Agreement on Government Procurement signed in Marrakesh on 15 April 1994 ("GPA 1994") contains the expression *"domestic content requirement"* and the revised version of the GPA 1994 entered into force on 6 April 2014 ("Revised GPA") contains the expression *"local content requirement"*. The GPA 1994 and the Revised GPA will be individually or collectively referred as to the "GPA".

90 "GATT III:5 (...) any internal quantitative regulation relating to the mixture, processing or use of products in specified amounts or proportions which requires, directly or indirectly, that any specified amount or proportion of any product which is the subject of the regulation must be supplied from domestic sources (…)."

91 "Illustrative List. (…) (a) the purchase or use by an enterprise of products of domestic origin or from any domestic source, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production (…)."

92 "SCM Agreement, Article 3.1(b) subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods."

source intermediate goods or equipment of domestic origin to be used in final goods produced, or projects taken place, in the host country.[93]

In *Canada — Renewable Energy (2013)* and *Canada — Feed-In Tariff Program* (2013), the Appellate Body defined domestic content requirements as "one type of TRIM [Trade-Related Investment Measure] regulated under the Illustrative List annexed to the TRIMs Agreement. One of the examples in the Illustrative List annexed to the TRIMs Agreement refers specifically to requirements relating to "the purchase or use by an enterprise of products of domestic origin or from any domestic source, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production" (footnotes omitted).[94]

From this definition, it is not clear if the Appellate Body intended to say that all domestic content requirements are equal to requirements to purchase or use products of domestic origin whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production. Nevertheless, the analysis of the case law indicates that, at least conceptually, panels and the Appellate Body do view the concept of local content measures from a narrow perspective (i.e. as a requirement to source inputs locally). In disputes involving ownership requirements and domestic partnering requirements, for instance, they do not use the nomenclature "domestic content" or "local content".

A trade policy paper of the Organisation for Economic Co-operation and Development (OECD) has distinguished between, on one side, localisation barriers, and, on the other

93 For instance, in *Indonesia – Autos* (1998), the local content requirement of the Indonesian 1993 car programme was related to the grant of "tax benefits for finished motor vehicles incorporating a certain percentage value of domestic products, and customs duty benefits for imported parts and components used in motor vehicles incorporating a certain percentage value of domestic products" (Panel Report, *Indonesia — Autos* (1998), para. 14.12). *India – Autos* (2002) involved the analysis of the WTO-consistency of an ""indigenization" requirement, also identified as a "local content" requirement whereby each Indian car manufacturer was obliged to achieve indigenization of a minimum level of 50 percent by the third year from the date of its first import of cars in the form of completely and semi-knocked down kits ("CKD/SKD kits"), or certain automobile components, and 70 percent by the fifth year from that date. The indigenisation requirement was computed taking into account the percentage of the CIF value of imported parts and materials assembled into the passenger car in relation to the ex works value of the passenger car. The Panel noted that "to meet the indigenization requirement, car manufacturers must purchase Indian parts and components rather than imported goods" (Panel Report, *India — Autos*, 2002, pp. 144, para 7.197). *Canada — Renewable Energy/Canada — Feed-In Tariff Program* (2013) dealt with minimum required domestic content levels that should be satisfied in the development and construction of solar PV electricity generation facilities participating in both streams of the Feed-in Tariff (FIT) Programme and of wind power electricity generation facilities in the Canadian Province of Ontario. The Panel found that, under those domestic content requirements, at least some Ontario-sourced goods (especially, renewable energy generation equipment and components) should be used by suppliers utilizing solar PV technology and generators using wind power technology.

94 Appellate Body Reports, *Canada — Renewable Energy and Canada — Feed-in Tariff Programme* (2013), para 5.6.

side, local content requirements. The former covers a variety of measures favouring domestic industry over foreign competitors. They comprise not only LCRs, but also subsidies or other preferences that are only received if producers use local goods, locally-owned service providers, or domestically-owned or developed intellectual property (IP), or IP that is first registered in that country; requirements to provide services using local facilities or infrastructure; measures to force the transfer of technology or IP; requirements to comply with country- or region-specific or design-based standards; and requirements to conduct or carry out duplicative conformity-assessment procedures in the country.[95] LCRs are defined narrowly as requirements to purchase domestically manufactured goods or domestically supplied services.

Considering the scope of this research, the broader definition of LCRs (treated as "localisation barriers" in the OECD study) will be adopted. Some explanations are provided in support of this conceptual choice.

First of all, "content" can have an all-encompassing scope such as "the things that are held or included in something" or "the amount of a particular constituent occurring in a substance".[96] Accordingly, the LCRs linked to an industrial policy program could be interpreted as referring to goods, labor, ownership or other types of requirements where domestic origin or source is a necessary condition to obtain an advantage.

Secondly, the economic literature focused on the study of specific industries (e.g. oil and gas, automotive) have identified measures beyond the requirement of purchase or use of domestic products in local production which are also identified as "local content" by national governments. Accordingly, the analysis of these other measures has the purpose of better reflecting industry and market realities.

Finally, the definition of local content rule is directly linked to the policy outcome intended by a national or sub-national government. As will be explored in detail in this chapter, LCRs are generally related to industrial policies which aim at increasing the value-added of national industry, creating employment opportunities, improving human capacity development, enhancing local technology and R&D capacity, among others. As a result, the adoption of a broad definition of LCRs, which is linked to these development goals, is recommended.

95 Susan Stone, James Messent, and Dorothee Flaig, "Emerging Policy Issues: Localisation Barriers to Trade," *OECD Trade Policy Papers, No. 180* (2015).

96 "Oxford English Dictionaries Online," in *OED Online* (Oxford University Press, 2015).

Local content measures can be both explicit and implicit. They can reflect explicit (i.e. numerical or qualitative) targets contained in national legislation or industry-specific regulations that specify a minimum share of locally sourced goods and/or services (or conversely a maximum ceiling for imported inputs). More implicit forms of LCRs involve the creation of 'weighting' or 'scorecard' systems where local content is one of usually several criteria (including export performance and whether the sector in question has been designated as strategic by the Government).[97]

Lastly, LCRs may be *de jure* (i.e. written in legislation, regulations or directives) or *de facto*. This last case may involve, for instance, public procurement where selection processes are heavily influenced by political considerations and a statement by relevant government officials that local content will be given heavy weighting in tender assessment could suffice to indicate that a *de facto* LCR will be applied.[98]

I.2.2 Objectives of LCRs

The objectives of LCRs generally fit within industrial development, employment and technological objectives. These objectives are "naturally interdependent, suggesting that pursuit of one objective can generate benefits associated with the other objectives."[99] For instance, employment may be increased by industrial development, employment-focused measures may improve skill development, which, in turn, positively reflects on technological development. Technological development may also be beneficial for industry development, which, in turn, may create more jobs.[100]

Industrial development objectives encompass broader to more specific policy purposes including improvement of industry diversification or industry's competitiveness in the export sector, for instance, through the development of internationally competitive players, support of small and medium enterprises (SMEs) or minorities in economy and improvement of the security of energy supply through the development of the Renewable Energy (RE) sector. Also, specific goals of technological development may involve measures requiring foreign firms to transfer technology to domestic suppliers which may improve technological capacity, prompting innovation at the national, regional, or industrial level.[101] Accumulation of technological capabilities is also relevant for developing long-term competitiveness and adapting technology to local needs.[102]

97 Silva, *Local Content Requirements and The Green Economy*, 4.
98 Silva, *Local Content Requirements and The Green Economy*, 4-5.
99 Stone, Messent, and Flaig, "Emerging Policy Issues: Localisation Barriers to Trade," 17.
100 Stone, Messent, and Flaig, "Emerging Policy Issues: Localisation Barriers to Trade," 8.
101 Stone, Messent, and Flaig, "Emerging Policy Issues: Localisation Barriers to Trade," 18.
102 Oliver Johnson, *Exploring the effectiveness of local content requirementsin promoting solar PV manufacturing in India*, Discussion Paper n. 11/2013 (Bonn: German Development Institute, 2013), 4.

Rabiu Ado summarises the main reasons for application of LCRs especially in relation to developing countries: (i) protect infant industry; (ii) counterbalance market power of international firms; (iii) compensate local community; (iv) achieve political harmony; (v) protect strategic sectors.[103]

First, the infant industry argument is related to the idea that the emerging domestic industries, unlike their mature international counterparts, lack the economies of scale advantage and therefore need to be protected and supported up to the period they can effectively compete with the established international firms. This argument, although today associated with developing countries, has historically been used by the United States in the time of its industrialisation amidst the British dominance of the global trade.[104]

Letnes and Moses explain that the importance of the infant industry argument had gained international traction by the end of the 50's, where an international consensus was beginning to develop that a free market economy did not benefit all countries equally. Progressively, it was recognised that economic development demanded the support for infant industries, so that countries could better exploit the terms of trade, or to develop alternative solutions to deteriorating terms of trade. In other words, there was a recognition that "free markets were neither fair nor politically sustainable; the state needed to intervene in the market in order to secure a more just distribution of resources and power."[105]

Second, the market power argument asserts that LCRs may be used to counterbalance the market power of international suppliers vis-à-vis local industries. In this same line, a 2014 UNCTAD study mentions that the crucial objective of a local content policy that truly promotes competitiveness is "not to simply shift industry rents from foreigners to locals, but rather to gradually minimise the market power of large international contractors, whose global sourcing arrangements and repeat use of preferred suppliers may lockout fully capable and competitive domestic suppliers." [106]

Third, the social compensation argument posits that LCRs can also be justified based on their social impact. The main idea behind this argument as applicable specially to

103 Rabiu Ado, "Local Content Policy and The WTO Rules of Trade-related Investment Measures (TRIMS): The Pros and Cons," *International Journal of Business and Management Studies* 2 no. 1 (2013): 141-42. The author's analysis is focused on the oil and gas industry.

104 Ado, "Local Content Policy and The WTO Rules of Trade-related Investment Measures (TRIMS): The Pros and Cons," 141.

105 Jonathon Wayne Moses and Bjørn Letnes, *Managing Resource Abundance and Wealth: The Norwegian Experience* (Oxford University Press, 2017), 20.

106 Silva, *Local Content Requirements and The Green Economy*, 11.

the oil and gas sector is that "oil communities that have been negatively affected by oil operations should get reasonable benefit in return. This can be made possible through adopting policies of local content that are capable of influencing job creation and value addition for the local communities."[107] In this same line, Ramdoo explains that the use of LCRs in resource-rich developing countries is triggered by the idea that they have not satisfactorily benefitted from the wealth generated by their resources and need to address issues relating to a better and more equitable distribution of wealth and the need to create more job opportunities considering the capital-intensiveness of extractive sectors.[108]

Fourth, the political harmony argument states that LCRs can be used to achieve alignment between government objectives and those of society. For instance, LCRs were used in Nigeria to prevent conflict and crises especially within the oil producing communities. In Liberia and Sierra Leone, they were adopted to achieve post-conflict harmony.

Fifth, according to the strategic sectors argument, certain sensitive sectors such as energy, communication and transport, are subjected to some ownership restrictions because of their strategic importance. Economic excellence in these sectors may not be guaranteed without some form of protectionism.[109]

Another goal for implementing LCRs in developing countries is the safeguarding of the balance of payments (BOP), given the often very high foreign currency drainage associated with the importation of goods and services for strategic industries.

Furthermore, LCRs may also entail more specific objectives of interest to both developed and developing countries such as energy security, environment and national concerns over privacy and cybersecurity. This is reflected in the use of LCRs in the renewable energy (RE) segment and in the digital field.

Recently, LCRs have exponentially increased in the RE sector. In this specific case, they are justified not only for environmental purposes but also for energy security reasons.[110] In the RE area, it is known that state intervention is required to promote RE technologies necessary to mitigate climate change. As explained by Johnson, "without it, environ-

107 Ado, "Local Content Policy and The WTO Rules of Trade-related Investment Measures (TRIMS): The Pros and Cons," 142.

108 Ramdoo, *Unpacking Local Content Requirements in the Extractive Sector: What Implications for the Global Trade and Investment Frameworks*, 1.

109 Ado, "Local Content Policy and The WTO Rules of Trade-related Investment Measures (TRIMS): The Pros and Cons," 141.

110 Kuntze and Moerenhout, *Local Content Requirements and the Renewable Energy Industry - A Good Match?*, 13.

mental costs of carbon emissions will not be internalised, perceived risks associated with new technologies will remain high and energy systems will continue along conventional fuel-based path-dependent trajectories."[111] LCRs, in this context, are used as a policy tool to guarantee that private and public investment benefits the local economy by protecting infant industry and encouraging foreign firms to open local manufacturing facilities or outsource manufacturing to domestic firms. [112]

Among the developed countries, Canada (in Ontario and Quebec), European Union (EU) members (e.g. Spain, Italy, France, Greece and Croatia) and the United States have used local content measures in some form to stimulate the growth of renewable energy projects. Among the developing countries, the use of local content in green economy strategies extends from large global players such as China, Brazil, India, South Africa and Argentina, to smaller countries such as Tunisia, Ecuador and Nepal.[113]

In this case, the argument in favour of implementing LCRs are as important to developing as it is to developed countries in fostering their infant industries. RE is a dynamic field with new technologies under development, which may be considered infant industry regardless of the economic status of the country. Therefore, although LCRs bring an appealing developmental argument which favours its use by developing countries, in the RE sector, the case for LCRs may be equally relevant for both developing and developed countries. In fact, in the context of the WTO dispute settlement system, most of the cases involving the RE segment concern complaints against the use of LCRs by developed Members.[114]

Likewise, there has been a growing number of LCRs enacted in connection with digital markets. They involve local data storage (or data residency) requirements mandating storage and/or processing of data within the imposing country and local data centre requirements demanding that firms, wishing to provide certain digital services in a particular country, establish a data centre in that country.[115]

111 Johnson, *Exploring the effectiveness of local content requirementsin promoting solar PV manufacturing in India,* 1.

112 Johnson, *Exploring the effectiveness of local content requirementsin promoting solar PV manufacturing in India,* 1.

113 Silva, *Local Content Requirements and The Green Economy*, 1.

114 *US – Renewable Energy* (DS510) (2019), *European Union and Certain Member States — Certain Measures on the Importation and Marketing of Biodiesel and Measures Supporting the Biodiesel Industry (DS459), India – Solar Cells* (DS456) (2016), *European Union and certain Member States — Certain Measures Affecting the Renewable Energy Generation Sector (DS452); European Union and a Member State — Certain Measures Concerning the Importation of Biodiesels (DS443), Canada — Feed-In Tariff Program (DS 412 and DS426), China – Wind Power (DS419).*

115 Shadikhodjaev, *Industrial policy and the World Trade Organization: between legal constraints and flexibilities*, 172.

Shadikhodjaev explains that "[S]uch LCRs in the digital environment have been especially pervasive since the revelations by Edward Snowden, a former contractor for the Central Intelligence Agency in 2013, and afterward about the US National Security Agency's expansive secret gathering of private data from US-based Internet companies. These localisation measures apparently intend to insulate in-country digitised information from undesirable third-country checks." [116]

Requirements for data localisations or restrictions on free flow of data have been made in countries such as Vietnam, Indonesia, Brunei, Iran, China, India, Australia, Korea, Nigeria, Russia, Malaysia, Philippines and within the European Union.[117] Under data localisation requirements, companies may be obliged to store or process data locally, in addition to being subject to governmental consent for data transfers. Rationale for data localisation includes privacy and cybersecurity. As explained by Panday and Malcolm, "concerns about the lack of control over collection of personal data and its processing and storage in jurisdictions with autocratic governments, a weak rule of law, or surveillance programs have led governments to recognise data protection as a legitimate reason to limit transfer of data."[118] Data is also considered a strategic asset for countries and they may limit its flow outside its borders in order to increase its control and surveillance not only for security reasons but for geopolitical purposes.[119]

While several LCRs on the digital markets are motivated by privacy or cybersecurity concerns, others are part of an industrial development strategy to attract foreign IT companies' investment and stimulate the domestic internet industry. [120]

I.2.3 What economic theory says about LCRs?

Theoretical economics studies on the effects of LCRs are contradictory. On one hand, there are studies which indicate that LCRs, under certain conditions, could actually work as catalysts for local economic development providing local firms an opportunity to enter into the manufacturing of complex products and generating spillovers or learning effects, which could increase the overall capability of the industry to levels that would

116 Shadikhodjaev, *Industrial policy and the World Trade Organization: between legal constraints and flexibilities*, 172.
117 Neha Mishra, "Data Localization Laws in a Digital World: Data Protection or Data Protectionism?," *NUS Centre for International Law Research Paper No. 19/05* (2016): 139.
118 Jyoti Panday and Jeremy Malcolm, "The Political Economy of Data Localization," *Partecipazione e Conflito* 11, no. 2 (2018): 516.
119 Panday and Malcolm, "The Political Economy of Data Localization," 518.
120 Shadikhodjaev, *Industrial policy and the World Trade Organization: between legal constraints and flexibilities*, 173.

not be attainable by alternative means.[121] They also suggest that LCRs may have positive effects on the production of the intermediate sector, unemployment, and welfare.[122] Ultimately, the implementation of LCRs stimulates economic diversification and the development of reliable backward linkages.[123]

On the other hand, studies show a growing concern that the increased use of LCRs is accompanied by trade protectionism. Opponents to LCRs generally rely on neoliberal theory and submit that LCRs are unjustified as they go against the principle of comparative advantage, forcing or encouraging businesses and countries to invest their resources inefficiently in sectors where they do not have a comparative advantage, artificially improving the competitiveness of local products and hampering international competition.[124] Accordingly, opponents of LCRs see them as per se trade-distortive, economically burdensome[125] and "by definition protectionist measures."[126] They argue that LCRs increase production and output prices and reduce competitiveness, which ultimately leads to economic isolation. [127]

These studies against LCRs also mention that when they are used in connection with government procurement, they reduce the number of firms eligible to enter markets, potentially leading to an increase of market power and a reduction in output and employment. This allegedly raises the cost of the government procurement, undermining the 'value for money' objective. [128]

A recent and controversial OECD study on localisation barriers claims that trade-related local content measures have led to a fall in global welfare of USD 5 billion or 0.07% of

121 Francisco M. Veloso, "Local Content Requirements and Industrial Development Economic Analysis and Cost Modeling of the Automotive Supply Chain" (PhD Massachusetts Institute of Technology, 2001); Nagesh Kumar, "Performance requirements as tools of development policy : lessons from experiences of developed and developing countries for the WTO agenda on trade and investment," in *Putting Development First: The Importance of Policy Space in the WTO and International Financial Institutions*, ed. Kevin Gallagher (London: Zed Press, 2005).

122 Gu and Yabuuchi, "Local content requirements and urban unemployment," 492.

123 Kazzazi and Nouri, "A conceptual model for local content development in petroleum industry," 2171. See also Tordo, *National oil companies and value creation*.

124 Johnson, *Exploring the effectiveness of local content requirementsin promoting solar PV manufacturing in India,* 11.

125 Hufbauer, Schott, and Cimino, *Local Content Requirements: Report on a Global Problem*, 14.

126 Kuntze and Moerenhout, *Local Content Requirements and the Renewable Energy Industry - A Good Match?*, 7.

127 Stone, Messent, and Flaig, "Emerging Policy Issues: Localisation Barriers to Trade," 35.

128 Stone, Messent, and Flaig, "Emerging Policy Issues: Localisation Barriers to Trade," 9.

global income, in addition to shrinking world imports by USD 12 billion, world exports by 11 billion and reducing international competitiveness.[129]

The prohibition of LCRs under WTO agreements – despite their potential contribution to industrial development – is based on the idea that they are an economically inefficient mechanism to protect or promote domestic industry.[130] As a consequence, investors in any country should be free to source the components of their manufacturing processes abroad if foreign inputs are cheaper and arguably better in terms of quality than local ones. The underlying assumption is that if local inputs were more cost-effective, there would be no need for LCRs as producers would naturally source their inputs locally.[131]

Despite the controversy in economic literature on the economic effects of LCRs, studies show that under certain conditions, LCRs can indeed have a positive effect on development.[132] As mentioned by a study commissioned by UNCTAD:

> The dominant theoretical framework presumes that performance requirements such as LCRs by their very nature can lead to no other outcome except distortion. This conclusion, however, is based on the assumption of perfect competition and equality among investors. Once this assumption is lifted, there are a number of effects that can benefit domestic industries. Thus, LCRs can (i) raise employment levels; (ii) promote or protect verti-

129 Stone, Messent, and Flaig, "Emerging Policy Issues: Localisation Barriers to Trade," 5. Note, however, that it is not clear what the study means by 'global welfare'. Most of the LCRs analysed by the authors were relatively recently implemented (2009-2013). Since local content measures are not expected to have significant short-term effects, it may be too hasty to draw any inferences from their welfare effects within such a limited period of time. In addition, the OECD study focuses on the LCRs impacts on imports of the intermediate goods, exports and employment. Declines in imports and even in exports are expected upon the adoption of LCRs. Moreover, the measurement of employment level in the study is not clear as it is not possible to conclude whether it measures direct and indirect level of employments derived from the activities affected by the local content rules. Also, the study does not measure one of the most important factors which is supposed to derive from the implementation of LCRs, i.e. technological spillovers. Finally, the report does not account for the effect of LCR measures on investment.

130 Ratnakar Adhikari, "The Local Content Paradox at the WTO: A Minor Lapse or Lapse or Organised Hypocrisy?," *Bridges*, 2008. The basic economic rational of WTO main rules and their underlying principles, namely non-discrimination, predictability and transparency, "is to regulate, if not remove, distortions to trade. These distortions contribute to economic inefficiency, by, for example, reducing consumer choice, raising prices to consumers, including downstream processors, and disrupting global supply chains (…)" Michael Daly, *Is the WTO a World Tax Organization?; A Primer for WTO Rules for Policy Makers*, IMF Technical Notes and Manuals 16/03 (Washington: International Monetary Fund, 2016), 3.

131 Adhikari, "The Local Content Paradox at the WTO: A Minor Lapse or Lapse or Organised Hypocrisy?."

132 Tordo explains that the idea that LCRs generate distortions, inefficiency, corruption cannot be generalized. Economic histories of a number of developed and developing countries demonstrate that LCRs contributed to economic growth. Tordo, *National oil companies and value creation*, 15-21.

> cally integrated domestic industries; (iii) induce inward FDI in intermediate goods production; (iv) shift profits to domestic firms.[133]

Also, a 2016 study from the United Nations Industrial Development Organisation (UNIDO) concludes that "when local content policies are well designed, focused, transparent, adapted to the national context and linked to other policies and useful long-term targets, they can play a crucial role in domestic industrial development and competitiveness."[134]

Accordingly, the use of LCRs as industrial policy tools can be relevant for promoting economic growth associated with social benefits for the local population. Not only developing countries can benefit from these measures but also developed economies, for instance, in the RE sector where government intervention is required to promote green energy and governments need to increase the social impact of their investments. As mentioned by Tordo, "local content policies are in essence a trade-off between short-term efficiency and long-term economic development."[135]

In analysing economic studies on the effects of LCRs starting from the pioneer work from Grossman[136], Veloso mentions that virtually all of them conclude that LCRs result in overall welfare losses. However, the author submits that the problem with this line of work is that: "it assumes well-behaved costs, typically higher for local suppliers than imports, and inefficiencies arising solely from market power. Yet, local content requirements are usually enacted in contexts far from equilibrium, with issues related to scale, barriers to entry, learning and technological spillovers playing a critical role."[137] According to Veloso, these aspects have been by and large overlooked by existing work.

A number of recent papers have recognised the controversy over the use of this policy tool. However, they focus on understanding the conditions under which LCRs can be a relevant policy option in promoting industrial and technological development and generating spill-over effects. As mentioned by Kazzazi and Nouri, "local content development is a challenging task, and agencies, facilitators and politicians should be encouraged to learn how things work, and to strive for continuous and incremental improvements." [138]

133 Silva, *Local Content Requirements and The Green Economy*, 12. See also Veloso, "Understanding local content decisions: economic analysis and application to the automotive industry."
134 Weiss, "The role of local content policies in manufacturing and mining in low-and middle-income countries," 1.
135 Tordo, *National oil companies and value creation*, 9.
136 Grossman, "The Theory of Domestic Content Protection and Content Preference."
137 Veloso, "Understanding local content decisions: economic analysis and application to the automotive industry," 749.
138 Kazzazi and Nouri, "A conceptual model for local content development in petroleum industry," 2174.

Ultimately, the case for LCRs is not black and white. As put by Veloso, "it is possible to find situations where domestic content requirements have a positive effect in the economy and other situations where the policy is damaging."[139] Local content policy should not be focused on protectionist ends, but on efforts to facilitate the participation of domestic companies in industrial activities on a competitive basis.

In this sense, a 2014 UNCTAD study on LCRs and the green economy points out some factors on which the success of local content policies depends. Most importantly, this work stresses that (i) "local content regimes have to be couched in a wider strategy of value-added creation and competitiveness."[140] It also mentions that (ii) local content policies should be designed openly and transparently, backed by strong and accountable institutions; (iii) local content targets should be set realistically and should be modified as conditions change; (iv) LCRs should be gradually phased out to allow for industrial development and avoid the entrenchment of special interests that thrive on regulatory barriers; and (v) local content should not to be seen as a panacea for every challenge within the domestic economy.

Regarding the first factor, the study mentions that, "by far the most important success factor identified in the literature on local content is the presence of wider strategic planning in trade and industry that accompanies local content regulations." [141]

As to the second factor, the study stresses that, in the application of LCRs, a most common stakeholder concern relates to a "perceived narrowness in the way by which local content regimes are often formulated, particularly in developing countries with a history of contention between the Government and large multinationals."[142] To address these concerns, policymakers should focus on process, i.e. the institutions and channels by which local content targets are formulated and enforced, and ensure the participation of foreign and local companies, the civil society and the public sector, including the Ministries that are not directly related to the sectors targeted by the LCR.

Additionally, the process of setting and enforcing local content targets must be administered by institutions with a clear, limited mandate. These institutions should have enough financial resources to implement the designed policy, but more importantly, they should be independent and honest and not '"stacked' with political appointees or current or ex-employees of former state monopolies – a difficult proposition in a devel-

139 Veloso, "Understanding local content decisions: economic analysis and application to the automotive industry," 768.
140 Silva, *Local Content Requirements and The Green Economy*, 11.
141 Silva, *Local Content Requirements and The Green Economy*, 11.
142 Silva, *Local Content Requirements and The Green Economy*, 14.

oping country setting where such persons are normally the only qualified nationals with adequate exposure to industry jargon." [143]

As relates to the third factor, the study points out that the most difficult barrier facing policymakers in the design of LCRs regime is the question of where to apply local content targets, and at what level to set relevant targets.

Firm-level production functions are highly sensitive to the degree of substitutability in production, the supply conditions in the domestic intermediate-goods industry, and the market structure for the goods in question. Because LCRs directly impact these production functions, they require careful calibration by policymakers if they are to encourage multinationals to domicile their activities within the host country. Furthermore, LCRs must carefully balance costs and competitiveness. The burden of compliance costs being placed directly on firms – particularly in the absence of a wider government strategy to address deficiencies in training and infrastructure – may adversely affect export competitiveness.[144]

Setting an appropriate level of LCR[145] goes back to the issue of an open regulatory process with the involvement of all relevant actors. Also, it is important to allow local content regulations and as conditions change – for example, as capacity improves, or as global/domestic economic conditions change, as technology moves in new directions, or as new information is available to policymakers with respect to current and potential local capacity.

According to the study, an optimal approach would eschew hard, quantitative targets in favour of "soft" measures. Consequently, rather than setting arbitrarily ambitious LCR targets, an optimal local content regime should concentrate instead on mandating firms to develop plans for domestic capacity-building, which the companies themselves expect to work, based on their market knowledge and expertise. The proposed approach draws from the Norwegian case, where legislatively mandated local content requirements were eschewed in favour of "soft" measures.

143 Silva, *Local Content Requirements and The Green Economy*, 14.

144 Silva, *Local Content Requirements and The Green Economy*, 11.

145 In this sense, if LCRs are too high, they may not create incentives for local investments. If they are too low, they may not have an adequate impact on local economy. See: Johnson, *Exploring the effectiveness of local content requirementsin promoting solar PV manufacturing in India,* 26. As mentioned in a UNCTAD study, "Higher levels of local content do not necessarily bring about economic benefits. There are trade-offs to be understood and managed, especially when local content levels reach the point where domestic suppliers are unable to win contracts on the basis of an internationally competitive tender. When that happens, any achievements in terms of new jobs and filled order books may come at the expense of loss in competitiveness, higher costs to investment projects, or reduced government revenues." Silva, *Local Content Requirements and The Green Economy*, 5.

Regarding the fourth factor, the study shows that LCRs, like any form of protection, should be carefully calibrated and implemented over time, and ideally reduced over time as capacity improves. A key lesson from real LCR cases was that the initial industrial gains from local content measures were often dissipated as insulated local suppliers – provided with a guaranteed and legislated industry demand, removed from market prices and technological trends – gradually lost sight of standards of international competitiveness, and suffered a strong adjustment during periods of market liberalisation. Therefore, it is important that LCRs are gradually phased out to avoid that certain groups unduly benefit from an extended protection.

As to the fifth and final factor discussed in the study, i.e., that local content should not be seen as a panacea to systemic problems in the economy, the study stressed that without policymakers focusing on addressing basic infrastructural and trade/industry policy deficiencies before implementing LCRs, ambitious local content targets simply act as an additional cost on foreign operators, who will either reduce their investments or reduce their profits, which could in turn lead to shareholder pressure back home to further reduce investments and exposure in the host country.

In the same line of argument of the UNCTAD study, a 2013 discussion paper funded by the German Development Institute found that for LCRs to be effective, they must be:

> "(a) limited in duration and incorporate planned evaluation phases, (b) focused on technologies and components for which technical expertise is available and global market entry barriers are manageable, (c) linked to additional mechanisms, such as training and promotion of business linkages and measures to support other stages of the value chain and wider services that are integral to success of renewable energy industries."[146]

LCRs should be phased out once the protected infant industry has become competitive. However, a big danger of their use involves regulatory capture, i.e., manufacturers successfully lobbying to indefinitely maintain the privileges received. In Brazil, for instance, certain LCRs involving the plastic sector which were supposedly designed to address developmental issues in the Amazon region of the country had the effect of privileging certain economic actors and increasing their monopoly power.[147] In this sense, the more obvious lessons in implementing LCRs are related to the challenges, which include the

146 Johnson, *Exploring the effectiveness of local content requirementsin promoting solar PV manufacturing in India*, 1.

147 Figueiredo, "Acordo TRIMS: Flexibilização ou não? Política de Conteúdo Local, Processo Produtivo Básico (PPB) e os Desafios para a Indústria Brasileira e a Integraçao Latino-Americana."

need to strike a proper balance between supporting local content in nascent industries and introducing distortions to processes that would otherwise be market-driven."[148]

Additionally, if local technologies are not competitive, companies may then be burdened with higher costs and lower performance, which they may pass on to the consumer.[149] If there is no potential for innovation and learning-by-doing, "LCRs will merely help firms to sustain their activities but not help them develop any competitive edge."[150] Education and training of workers and capacity building for local enterprises is a challenge for LCR-related policies. However, pursuing these elements would allegedly increase the educational opportunities so that locals can be involved in the jobs created by such policies.[151]

Furthermore, LCRs should be coupled with other financial support tools, such as duty exemptions, tax breaks, special economic zones, and engagement with local and foreign manufacturers, engineering, procurement and constructions contractures, government bodies and other stakeholders that can provide information to build a more adequate policy design.[152] Indeed, governments use a range of investment incentives to offset costs incurred by companies that choose to establish in the host market. These incentives range from direct transfers – e.g. grants (for R&D projects or new capital investment) and dedicated public-private investment funds – to indirect transfers, such as low or no-cost government services in marketing and distribution.[153]

In assessing LCRs in the RE sector, Kuntze and Moerenhout consider cooperation and financial incentives as two basic conditions for LCRs to create value in the host economy. They mention that when governments prepare the introduction of an LCR beforehand with local businesses and when it is coupled with some form of subsidy, they are more likely to generate positive welfare effects. Cooperation between government and local enterprises is supposed to increase certainty and information on both sides and to help governments to learn how to establish the appropriate rate of LCRs.[154] Other important aspects of implementing potentially effective LCR policies mentioned by these authors involve market size, stability and adequacy of policy design.

148 Klueh, Pastor, and Segura, "Policies to improve the local impact from hydrocarbon extraction: Observations on West Africa and possible lessons for Central Asia," 1134.

149 Johnson, *Exploring the effectiveness of local content requirementsin promoting solar PV manufacturing in India,* 1; Klueh, Pastor, and Segura, "Policies to improve the local impact from hydrocarbon extraction: Observations on West Africa and possible lessons for Central Asia."

150 Johnson, *Exploring the effectiveness of local content requirementsin promoting solar PV manufacturing in India,* 14.

151 Klueh, Pastor, and Segura, "Policies to improve the local impact from hydrocarbon extraction: Observations on West Africa and possible lessons for Central Asia," 1131.

152 Johnson, *Exploring the effectiveness of local content requirementsin promoting solar PV manufacturing in India,* 13.

153 Silva, *Local Content Requirements and The Green Economy*, 3.

154 Kuntze and Moerenhout, *Local Content Requirements and the Renewable Energy Industry - A Good Match?*, 10.

Sufficient market size is an important requirement for generating welfare effects from the use of LCRs as it is directly related to the country's ability to offer a stable demand. If there is no such demand, the higher costs as a result of LCRs may discourage investors from entering this market.[155]

Additionally, LCR policies should be inserted in a context of predictable government policies, "including prudent long-term fiscal management, low levels of red tape, and a level-playing field for all businesses."[156] Also, the development of a transparent policy and good governance is vital for avoiding state capture by rent-seeking of private interest groups.

In analysing the oil & gas sector, Klueh, Pastor and Segura have reported some best practices which were important to ensure that the potential for State capture is minimised. This includes "(i) a transparent set of rules regarding the monitoring of a—narrowly defined—local content concept and (ii) the provision of information to the market through designated and highly professional government bodies about investment opportunities within the oil sector and spin-off effects."[157]

Also, by examining the same segment, Kazzazi and Nouri concluded that "political factor is the most important macro factor which affects the local content development directly or through other factors like environmental, local capabilities and infrastructure factors."[158] Environmental factors involve mainly a stable macroeconomic environment (e.g. exchange rates, interest rates, development of domestic prices) which is decisive for encouraging investments. Local capabilities involve education, skills and expertise development, transfer of technology and know-how and an active research and development portfolio within manufacturing and services of local companies. Infrastructure factors concern the availability of certain conditions such as information technology, public utilities like roads, railways and air transport, telecommunications, electricity, and water supply which are basic for the development of business and their productivity.[159]

Tordo, who also focused on the oil market, argued that although "blueprint" solutions to successful value creation are difficult to suggest and country-specific factors influence the optimal design of local content policies, it is possible to identify general principles that can be applied broadly: (i) "set transparent and measurable targets"; (ii) "account

155 Kuntze and Moerenhout, *Local Content Requirements and the Renewable Energy Industry - A Good Match?* 10.
156 Klueh, Pastor, and Segura, "Policies to improve the local impact from hydrocarbon extraction: Observations on West Africa and possible lessons for Central Asia," 1132.
157 Klueh, Pastor, and Segura, "Policies to improve the local impact from hydrocarbon extraction: Observations on West Africa and possible lessons for Central Asia," 1141.
158 Kazzazi and Nouri, "A conceptual model for local content development in petroleum industry," 2169.
159 Kazzazi and Nouri, "A conceptual model for local content development in petroleum industry," 2169-70.

for technological strangeness";[160] (iii) "gradually maximize local value-added". (iv) "create and enhance local capabilities that can be transferred to other sectors"; (v) "report on the local content performance of operators;"[161] (vi) "create an enabling environment", setting a mix of incentives and mandatory requirements which however should be temporary so that domestic companies have incentives to be competitive, in addition to providing conditions for improving local skills, business know-how, technology, capital market development, wealth capture, and wealth distribution to create the conditions for domestic companies to emerge.[162]

Based on the above, it is possible to conclude that several factors may contribute to the success of a local content policy. Below, based on the review of the literature discussed above, we summarise the main factors which should be present in order to maximise the chances that LCRs fulfil their economic and social objectives.

- LCRs should be set in the context of a wider strategy of value-added creation and competitiveness;
- LCRs should not be seen as a panacea for every challenge within the domestic economy;
- Countries introducing LCRs should have sufficient market size and political stability;
- Countries adopting LCRs should have adequate local capabilities and infrastructure or be able to develop them;
- LCRs should be linked to additional mechanisms, such as training and promotion of business linkages and measures to support other stages of the value chain and wider services;
- The process of local content policy formulation should be open and transparent, backed by strong and accountable institutions and allowing for cooperation between government and the market;
- Local content targets should be set realistically and should be modified as conditions change; LCRs should be gradually phased out.

160 Tordo explains that policy makers need to consider the ability of the rest of the economy to develop service capacity through backward linkages and the speed at which such capacity can be created. The creation of forward links, in turn, is more complicated and demands scale and technology that are not always within the reach of a country. Tordo, *National oil companies and value creation*, 10.

161 Tordo clarifies that performance of local - private or state-owned - and foreign companies should be periodically compared to establish benchmarks and targets and identify opportunities for transferring best practice, and reports should be publicly available. Tordo, *National oil companies and value creation*, 10.

162 Tordo, *National oil companies and value creation*, 10-11.

I.2.4 Case studies

Just as the economic literature foresees adverse and positive effects for local content policies, countries' actual experiences in implementing LCRs also vary. There are cases of success and failures deriving from these policies,[163] which enforces the idea that the economic effects of LCRs differ depending on a series of factors varying from specificities of the respective economy to the way that the local content policy is designed. Below, we summarise the different experiences of Norway, Brazil and Nigeria in the adoption of LCRs in the oil and gas sector to illustrate the different economic and social effects that local content policies implemented by different countries in the same segment can present.

I.2.4.1 Norwegian experience

Norway is considered a reference in the implementation of LCRs in the oil & gas sector and its industrial policy in this area is considered a success in terms of its outcome to the economic and social development of that country.

Letnes and Moses explain that the local content policy in Norway can be divided up into three distinct periods. For most of Norway's oil history, however, the government has not played an active role in encouraging local content. In the first period (1963–70) and the more recent period (1986–present), the government has largely remained on the sidelines, trying to create a level playing field upon which Norwegian firms could compete. It is only in the intermediate period (1970–86) that it is possible to see a more interventionist policy, when the government actively encouraged and facilitated the expansion of local content.[164] The four main tools for securing local content in this period involved: (a) local content legislation, (b) the negotiated nature of the licensing agreements; (c) the large portion of activity on behalf of the national oil company Statoil (and its reliance on Norwegian suppliers and subcontractors); and (d) explicit technology agreements.

In this sense, regarding point (a), Norway introduced in its legislation an obligation according to which licensees were obliged to use Norwegian goods and services in petroleum operations to the extent that these were competitive in terms of quality, service, delivery time and price. This requirement was not meant to protect Norwegian industry from competition. Instead, it intended to secure opportunities for Norwegian industry—to participate on an equal footing, in line with Norway's objectives of maintaining international competitiveness in order to survive in a global economy.[165]

163 Tordo, *National oil companies and value creation*, 11.
164 Moses and Letnes, *Managing Resource Abundance and Wealth: The Norwegian Experience*, 153.
165 Moses and Letnes, *Managing Resource Abundance and Wealth: The Norwegian Experience*, 156.

However, it was a flexible mechanism – and not law – that allowed for more cooperation between Norwegian companies and international oil companies enabling transfer of technology and experience. Through negotiated licencing agreements, the government. would negotiate with the international oil companies (IOCs) to secure agreements that would team up Norwegian companies with more capable IOCs, so that the Norwegian firms could learn from their more experienced international partners.

Statoil, the national oil company, also played a major role in the local content policy as its interests were prioritised, for instance, with most of the licenses and the best allocated fields. In addition, in 1978, Norway determined that at least 50 percent of research and development (R&D) efforts related to field development should occur in Norway. As a result, applicants were required to sign R&D agreements (so-called technology agreements) with Norwegian institutions. Meanwhile, the government was expanding its petroleum-related educational offerings, to fuel the increased demand.

Along with local content mechanisms, Norway was able to employ different policy tools to build up local competence and expertise. The result is evident today in a strong, competitive, and internationally oriented Norwegian petroleum industry.[166]

I.2.4.2 Brazilian experience

In Brazil, the use of LCRs in the oil and gas sector is also well known. With the purpose of incentivising the development of the petroleum chain in Brazil and increasing the positive impacts of oil and gas production on the supply chain, the Brazilian government established that, as part of bidding rounds for the concession of an exploration block, companies should acquire a certain percentage of domestic goods and services. LCRs involved not only intermediate goods, but equipment, systems, labour, services and other inputs necessary for oil and gas exploration and production.[167]

While Brazilian oil company Petrobras had a history of developing local suppliers, a formal LCR was only established in law in 1997. The requirements were progressively increased in bidding rounds for new oil exploration and understood by both private operators and the national oil company.[168] In order to ensure that local content percentages are complied with, the Brazilian National Petroleum Agency can apply penalties to the companies, including payment of fines, loss of concessions, among others.

166 Moses and Letnes, *Managing Resource Abundance and Wealth: The Norwegian Experience*. 156

167 Carlos Eduardo Ramos Xavier Junior, *Políticas de Conteúdo Local no Setor Petrolífero: o caso brasileiro e a experiência internacional*, Texto para Discussão No. 1775 (Rio de Janeiro: Instituto de Pesquisa Econômica Aplicada (IPEA), 2012).

168 Renato Lima De Oliveira, *Local Content Requirements in the Oil and Gas Industry in Developing Countries: The Return of ISI?*, Research Paper No. 2015-20. (MIT Political Science Department 2015), 18-19.

Studies show that there are indicia that the level of employment in the oil and gas- related sector as well as productivity have increased as a result of implementation of LCRs. Nevertheless, they point out that LCRs in the sector have not contributed to creating a local competitive supply sector.[169] They have showed that the current design of LCRs has not been efficient in promoting the transfer of technology to domestic companies. In this sense, highly technology-intensive industries in the oil and gas sector in Brazil are less developed. In this segment, international companies are more present. Brazilian local content policy in the sector is criticised for focusing on merely achieving the percentages of investments of R&D instead of concentrating on actions that guarantee that R&D investments are directed to highly technology-intensive sectors.[170]

In Brazil, the local oil-related sector is mostly comprised by technology licensors from leading international companies and subsidiaries of multinational companies. Domestic companies occupy the segments of less technological complexity, and the most complex products and services are imported from international suppliers. As a result, the interaction of domestic companies with international companies established in Brazil has not led to technology transfer. In this sense, there is need for a stronger link between local content policies and innovation policies.[171]

I.2.4.3 Nigerian experience

LCRs are also common in petroleum contracts in Nigeria. These requirements mandate the use of local goods and services if they are of equal quality and availability to imported ones and if their prices are no more than 10 percent higher than imported goods and services. In addition, training and local employment obligations are common. During licencing rounds, bidders were also required to commit to the development of Nigerian expertise and know-how.

The Nigerian Oil and Gas industry Content development Bill was approved in 2010. The Bill strengthened the requirements for developing the local industrial and service sectors and introduced mechanisms to coordinate and monitor implementation. The law required all oil and gas explorers, producers, transporters, and exporters to use a greater share of indigenous Nigerian service companies and personnel in their project development plans. Furthermore, every multinational company should hold a minimum of 10

169 Raquel Filgueiras de Almeida, "Políticas de Conteúdo Local e setor para-petroleiro: uma análise comparativa entre Brasil e Noruega " (Master Universidade Federal do Rio de Janeiro, 2015), 80.

170 Bruno Plattek de Araújo, André Pompeo do Amaral Mendes, and Ricardo Cunha da Costa, "Perspectivas para o desenvolvimento industrial e tecnológico na cadeia de fornecedores de bens e serviços relacionados ao setor de P&G," *BNDES 60 anos - Perspectivas Setoriais* (2012): 269-72.

171 See Almeida, "Políticas de Conteúdo Local e setor para-petroleiro: uma análise comparativa entre Brasil e Noruega "; Xavier Junior, *Políticas de Conteúdo Local no Setor Petrolífero: o caso brasileiro e a experiência internacional.*

percent of its annual profits in a Nigerian bank. The country's national oil company operates a Nigerian Content division that promotes local content in the oil and gas sector by training engineers and welders and increasing the availability of low-interest loans to local contractors. A three-year grace period was provided to allow foreign companies to adjust their procurement and investment strategies.[172]

Despite strict quantitative targets for employment and local sourcing, satisfactory results in practice have taken time to materialise due to the insufficient capacity of local suppliers to meet targets or the unavailability of sufficient skills to be absorbed by the industry. The continuous instability in the Niger delta is also a challenge to Nigerian local content policy.[173] A few Nigerian companies have, however, started to internationalise themselves and are now operating in other African countries. But given the potential of Nigeria, this remains largely insufficient.[174]

As can be seen from the cases discussed above, there are distinct outcomes for local content measures and there is no simple answer when it comes to assessing the economic and social effects of local content rules. While the countries implementing them have certainly intended to strengthen industrial capacity, generate jobs and spill-over effects, not all of them achieved the desired objectives. This confirms that designing adequate LCRs is a complex task which involves several variables. The result of this equation in terms of the economic and social benefits to the implementing country may be positive or negative depending on a series of aspects, as summarised above. The examples of Norway, Brazil and Nigeria reflect the realities of three distinct countries with different levels of political stability, local capabilities, infrastructure and different policy designs which have led to different consequences.

I.2.5 Potential dangers of LCRs

Despite having the capacity of playing an important role in domestic development and competitiveness, LCRs also present dangers. As seen, policy-makers face challenges in designing and implementing LCRs which are adequately adapted to the countries' specificities, including resource endowments, economic and political systems, infrastructure, technological capabilities, labour skills, in addition to the changing international geography of production and consumption. As a result, if not implemented properly, LCRs can indeed generate the inefficiencies pointed out in the studies presented in section I.2.3 above opposing the implementation of LCRs. Consequently, they can lead to price in-

172 Tordo, *National oil companies and value creation*, 117.
173 Tordo, *National oil companies and value creation*, 117. 117.
174 Ramdoo, *Unpacking Local Content Requirements in the Extractive Sector: What Implications for the Global Trade and Investment Frameworks*, 5.

creases in the final product, outputs with reduced quality, reduction of consumer choice, among others. Ultimately, LCRs may not foster the competitiveness of an industry, but, on the contrary, stimulate an inefficient structure. Also, when not gradually phased-out, LCRs can stimulate the maintenance of non-competitive and inefficient companies.

For instance, a study on the Australian local content policy on the auto industry shows that LCRs "led to market fragmentation and high costs and prices, reduced national income, and were strongly counter competitive, with the administering government authority effectively cartelizing the industry. They retarded rather than promoted technical change, and reduced rather than increased employment in auto production, distribution and repair."[175] Furthermore, they resulted in high costs for consumers and for the economy as a whole.[176] For this reason, it is very important that LCRs are well designed, focused and adapted to the national reality.

In addition, LCRs may increase the risks of a country's exposure to corruption and market inefficiencies if not designed and implemented in a transparent way.[177] In this sense, LCRs may be pushed for by interest groups who seek monopoly rents in an environment with restricted competition and lobby to maintain their privileges.[178]

In discussing corruption risks in local content policies in the oil and gas industry, a study commissioned by Transparency International pointed out some factors that make countries more prone to corruption risks, including favouritism and conflict of interests, political interference and discretionary power of public officials in implementing and enforcing local content rules and nepotism in the hiring of local staff.[179]

In this sense, sometimes the decision to adopt LCRs may be closely aligned with public officials' or investors' interests rather than the promotion of local businesses and the domestic industry. In many resource-rich countries, politicians and decision-makers may be very close to the economic elite, and in several cases are the main beneficiaries of LCRs. As such, "local content rules end up benefiting and generating revenues for government-affiliated individuals, failing to achieve some of their objectives such as

175 Garry Pursell, *The Australian experience with local content programs in the auto industry*, World Bank Policy Research Working Paper No. 2625 (World Bank, 2001), 2-3.
176 Pursell, *The Australian experience with local content programs in the auto industry,* 9.
177 Moses and Letnes, *Managing Resource Abundance and Wealth: The Norwegian Experience*, 143.
178 Johnson, *Exploring the effectiveness of local content requirementsin promoting solar PV manufacturing in India,* 10.
179 Maíra Martini, *Local content policies and corruption in the oil and gas industry*, Transparency International and CHR Michelsen Institute (2014), 3-6.

promoting enterprise development and the broader sustainable development of the country."[180]

In Uganda, it was shown that local policies and resources are often directed to groups based on their affiliation, ethnicity and loyalty to the president. Likewise, in Angola, contracts were awarded to companies belonging to Angolan decision-makers. [181]

Moreover, non-transparent and discretionary decision-making may also "allow public officials to extort international companies wishing to operate in the country, in order to favour their own companies or those of close friends and family members." [182] It is suggested that, in many cases, "the local companies chosen by the public official do not even deliver the services contracted. International companies merely have to pay the agreed cost – that here functions as a bribe in order to be awarded the contract – and perform the services themselves". [183]

Also, LCRs imposing local employment obligations can also result in nepotism. Although they may be important to build technical capacity, create opportunities for nationals and reduce developing countries' dependence on foreign companies' expertise, "considering the lack of good and well-paid employment opportunities in the majority of resource-rich developing countries, local content positions may be in high demand, which – combined with opaque mechanisms and political interference – could also open space for corruption." [184]

Measures adopted to curb corruption within the public administration in general, such as enhancing transparency in decision-making, establishing clear and transparent procurement rules, providing access to public documents, and strengthening oversight, are also instrumental to prevent corruption in local content policies. [185]

Finally, given the public appeal of LCRs as an instrument of job creation, they can be used by populist leaders to endorse their nationalist views. In this case, it is dangerous that LCRs are used for purely protectionist purposes, to back up a nationalist ideology, and not for genuinely developmental or societal purposes.

180 Martini, *Local content policies and corruption in the oil and gas industry*, 3.
181 Martini, *Local content policies and corruption in the oil and gas industry*, 4.
182 Martini, *Local content policies and corruption in the oil and gas industry*, 4.
183 Martini, *Local content policies and corruption in the oil and gas industry*, 4.
184 Martini, *Local content policies and corruption in the oil and gas industry*, 6.
185 Martini, *Local content policies and corruption in the oil and gas industry*, 3.

Therefore, while LCRs can contribute to the countries' developmental strategies, they can also generate, if not adequately designed and implemented, adverse impacts on industrial development and industry competitiveness, and ultimately on the economy as a whole. In addition, if non-transparent LCRs are adopted, local content policy may be subject to high risks of corruption. Ultimately, they can also be distorted as a political instrument for populist leaders to support their nationalist views.

I.3 LEGAL CONSTRAINTS AND INCENTIVES TO THE USE OF LCRS

As seen above, LCRs can, under certain circumstances, be used as important development tools. However, from an international trade and investment perspective, there are a number of legal constraints on how far countries can go in putting in place and implementing such measures.[186] As will be detailed in Chapter 2, in the multilateral trading system under the WTO, several agreements restrict the adoption of LCRs, i.e., the GATT 1994, the TRIMs Agreement, the GATS, the SCM Agreement, and the GPA. The TRIPS Agreement also enable a restrictive reading of the local working of patents, that is, a requirement that the patentee manufacture the patented product locally. In addition, when these measures are found insufficient to address the concerns of investors, countries have concluded tighter agreements, in the form of bilateral investment treaties (BITs), international investment agreements (IIAs) or preferential trade agreements (PTAs), restricting even more the possibility of adoption of LCRs.

The underlying assumption of these international instruments outlawing or restricting the use of LCRs is, as mentioned, that these policy tools are trade-distortive and inefficient as they allegedly go against the principle of comparative advantage, obliging investors to purchase from inefficient local producers, which leads to price increases and the maintenance of inefficient markets.

In turn, from a human rights and developmental perspective, there are other international law instruments establishing important rights which may be used as a justification for countries longing for more policy space to implement LCRs, especially considering that they can, under certain conditions, contribute to a country's social, economic and technological development.

186 Ramdoo, *Unpacking Local Content Requirements in the Extractive Sector: What Implications for the Global Trade and Investment Frameworks*, 12.

This is the case of the right to self-determination contained in the ICESCR, the right to development enshrined in the 1986 UNDRD and also in soft law instruments such as interpretations from the Committee on Economic, Social and Cultural Rights and works from the former High Commissioner for Human Rights (currently, the Human Rights Council), the MDGs and the SDGs. The WTO agreements themselves, which contain restrictions to LCRs also have derogations, waivers and exceptions and preambular language that could mitigate the prohibitions on the adoption of LCRs.

Problematically, there is lack of coherence between these two systems: that of international trade law and human rights/development. Originally, the human-rights and the trade regimes were born after World War II with a shared goal of promoting peace but have developed in isolation from each other.[187] Human rights "were not effectively integrated into the law of most worldwide organisations so as to facilitate functional international integration".[188]

This lack of coherence between regimes is not exclusive of trade law and human rights, but affects several other specialised law-making and institution-building (e.g. environmental law, investment law, European law, international refugee law, etc.) that have emerged and have been tailored to the needs and interests of each regime but rarely taking into account adjoining fields and the relationship to each other.[189]

It is suggested in Chapter 4 that when it comes to interpretation and application of WTO agreements, many barriers have been in place which prevent a more consistent dialogue between free trade and development and free trade and human rights. This also has impacts on Members' policy space to the extent that, in certain cases, they are prevented from pursuing policies whose values and preferences are cherished by the local community, which can sound as an illegitimate intrusiveness of the WTO in the countries' right to regulate and self-determination, even in a context where they agreed to WTO agreements, making bargains as a result of their sovereignty powers.

187 It is interesting to note, though, that the International Trade Organisation which is at the origin of the global trading system was supposed to be "an integral part of the blueprint for global peace and security after WWII. A fair international trading regime was thought to be essential to global peace." See Robert Howse and Makau Mutua, "Protecting human rights in a global economy: challenges for the World Trade Organization " *International Centre for Human Rights and Democratic Development* (2000): 4.

188 Ernst-Ulrich Petersmann, "Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration," *European Journal of International Law* 13, no. 3 (2002): 622, https://doi.org/10.1093/ejil/13.3.621, https://doi.org/10.1093/ejil/13.3.621.

189 International Law Commission, *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law. Conclusions of the work of the Study Group.*, 245.

Considering the current international scenario, boosted by manifestations all around the world reflecting popular dissatisfaction, emergence of nationalist populist movements characterised by a discourse against global integration, increasingly inequality, the fact that the WTO does not adequately accommodate countries' specific values and preferences and do not adequately integrate human rights and developmental concerns into its reality contributes for its legitimacy crisis.

In the case of LCRs, it is undeniable that it has a popular appeal[190][191] and may generate popular dissatisfactions if strongly attacked under the international field. People may feel that employment opportunities may be curtailed by international rules in relation to which they have no say and no participation, which may strengthen nationalist claims.

As mentioned, LCRs have the potential of generating local jobs in a scenario of crisis, of strengthening the links between foreign and national companies, increasing the benefits that nationals and the local economy can reap from foreign investment and international economic integration. However, as will be detailed in Chapter 2, WTO panels and the Appellate Body have consistently condemned such industrial policy instrument.[192]

Nevertheless, LCRs continue to be implemented by WTO Members.[193] As mentioned above, their number increased significantly after the 2008 global financial crisis. LCRs continue to be a matter of debate on WTO committees. As explained by Shadkihodjaev:

190 For instance, there is nothing more appealing than "Buy America," a US program that restricts the purchase of non-US supplies in federal government procurements for products used in the USA. The expression gives a sense of community, that Americans will help each other for the better.

191 Shadikhodjaev argue that "LCRs are politically appealing because of their effect of creating immediate employment in targeted sectors and channelling in-country business opportunities to domestic firms. During economic difficulties, governments may resort to LCRs even more frequently than ever."Shadikhodjaev, *Industrial policy and the World Trade Organization: between legal constraints and flexibilities*, 148.

192 *Canada – Periodicals* (DS31) (1997); *Indonesia – Autos* (DS54, DS55, DS59 and DS64) (1998); *US – FSC* (DS108) (2000); *Canada - Autos* (DS139 and DS142) (2000); *Korea — Procurement* (DS163) (2000); *India — Autos* (DS146 and DS175) (2002); *US — Upland Cotton* (DS267) (2005); *Canada — Wheat Exports and Grain Imports* (DS276) (2004); *EC - Export Subsidies on Sugar* (DS283) (2005); *Turkey – Rice* (DS334) (2007); *China - Auto Parts* (DS339, DS340 and DS342) (2009); *China – Publications and Audiovisual Products* (DS363) (2010); *China – Electronic Payment Services* (DS413) (2012); *Canada – Renewable Energy/Canada - Feed-in Tariff Program* (DS412 and DS426) (2013); *Argentina – Import Measures* (DS438, DS444 and DS445) (2015); *India – Solar Cells* (DS456) (2016); *Brazil – Taxation* (DS497 and DS472) (2019).

193 Several WTO Members raised concerns over local content requirements imposed by other Members at a meeting of the Committee on Trade-Related Investment Measures (TRIMs) on 6 June 2019. Certain domestic legislation concerning fisheries, mobile and medical devices, and retail, automobile and pharmaceutical products may breach WTO rules according to some Members. The countries imposing LCRs are China, Russia, Indonesia and Argentina. See: "Local content measures scrutinized by WTO members in investment committee," 2019, accessed 27 July 2019, https://www.wto.org/english/news_e/news19_e/trim_06jun19_e.htm.

> Between 1995 and 2015, the Committee on TRIMs discussed thirty-four local content measures of sixteen WTO members, breaking down as follows: six measures (by Indonesia), four (by Brazil, China, and India each), three (by Russia), two (by Korea, Nigeria, and the United States each), and one (by Argentina, Colombia, Colombia/Ecuador/Venezuela, Malaysia, Turkey, Ukraine, and Uruguay each). Only seven (or 21 percent) of these measures were challenged in the WTO dispute settlement procedures.[194]

Also, at a meeting of the Committee on Trade-Related Investment Measures (TRIM Committee) on 6 June 2019, WTO Members raised concerns over LCRs imposed by China on goods related to cybersecurity, by Indonesia in the pharmaceutical and medical devices sector, by Argentina in the auto-part industry and over the expansion of Russia's import substitution policy, including its legislation on fisheries and conservation of aquatic biological resources under which subsidies in the form of fishing quotas appear to be granted to companies that use Russian-made ships.[195]

Also, in the Report of the TRIM Committee of October 2018, where Members reported the discussions taken place in the preceding year, it is possible to observe that all discussions that occurred in this committee concerned LCRs adopted by Members.[196] The

194 Shadikhodjaev, *Industrial policy and the World Trade Organization: between legal constraints and flexibilities*, 149.

195 See WTO, "Local content measures scrutinized by WTO members in investment committee."

196 The Report mentions the following issues raised during the reporting period: (i) *Indonesia – Local content requirements for dairy importation and distribution*, item requested by the United States; (ii) *Nigeria – Guidelines on Nigerian content in information communications technology (ICT)*, item requested by Canada and the United States3 ; (ii) and (iii) *Turkey – Forced localisation policy in the pharmaceutical sector*, item requested by the European Union and the United States; (iv) *China – Provisions on insurance system informatization*, item requested by the United States4 ; (v) *Indonesia – Local content requirements for 4G LTE mobile devices*, item requested by the European Union, Japan, and the United States5 ; (vi) *Indonesia – Certain local content provisions in the energy sector (mining, oil and gas)*, item requested by Canada, the European Union, Japan, and the United States6 ; (vii) *Indonesia – Industry Law and Trade law*, item requested by the European Union and Japan7 ; (viii) *Indonesia – Minimum local product requirement for modern retail sector*, item requested by the European Union and Japan, (viii) *Indonesia – Certain measures addressing local content in investment in the telecommunications sector*, item requested by Japan; (vii) *Russian Federation – Measures implementing Russia's import substitution policy*, item requested by the European Union and the United States; and (ix) *Argentina – Act 27,263 on the development and strengthening regime of the Argentine autopartism*, item requested by Mexico. "Report of the Committee on Trade-Related Investment Measures (G/L/1273; G/TRIMS/8)," 2018, accessed 19 January 2020, https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(@Symbol=%20g/l/*%20and%20(@Title=%20report%20and%20(committee%20on%20trade-related%20investment%20measures)))&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#.

same trend is noted in the Reports of this Committee adopted on November 2017[197] and October 2016.[198]

Furthermore, a study shows that even with the execution of the WTO agreements restraining LCRs, Members have not unilaterally withdrawn local content policies used during the GATT area. In fact, compliance with WTO laws in this case was induced by dispute settlement. For instance, Brazil and Indonesia's LCRs in the auto-industry are prior to the establishment of the WTO. These countries did not withdraw these measures upon their signing of the WTO agreements. They were only withdrawn after these countries suffered a loss in disputes before the WTO dispute settlement body.[199]

With the revival of LCRs after the 2008 world crisis and now with COVID-19, it is suggested that the withdrawal of LCRs and compliance with WTO norms on this subject will also be dispute-induced. Countries do not seem to be willing to give up from implementing such measures despite WTO laws constricting them. As concluded by Aaron Cosbey,

197 The Report mentions the following issues raised during the reporting period: (i) *Indonesia – Local content requirements for dairy importation and distribution*, item requested by the United States; (ii) *Nigeria – Guidelines on Nigerian content in information communications technology (ICT)*, item requested by Canada and the United States; and (iii) *Turkey – Forced localisation policy in the pharmaceutical sector*, item requested by the European Union and the United States; (iv) *China – Provisions on insurance system informatization*, item requested by the United States; (v) *Indonesia – Local content requirements for 4G LTE mobile devices*, item requested by the European Union, Japan, and the United States; (vi) *Indonesia – Certain local content provisions in the energy sector (mining, oil and gas)*, item requested by Canada, the European Union, Japan, and the United States; (vii) *Indonesia –Industry Law and Trade law*, item requested by the European Union and Japan; (viii) *Indonesia – Minimum local product requirement for modern retail sector*, item requested by the European Union and Japan ; (vi) *Indonesia – Certain measures addressing local content in investment in the telecommunications sector*, item requested by Japan; (ix) *Russian Federation – Measures implementing Russia's import substitution policy*, item requested by the European Union and the United States ; and (x) *Argentina – Act 27,263 on the development and strengthening regime of the Argentine autopartism*, item requested by Mexico. "Report of the Committee on Trade-Related Investment Measures (G/L/1197; G/TRIMS/7)," 2017, accessed 19 January, 2019, https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(@Symbol=%20g/l/*%20and%20(@Title=%20report%20and%20(committee%20on%20trade-related%20investment%20measures)))&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#.

198 The Report mentions the following issues raised during the reporting period: (i) *Argentina – Act 27,263 on the development and strengthening regime of the Argentine autopartism* (item requested by Mexico); (ii) *China – provisions on insurance system automatization* (item requested by the United States); (iii) *Russian Federation – measures implementing Russia's import substitution policy* (item requested by the European Union and the United States); (iv) *Indonesia – local content requirements for 4G LTE mobile devices* (item requested by Canada, the European Union, Japan, Chinese Taipei and the United States); (v) *Indonesia – Minimum local product requirement for modern retail sector* (item requested by the European Union, Japan and the United States); (vi) *Indonesia – Newly adopted Industry Law and Trade law* (item requested by the European Union, Japan and the United States; (v) *Indonesia – Certain local content provisions in the energy sector (mining, oil and gas)* (item requested by Canada, the European Union, Japan and the United States); (vi) *Indonesia – Certain measures addressing local content in investment in the telecommunications sector* (item requested by Japan and the United States). "Report of the Committee on Trade-Related Investment Measures (G/L/1153; G/TRIMS/6)," 2016, accessed 19 January, 2019, https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(@Symbol=%20g/l/*%20and%20(@Title=%20report%20and%20(committee%20on%20trade-related%20investment%20measures)))&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#.

199 DiCaprio and Gallagher, "The WTO and the shrinking of development space: How big is the bite?," 793.

"as it stands now, the international community has agreed to ban tools that everyone continues to use."[200]

Alter and Meunier observe that "political deals often get redefined during implementation because the actors who implement agreements have different priorities and are subject to different pressures than are the policy-makers who designed the deal in the first place."[201] In the case of LCRs, domestic policy makers may not be willing to comply with WTO rules restricting local content rules as they may be subject to more immediate pressures of domestic social and economic order, especially after the economic crisis generated by the COVID-19 pandemic, which is now considered the worst economic crisis since the 1930s depression.[202]

Therefore, in the crossroads between the political choice of observing international economic rules oriented to further liberalisation of international trade and that of designing and protecting their own social arrangements, regulations and institutions for a development purpose, indicia show that countries may be preferring the latter, at least as they relate to LCRs. This is corroborated by the fact that the number of LCRs implemented by countries has increased and these mechanisms continue to be adopted despite prohibitions from international economic law. LCRs are also implemented in new sectors such as the RE segment and in the field of digital data. Spadano also mentions that WTO-inconsistent LCRs in the oil&gas (and other mineral) concessions and those imposed as conditions to provide official credit facilities, including export credits are commonly tolerated. In some cases, such LCRs are debated in various diplomatic instances at the WTO, such as the Trade Policy Review Body or the TRIMs Committee but no dispute has even been initiated.[203]

For this reason, it is of crucial importance to situate the debate of LCRs in the context of trade and development/human rights and to establish channels where these two areas can communicate, making the regulation of LCRs more coherent. It does not make sense that industrial policies of virtual importance for development are consistently outlawed under WTO law considering the universe of rules in the framework of development and human rights that support countries to pursue their own economic, social and cultural

200 Aaron Cosbey, "Everyone's Doing It: The Acceptance, E¶ectiveness and Legality of Performance Requirements," *Investment Treaty News* (2015). https://www.iisd.org/itn/2015/02/19/everyones-doing-it-the-acceptance-effectiveness-and-legality-of-performance-requirements/.

201 Karen J.; Alter and Sophie Meunier, "The Politics of International Regime Complexity," *Perspectives on Politics* 7, no. 1 (2009): 15-16.

202 BBC News. "Coronavirus: Worst economic crisis since 1930s depression, IMF says". 20 April 2020. Available at: https://www.bbc.com/news/business-52236936. Accessed on Oct 6, 2020.

203 Spadano, "Local content requirements: perspectives under WTO law and other international norms," 404.

policies in accordance with their realities. It may also be problematic for WTO legitimacy to act in a way that may seem too intrusive on a country's policy space.

The subsections below give a brief overview of the international rules impacting LCRs and clarify this picture where countries are subject to two different frameworks distinctively affecting their local content policies. One is the framework of trade liberalisation represented by WTO agreements and IIAs, which, in general, tend to restrain the use of LCRs, and the other is the normative framework of development and human rights, which, in a way, may be supportive of the use of LCRs as developmental strategies to the extent it buttresses the country's right to self-determination in pursuing their own economic, social and cultural objectives and supports a right-based analysis of rules restricting LCRs. These different frameworks as related to LCRs will be further detailed in Chapters 2 and 3.

I.3.1 Framework of trade liberalisation: restrictions on LCRs from WTO agreements and IIAs

The use of LCRs gained traction in the seventies in a time where the international economic system was under the Bretton Woods model of "embedded liberalism". This regime, while allowing enough international discipline and progress towards trade liberalisation, kept sufficient space for governments to respond to social and economic needs at the domestic level. International economic policy was "subservient to domestic policy objectives - full employment, economic growth, equity, social insurance, and the welfare state - and not the other way around."[204]

Under this model, GATT rules prohibiting discrimination between domestic and foreign goods were already in place, which could allegedly be the basis for a case against LCRs. In this sense, the non-discrimination principle embodied in Article III of GATT directly attacks the discrimination against foreign products or producers which is at the very heart of local content measures. In this sense, Article III.1 of GATT states:

> The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.

204 Rodrik, *The globalization paradox: democracy and the future of the world economy*, 48.

> Article III:5 addresses LCRs more squarely when it establishes that
>
> No contracting party shall establish or maintain any internal quantitative regulation relating to the mixture, processing or use of products in specified amounts or proportions which requires, directly or indirectly, that any specified amount or proportion of any product which is the subject of the regulation *must be supplied from domestic sources*. Moreover, no contracting party shall otherwise apply internal quantitative regulations in a manner contrary to the principles set forth in paragraph.

Also, Article XI.1 of GATT proscribes the use of *quantitative restrictions* and regulates the use of non-automatic licensing systems, which could also adversely affect local content policy.

However, the whole idea of the GATT system was to allow policy space for countries to manage their domestic issues, such as the case for LCRs, which intend to address domestic questions relating to unemployment, lack of industrial and technological development. In this sense, despite the existence of GATT and its non-discrimination principle, disputes concerning LCRs among GATT Members were rare.[205] Additionally, conflict-solving through GATT dispute-settlement system was not effective given veto powers attributed to the losing country, which could block panel decisions or drag out implementation of the decision for years. Therefore, questioning one country's local content policy was neither common nor feasible under the GATT system.

With the rise of neoliberalism, the WTO system is created under a different philosophy from the Bretton Woods regime. Free market was on the ascendancy and the "WTO envisaged both a significant ramping up of ambitions with respect to economic globalisation and a dramatic rebalancing of nation states' domestic and international responsibilities."[206] In this sense, the Uruguay Round of trade negotiations resulted in an agreement with much broader coverage than the GATT. Areas such as agriculture, services, intellectual property, domestic health and safety regulations and tighter restrictions on the use of government subsidies were included in the agreement. In addition, express prohibitions on LCRs were set forth in the context of the TRIMs Agreement.

For the first time, countries had to comply with rules that tightly limited their margin of manoeuvre to carry out their domestic industrial policies. In addition, the WTO was cre-

205 See: GATT Panel Reports on *US – Tobacco* (1994); *US – Taxes on Automobiles* (1994); *Canada — FIRA* (1984). These are the only cases in GATT jurisprudence found in connection with LCRs.

206 Rodrik, *The globalization paradox: democracy and the future of the world economy*, 52.

ated along with a new dispute-settlement system, which is rule-based and compulsory for all WTO Members, which did not have any more individual veto powers to block a decision. In fact, consensus among WTO Members was required to block it, which made it virtually impossible to escape from a decision issued by the WTO dispute settlement system. Losing parties shall remove the offending policies or adopt temporary remedies until full compliance, providing compensation to the complainant or suffering retaliation.

Under the WTO regime, domestic areas that were previously immune from external pressures started to be reached. LCRs were not an exception.

With the conclusion of the Uruguay round and the establishment of the WTO, new agreements came into existence. The TRIMs Agreement consolidates a prohibition on certain types of LCRs in light of their inconsistency with Article III (national treatment) and Article XI (prohibition on quantitative restrictions) of the GATT. Consequently, it outlawed investment measures that require (i) the purchase or use by an enterprise of products of domestic origin or from any domestic source, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production; or (ii) that an enterprise's purchases or use of imported products be limited to an amount related to the volume or value of local products that it exports.[207]

The SCM Agreement, in turn, prohibits "subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods."[208] GATS's market access commitments and national treatment obligations also restrict the implementation of LCRs. However, in GATS, LCRs are only regulated to the extent that countries have scheduled specific commitments. The plurilateral agreement GPA, in turn, limits the government's ability to establish conditions in government procurements which may favour domestic companies. The TRIPS Agreement, in its Article 27.1, states that "(…) patents shall be available and patent rights enjoyable *without discrimination as to the place of invention*, the field of technology and *whether products are imported or locally produced*," possibly limiting local working requirements of patents.

Despite these provisions restraining the use of LCRs, it is important to note that the WTO agreements themselves contain certain language and provisions that could be used to mitigate the prohibitions on LCRs.

207 Article 1 of the Illustrative List to the TRIMS Agreement.
208 Article 3.1(b) of the SCM Agreement.

In this sense, the preamble of the Marrakesh Agreement pays due consideration to broader social and economic objectives ("raising standards of living", "full employment", "growth in income and demand", "sustainable development", "economic development") and therefore could provide guidance, as reflecting the objective and purpose of the WTO Agreement, in the interpretation of WTO provisions limiting LCRs. Also, the interpretation of WTO exception clauses, such as that provided in Article XX of the GATT 1994, could widen the policy space of countries implementing otherwise WTO-inconsistent LCRs[209]

Additionally, WTO agreements have open concepts and ambiguous norms and standards which could be clarified in a way that takes international development into consideration. In addition, interpretation of WTO law in light of the human rights instruments mentioned above could also create instances where LCR is permissible. However, given the low level of integration between the WTO regime and the development framework/human rights norms, "much depends on how WTO law is interpreted and applied in any given case – that is, upon the intersubjective framework."[210]

A detailed analysis of these agreements and their provisions limiting the use of LCRs is provided in Chapter 2, which will also demonstrate that, since the creation of the WTO and its dispute settlement system, cases involving LCRs have become more common.

Nevertheless, the fact that disputes have been raised where this policy has been frequently used by WTO Members domestically seems quite awkward. One would think that countries would be reluctant to dispute LCRs in the WTO dispute settlement system to avoid having a ruling that could be applicable and restrictive to their own domestic policies. Nevertheless, WTO Members do question LCRs from other Members when they affect their trade interests. Trading partners of WTO Members implementing LCRs may be adversely affected by restrictions to exports generated by the adoption of these measures.

Despite decisions expressly prohibiting the use of LCRs, WTO Members continue to make use of them, contradicting, at least to some extent, the idea defended by respected scholars such as Bohanes and Celli that WTO repeated jurisprudence prohibiting LCRs

209 Gao Pengcheng, "Rethinking the Relationship Between the WTO and International Human Rights," *Richmond Journal of Global Law & Business* 8, no. 3 (2009): 411-12.

210 Rachel Harris, "Embedded Liberalism As a Framework for Description, Critique and Advocacy: The Case of Human Rights Measures under the GATT," in *The Future of International Economic Integration: The Embedded Liberalism Compromise Revisited*, ed. Gillian; Moon and Lisa Toohey (Cambridge Cambridge University Press, 2018), 183.

may produce a 'chilling impact' on the WTO Members' intention to implement local content policies.[211]

LCRs as a type of performance requirement are addressed not only by WTO agreements, but also in international investment agreements (IIAs): bilateral investment treaties and investment chapters in free trade agreements (FTAs). Although discussing LCRs in the context of investment law is not the purpose of this work, we briefly analyse this topic below, as IIAs, BITs and FTAs may also represent sources of constraints to local content policies at the international level.

Nikiéma shows, from making an analysis of existing BITs, that the majority does not particularly prohibit the use of performance requirements. However, prohibitions have been appearing in a growing number of them for a decade, having the North American Free Trade Agreement (NAFTA)[212] and the free trade agreements (FTAs) concluded by the United States, Canada and Japan as precursors.[213]

The NAFTA was one of the first IIAs to address performance requirements. It contains the TRIMs Agreement's disciplines as well as a prohibition on technology transfer requirements (Article 1106). Post-NAFTA, several countries in the OECD have entered into agreements with provisions on performance requirements. For instance, the ASEAN Comprehensive Investment Agreement[214] incorporates the TRIMs Agreement's obligations by reference and commits to assessing whether more obligations are desirable. The 2014 Canada–European Union Comprehensive Economic and Trade Agreement (CETA)[215], in its investment chapter, contains the NAFTA-like prohibitions, and goes further to ban joint venture requirements and quotas for domestic employment. Most

211 Jan Bohanes, "WTO Dispute Settlement and Industrial Policy," *E15Initiative* (2015): 2. http://e15initiative.org/wp-content/uploads/2015/09/E15-Industrial-Policy-Bohanes-FINAL.pdf. See also: Umberto Celli Junior, "The Impact of WTO Case Law on The Use of Local Content Requirements," in *The WTO Dispute Settlement Mechanism: A Developing Country Perspective*, ed. Alberto do; Amaral Junior, Luciana Maria; de Oliveira, and Cristiane Lucena Carneiro (Springer, 2019); Celli Junior, *OMC: Jurisprudência e Requisitos de Conteúdo Local como Política Industrial*.

212 North American Free Trade Agreement (signed 17 December 1992, entered into force 1 January 1994) (1994) 32 ILM 605.

213 Suzy H. Nikièma, *Performance Requirements in Investment Treaties*, Best Practices Series (Manitoba: International Institute for Sustainable Development (IISD), 2014), 7.

214 ASEAN Comprehensive Investment Agreement (signed 26 February 2009, entered into force 24 February 2012)., available at: http://investasean.asean.org/files/upload/Doc%2005%20-%20ACIA.pdf. Access on May12, 2019.

215 Canada-European Union (EU) Comprehensive Economic and Trade Agreement (CETA) (signed 30 October 2016, entered into force 21 September 2017, available at: https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/toc-tdm.aspx?lang=eng. Access on May 12, 2019.

agreements between developing countries, in contrast, do not address performance requirements. [216]

The recent Agreement between the United States of America, the United Mexican States, and Canada (USMCA)[217] provides that the Parties understand that GATT 1994 rights and obligations incorporated by paragraph 1 prohibit, in any circumstances in which any other form of restriction is prohibited, a Party from adopting or maintaining import licensing conditioned on the fulfilment of a performance requirement.[218] As regards covered public procurement, it sets forth that no Party, including its procuring entities, shall seek, take account of, impose, or enforce any offset,[219] at any stage of a procurement.[220] In its investment chapter, the USMCA establishes that no Party shall, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment of an investor of a Party or of a non-Party in its territory, impose or enforce any requirement, or enforce any commitment or undertaking: to export a given level or percentage of goods or services; to achieve a given level or percentage of domestic content; to purchase, use, or accord a preference to a good produced or a service supplied in its territory, or to purchase a good or a service from a person in its territory; to transfer a technology, a production process, or other proprietary knowledge to a person in its territory; to purchase, use, or accord a preference to, in its territory, technology of the Party or of a person of the Part, among other restrictions.[221]

The USMCA also addresses data localisation barriers. In this sense, it provides that, in relation to financial services, no Party shall require a covered person to use or locate computing facilities in the Party's territory as a condition for conducting business in that territory, so long as the Party's financial regulatory authorities, for regulatory and supervisory purposes, have immediate, direct, complete, and ongoing access to information processed or stored on computing facilities that the covered person uses or locates outside the Party's territory.[222] A similar provision is found in the chapter on digital trade.[223]

216 Cosbey, "Everyone's Doing It: The Acceptance, E¶ectiveness and Legality of Performance Requirements."
217 United States-Mexico-Canada Agreement (USMCA) (signed 30 November 2018, entered into force 1 July 2020), available at https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between. Access on May 12, 2019.
218 Article 2.11.2(b) of the USMCA.
219 Under the USMCA, offset mean "any condition or undertaking that requires the use of domestic content, a domestic supplier, the licensing of technology, technology transfer, investment, counter-trade, or similar action to encourage local development or to improve a Party's balance of payments accounts."
220 Article 13.4.6 of the USMCA.
221 Article 14.10 of the USCMA.
222 Article 17.18 of the USMCA.
223 Article 19.12 of the USMCA: "No Party shall require a covered person to use or locate computing facilities in that Party's territory as a condition for conducting business in that territory."

In general, most IIAs and FTAs contain TRIM-based disciplines on performance requirements (including LCRs), not stricter ones. Nevertheless, the fact that they incorporate TRIMs by reference means that these obligations become subject to investor–state dispute settlement as opposed to just the WTO's state–state process. This is worrisome because "in a BIT, the investor has direct access to investor–state arbitration and will be inclined to make more extensive use of it."[224] This is also problematic because decisions from investment tribunals are unpredictable and inconsistent, which may bring legal insecurity for countries implementing LCRs and investors subject to them.

Some IIAs that go beyond the scope of the TRIMs Agreement include wider prohibitions or conditions on LCRs such as restrictions on: (i) requirements to establish a joint venture with domestic participation; (ii) requirements for a minimum level of domestic equity participation; (iii) requirements to locate headquarters for a specific region; (iv) employment requirements; (v) requirements to supply goods produced or services provided to a specific region exclusively from a given territory; (vi) requirements to act as the sole supplier of goods produced or services provided; (vii) requirements to transfer technology, production processes or other proprietary knowledge; (viii) research and development requirements.[225]

The USMCA, as seen, entails localisation barriers in the financial services and digital field. The Regional Comprehensive Economic Partnership (RCEP), one of the largest free trade deals in history, which was signed on 15 November 2020 by 10 members of the Association of Southeast Asian Nations (Asean), in addition to China, Japan, South Korea, Australia and New Zealand, contain these WTO-plus restrictions on LCRs.[226]

224 Nikièma, *Performance Requirements in Investment Treaties,* 6.

225 UNCTAD, *Host Coutry Operational Measures* (New York and Geneva: United Nations, 2001).

226 Article 10.6.1 of the RCEP establishes that: "No Party shall impose or enforce, as a condition for establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment in its territory of an investor of any other Party, any of the following requirements: 21 (a) to export a given level or percentage of goods; (b) to achieve a given level or percentage of domestic content; (c) to purchase, use, or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory; (d) to relate the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with investments of that investor; (e) to restrict sales of goods in its territory that such investments produce by relating such sales to the volume or value of its exports or foreign exchange earnings; (f) to transfer a particular technology, a production process, or other proprietary knowledge to a person in its territory; (g) to supply exclusively from the territory of the Party the goods that such investments produce to a specific regional market or to the world market; or (h) to adopt a given rate or amount of royalty under a licence contract, in regard to any licence contract in existence at the time the requirement is imposed or enforced, or any future licence contract freely entered into between the investor and a person in its territory, provided that the requirement is imposed or enforced in a manner that constitutes direct interference with that licence contract by an exercise of non-judicial governmental authority of a Party.22 For greater certainty, this subparagraph does not apply when the licence contract is concluded between the investor and a Party." *Regional Comprehensive Economic Partnership (RCEP)*, 15 November 2020, available at: https://rcepsec.org/wp-content/uploads/2020/11/All-Chapters.pdf.

As clarified by Morosini and Sanchez Badin, the "new megaregional agreements, by and large, are the latest formulation of neoliberal regulation, designed to bypass developing country resistance within the World Trade Organization (WTO). As a product of a neoliberal agenda, these agreements intend to liberalize trade beyond existing WTO law in areas such as intellectual property, competition policy, the digital economy, state-owned enterprises, and government procurement."[227] As a result, they usually constrain LCRs.

I.3.3 Framework of development and human rights: potential justifications for LCRs

The existence of international norms restricting the use of LCRs is counterbalanced by the presence of international instruments that could otherwise justify, or at least support, their use.

While international law contains restrictions to the adoption of LCRs in the form of obligations reflected in WTO agreements, IIAs, BITs and FTAs, it also presents potential justifications for implementation of local content policies in human rights instruments pertaining to the normative framework of development such as the ICESCR, the UNDRD and soft law instruments (e.g. interpretations from the Committee on Economic, Social and Cultural Rights; works from the High Commissioner for Human Rights and the

227 Fabio Morosini and Michelle Ratton Sanchez Badin, "Reconceptualizing International Investment Law from the Global South: An Introduction," in *Reconceptualizing International Investment Law from the Global South*, ed. Fabio Morosini and Michelle Ratton Sanchez Badin (Cambridge University Press, 2017), 13.

Human Rights Council; the MDGs[228] and the SDGs[229]). Even the WTO agreements themselves present derogations, waivers and exceptions, in addition to preamble language, that could encourage a more flexible interpretation of the WTO restrictions on LCRs, as will be detailed in Chapter 4.

The ICESCR includes, among others, the right to self-determination for peoples (Art. 1). Although the content and the extension of a right to self-determination can be disputed, it involves the right of peoples to choose their own political status and to determine their own form of economic, cultural and social development. This contributes to the idea that countries need policy space to implement policies that foster their economic, social and technological development.

The 1986 UNDRD, in turn, reinforces the right of self-determination and the States' right and duty to "formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom."[230] It was adopted with 146 votes in favour, only eight abstentions and one vote against by the United States. At least politi-

228 The MDG 8 *"develop a global partnership for development"* recognizes the need to address the special needs of the least developed countries, landlocked developing countries and small island developing States. United Nations, *Millennium Development Goals and Beyond 2015 - Goal 8: Develop a global partnership for development*, https://www.un.org/millenniumgoals/global.shtml. In turn, the MDG 1 *"eradicate extreme poverty and hunger"* seeks to achieve full and productive employment and decent work for all, including women and young people. United Nations, *Millennium Development Goals and Beyond 2015 - Goal 1: Erradicate Extreme Poverty & Hunger* https://www.un.org/millenniumgoals/poverty.shtml.

229 The SDG 8 *"promote inclusive and sustainable economic growth, employment and decent work for all"* seek to achieve higher levels of economic productivity through diversification, technological upgrading and innovation, including through a focus on high-value added and labour-intensive sectors and promote development-oriented policies that support productive activities, decent job creation, entrepreneurship, creativity and innovation. United Nations, *Sustainable Development Goals - Goal 8: Promote inclusive and sustainable economic growth, employment and decent work for all* (2019), https://www.un.org/sustainabledevelopment/economic-growth/. The SDG 9 *"build resilient infrastructure, promote sustainable industrialization and foster innovation"* recognizes the need for the support of domestic technology development, research and innovation in developing countries, including by ensuring a conducive policy environment for, inter alia, industrial diversification and value addition to commodities. It also considers that technology progress is a crucial element for innovation and industrialization. This SGD also seeks to promote inclusive and sustainable industrialization and, by 2030, significantly raise industry's share of employment and gross domestic product, in line with national circumstances, and double its share in least-developed countries; and enhance scientific research, upgrade the technological capabilities of industrial sectors in all countries, in particular developing countries, including, by 2030, encouraging innovation and substantially increasing the number of research and development workers. United Nations, *Sustainable Development Goals - Goal 9: Build resilient infrastructure, promote sustainable industrialization and foster innovation* (2019), https://www.un.org/sustainabledevelopment/infrastructure-industrialization/. SDG 10 *"reduce inequality within and among countries"* recognizes that economic growth is not sufficient to reduce poverty if it is not inclusive and if it does not involve the three dimensions of sustainable development – economic, social and environmental. Accordingly, this goal incentivises policies that progressively achieve greater equality. United Nations, *Sustainable Development Goals - Goal 10: Reduce inequality within and among countries* (2019), https://www.un.org/sustainabledevelopment/inequality/.

230 Article 2(3) of the UNDRD.

cally, the international realm reached a universal consensus on the Right to Development at the 1993 World Conference on Human Rights,[231] which explicitly recognises "[t]he right to development, as established in the Declaration, as a universal and inalienable right and integral part of fundamental human rights".[232]

The right to development is related to the State's primary responsibility for their own economic and social development, and for the protection, fulfilment and realisation of the human rights of its citizens. Consequently, the role of national policies and development strategies cannot be underestimated, and governments need to establish, at the national level, an enabling legal, political, economic and social environment for the realisation of the right to development.[233] By referring to the notion that a State has the right to establish its developmental policy, it does not a priori condemn the use of LCR as a development-oriented tool.

Like in the case of the right to self-determination, the precise content and legal status of the right to development is not yet fully crystallised[234] and has not been formally invoked as a justification for implementation of LCRs at least in the context of the WTO dispute settlement system. However, its existence in the context of the international instruments mentioned above also enables countries to implement local content policies on the grounds of the right to development, especially because LCRs have traditionally been used as mechanisms for maximising the local benefits of the industrialisation process through generation of employment, advancement of local technological capabilities and creation of spillovers in the domestic economy. MDGs and SGDs also encourage measures which are taken towards the development objective and that are intended to promote sustainable economic growth, employment and decent work for all, and higher levels of economic productivity.[235]

The Committee on Economic, Social and Cultural Rights, in its General comment No. 24 (2017) on State obligations under the ICESCR in the context of business activities advocates that trade and investments treaties should be interpreted in light of the human rights obligations of the States. More importantly, it advocates that States cannot dero-

231 United Nations Human Rights: Office of the High Commissioner for Human Rights (1995) World conference on human rights, 14–25 June 1993, Vienna Austria. Excerpted from: DPI/1394/Rev.1/HR-95-93241, April. http://www.ohchr.org/EN/AboutUs/Pages/ViennaWC.aspx. Accessed on April 25, 2019.

232 Christian Tietje, "The Right to Development within the International Economic Legal Order," in *Reflections on the constitutionalisation of international economic law: liber amicorum for Ernst-Ulrich Petersmann*, ed. Marise; Cremona et al. (Leiden, Boston: Nijhoff, 2014).

233 Office of the High Commissioner for Human Rights, "Resolution 2001/9 relating to the right to development, adopted in the Fifty-Seventh Session of the Commission on Human Rights (E/CN.4/RES/2001/9)," (Geneva: United Nations, 2001).

234 Prévost, *Balancing Trade and Health in the SPS Agreement: The Development Dimension*, 21.

235 See footnotes 208 and 209 above.

gate from the obligations under the ICESCR in trade and investment treaties that they may conclude. The Committee encourages States to insert, in future treaties, a provision explicitly referring to their human rights obligations, and to ensure that mechanisms for the settlement of investor-State disputes take human rights into account in the interpretation of investment treaties or of investment chapters in trade agreements.[236] Additionally, it mentions that before signing trade and investment agreements, countries should make a human rights impact assessment that take into account both the positive and negative human rights impacts of trade and investment treaties, including the contribution of such treaties to the realisation of the right to development.[237]

Documents from the High Commissioner for Human Rights also encourage a human rights-based approach to trade as a conceptual framework for the processes of trade reform that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights. According to this view, human rights law is neutral with regard to trade liberalisation or trade protectionism. Instead, a human rights approach to trade focuses on processes and outcomes – how trade affects the enjoyment of human rights – and places the promotion and protection of human rights among the objectives of trade reform.[238]

The idea that trade and investment agreements should be interpreted in light of ESC rights, and that the obligations from the former should not derogate those from the latter, mean that restrictions on LCRs inserted in the WTO law and investment treaties could be softened during the interpretative process of WTO adjudicating bodies. A human-rights based approach to trade, in this sense, could also enable countries to use LCRs when these instruments are targeted at improving social and economic rights of the local population and have the potential to impact positively social and economic indicators as well as contribute to the realisation of human rights.

236 UN Committee on Economic Social and Cultural Rights (CESCR), "General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities (E/C.12/GC/24)," (United Nations, 2017), para. 13.

237 "States parties should identify any potential conflict between their obligations under the Covenant and under trade or investment treaties, and refrain from entering into such treaties where such conflicts are found to exist, as required under the principle of the binding character of treaties. The conclusion of such treaties should therefore be preceded by human rights impact assessments that take into account both the positive and negative human rights impacts of trade and investment treaties, including the contribution of such treaties to the realization of the right to development. Such impacts on human rights of the implementation of the agreements should be regularly assessed, to allow for the adoption of any corrective measures that may be required." UN Committee on Economic Social and Cultural Rights (CESCR), "General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities (E/C.12/GC/24)," para. 13.

238 Office of the High Commissioner for Human Rights, "Human rights and trade" (paper presented at the 5th WTO Ministerial Conference, Cancún, Mexico, 10-14 September 2003), 4.

In Chapter 3, we will detail the content of the relevant norms and instruments pertaining to the normative framework for development to better understand how they could play a role in the interpretation of WTO rules applicable to LCRs, bringing more coherence between the trade regime and the framework for development and human rights.

I.4 CONCLUDING REMARKS

As seen above, LCRs as conceptualised under this work have a broad meaning and encompass not only those measures which involve requirements to source inputs, goods or services locally but also local employment requirements, local production requirements, local partnership requirements, requirements to further process raw materials domestically, and requirements to perform research and development in, or transfer technology to, the host country.

The objectives of local content rules are primarily related to economic, social and technological development. LCRs are important political and economic tools for both developed and developing countries. As political instruments, they allegedly address residents' needs and further social objectives such as employment, improvement of livelihood and, as economic mechanisms, they can potentially increase the value added (e.g., encourage diversification and new products/activities) and minimise market failures/externalities (e.g., increase learning and knowledge links between local firms and international companies)[239] and the international competitiveness of an industry. Accordingly, LCRs have a central role in a country's development processes to the extent that they can potentially strengthen the domestic industrial base; create backward

239 Moses and Letnes, *Managing Resource Abundance and Wealth: The Norwegian Experience*.

linkages;[240] increase domestic value-addition in certain industries;[241] and encourage the dissemination of knowledge and technology to the local economy.[242]

LCR policies may assist developing countries in the process of bringing new mature players to the international market, by creating conditions for technology transfer and for the progressive development of a new industry. Government intervention through LCR is particularly important for creating incentives for local firms to learn how to master technologies from the developed world.[243] By mandating the use of local products in specific projects, "LCRs aim to guarantee sales for local infant industries whilst they build up the capabilities necessary to compete with international competitors, both domestically, and eventually internationally."[244]

For developed countries, LCRs may be particularly relevant for the support of new industries such as those related to the renewable sector. Their use is also increasing fast in the digital markets with the adoption of data localisation barriers.

240 Backward links involve *"supplying input to the local economy through transfer of technology, the creation of local employment opportunities, and increasing local ownership and control."* Tordo, National oil companies and value creation, 8.

241 An important factor for the development of a country in the context of global value chain is *"economic upgrading"*, which is the process by which economic actors—firms and workers— *"climb the value chain from basic assembly activities using low-cost and unskilled labor to more advanced forms of 'full package' supply and integrated manufacturing"* Gary Gereffi, "A Global Value Chain Perspective on Industrial Policy and Development in Emerging Markets," *Duke Journal of Comparative & International Law* 24 (2013): 441. However, when there is a disjuncture between innovation and production, and technology is concentrated in developed countries, LCRs could be viewed as an alternative to (i) push developed countries to share innovation and the underlying economic returns with developing countries and (ii) move developing countries away from the lower levels of the GVCs that earn less, pay their workers less, and are more vulnerable to business cycles. Additionally, in a global supply chain scenario, local small and medium size enterprises (SMEs) and small farmers have less (if no) chances to integrate in the economy without any governmental policy encouraging their activities.

242 WTI Advisors, "Local Content Requirements and the Green Economy" (paper presented at the Ad Hoc Expert Group Meeting on Domestic Requirements and Support Measures in Green Sectors: Economic and Environmental Effectiveness and Implications for Trade, June, 2013); Veloso, "Local Content Requirements and Industrial Development Economic Analysis and Cost Modeling of the Automotive Supply Chain."; Kumar, "Performance requirements as tools of development policy : lessons from experiences of developed and developing countries for the WTO agenda on trade and investment."A UNCTAD study mentions that "the specific objectives for imposing performance requirements include: strengthening the industrial base and increasing domestic value added; generation of employment opportunities; linkage promotion; export generation and performance; trade balancing; regional development promotion; technology transfer; avoidance of restrictive business practices; generation and distribution of rents; various non-economic objectives, such as political independence and distribution of political power." UNCTAD, Foreign direct investment and performance requirements: new evidence from selected countries, 7.

243 Veloso, "Understanding local content decisions: economic analysis and application to the automotive industry," 748.

244 Johnson, *Exploring the effectiveness of local content requirementsin promoting solar PV manufacturing in India,* 10.

At the same time, however, the use of LCRs by one country can affect its trading partners to the extent that they will reduce their export opportunities. This can have adverse effects on their economies, rasing development concerns also on the trading partners.

In economic theory, the effects of LCRs in the economy of those countries adopting them is disputed. Some scholars defend that they contribute to a country's economic development, others see them as trade-distortive and protectionist measures that produce only inefficiencies. More recent studies on LCRs, however, show that they can have positive effects provided that some conditions are met. These conditions include among others, having sufficient market size and political stability, adequate local capabilities and infrastructure, linkages to additional mechanisms such as training and business promotion, realistic targets, implementing LCRs in the context of a wider economic and industrial strategy, gradual phasing-out, among others.

Case studies show that in certain instances, the adoption of LCRs as a part of a wider industrial policy was very successful as in the case of Norway in the oil sector. In other instances, the design of the relevant LCRs present some flaws as in the case of Brazil, where although LCRs in the oil sector may have had a positive impact on the level of employment and productivity, they have not contributed to creating a local competitive supply sector. Also, in Nigeria, the results from the local content policy in the oil and gas sector have taken time to appear given the insufficient capacity of domestic suppliers to meet targets or the unavailability of sufficient skilled people to be hired by the industry.

Also, LCRs do not come without danger. If poorly designed, it may generate very negative effects. It can contribute for monopolisation of the market, maintenance of inefficient industries, high prices and, in the long term, adverse effects to the whole economy. In addition, lack of clarity in the design and implementation of the rules may encourage corruption schemes. Furthermore, purely protectionist LCRs may sometimes be used as political instruments by populist leaders to back up their nationalist views.

The use of LCRs has been widespread in the past and continues to show its relevance with an increasing number of countries implementing them after the 2008 financial crisis and now amid the COVID-19 crisis as potential catalyst for development and economic growth.

Despite being largely outlawed in WTO agreements, i.e., the GATT 1994, the TRIMs Agreement, the GATS, the SCM Agreement, the GPA and possibly the TRIPS Agreement, LCRs continue to be adopted by WTO Members. In this context, "there is a clear mismatch between, on the one hand, the prevailing narrative that describes LCRs as necessarily

bad, trade-distortive policies that should be prohibited and, on the other hand, their worldwide pervasiveness and the interest in preserving clear policy space for localisation incentives."[245]

WTO Members' local content policies have been constantly debated in WTO committees and some of them have been questioned before the WTO dispute settlement system. A study suggests that local content measures are only withdrawn after a dispute has been initiated contesting them. In addition to being disciplined in the WTO rules, restrictions to LCRs are present in various bilateral investment treaties (BITs) and in investment chapters of preferential trade agreements (PTAs).[246]

At the same time, countries are also faced with legal instruments and mechanisms that somehow justify or at least support the use of LCRs. Above, we have mentioned the right to self-determination provided in the ICESCR, the right to the development set out in the UNDRD, works from the Committee on Economic, Social and Cultural Rights and the High Commissioner for Human Rights calling for a development-oriented reading of trade and investment agreements, and other soft law instruments encouraging a global partnership for development, reduction of inequality, inclusive economic growth, innovation, among others.

In a scenario of restrictive rules for LCRs under WTO agreements and relevant rules pertaining to the normative framework for development possibly justifying LCRs when they are used for developmental purposes, it is important to assess how WTO adjudicating bodies are dealing with the challenge of balancing free trade and conflicting societal values and how they address the role of governments in implementing LCRs under WTO law. Considering LCRs' potential impacts on a countries' development process, and a scenario where people are showing increasing concerns over unrestricted international economic integration and are willing to defend their preferences, values and national interests, it is worrisome that international prohibitions/restrictions on LCRs might be interpreted without flexibilities and without due regard to social preferences and national contexts.

245 Spadano, "Local content requirements: perspectives under WTO law and other international norms," 405.
246 Ramdoo, *Unpacking Local Content Requirements in the Extractive Sector: What Implications for the Global Trade and Investment Frameworks*, 6.

CHAPTER 2

2

LCRs in the context of trade liberalisation: Legality under WTO law and jurisprudence

II.1 INTRODUCTION

As seen in the previous chapter, LCRs can have positive effects on industrial development, value addition, employment creation, development of backward and forward links along the value chain when they are well-designed, transparent, adapted to the national reality and linked to other policies and long-term targets. They have been widely used in the past and, more recently, their popularity has increased since the economic crisis of 2008.

WTO agreements contain several limitations and prohibitions on LCRs. However, WTO Members do not seem to be willing to abandon their local content policies unless they are challenged before the WTO dispute settlement system.

Considering the deadlock in WTO negotiations and the consequent fact that rules on LCRs may not be modified in the short or medium term, it may be appropriate to turn the attention to the role of panels and the Appellate Body in mitigating the severity of WTO prohibitions on LCRs through purposive interpretation and interpretation of WTO agreements vis-à-vis development-oriented instruments of international law so as to bring the international trade system closer to the reality of its Members, which are under pressure to solve domestic issues of social and economic order. This gives support to the idea of creating channels of communication between the framework of trade liberalisation, on one side, and the framework of development and human rights, on the other side.

In order to analyse the potential function of panels and the Appellate Body in making this approximation between trade rules and rules concerning development and human rights, it is necessary to assess (i) how WTO restrictions on LCRs are currently interpreted by them; (ii) what are the development-oriented instruments which could potentially be integrated in the decision-making process of panels and Appellate Body and what is their normative force to actually influence the interpretative process in the context of WTO dispute settlement; (iii) whether it is possible, from a legal point-of-view, to adopt a development-oriented approach to the interpretation of WTO agreements; and (iv) whether from a political and institutional perspective, panels and the Appellate Body actually have space to read flexibilities into the WTO limitations on LCRs.

The present chapter deals with the current interpretation of WTO rules affecting LCRs by panels and the Appellate Body. In particular, we analyse the legality of LCRs under WTO law and jurisprudence. This assessment is based on the examination of all LCR cases decided by panels and the Appellate Body since the establishment of the WTO. It is intended to determine what space is left for national governments under WTO law to implement LCRs considering the current interpretation of such rules by WTO adjudicating bodies.

II.1.1 LCR cases in numbers

In order to select those cases involving LCRs, an analysis of all consultations requested by WTO Members was made. The documents containing the Members' request for consultations were scrutinised in order to identify those disputes that could be related to LCRs in the broad sense defined under Chapter 1.[247]

Number of cases

From 1995 to 2021, 67 requests for consultations were made by WTO Members in connection with LCRs (Table 1). A record number of notifications were received by the DSB in 1996 (9 requests for consultations) and 2012 (7 requests for consultations). On average, each year, 2.48 consultations involving LCRs are made.

Table 1 – Number of WTO disputes involving LCRs

Year of consultation	Number of disputes
1995	0
1996	9
1997	3
1998	3
1999	2
2000	2
2001	1
2002	3
2003	1
2004	2
2005	1
2006	4
2007	3
2008	4
2009	0
2010	3
2011	1
2012	7
2013	5
2014	1
2015	1
2016	1
2017	3
2018	3

247 The full analysis of the WTO consultations relating to LCRs can be found in the following link: https://drive.google.com/file/d/1o3oM_LWByHsiybH8uamST2HfTz2PhpS4/view?usp=sharing.

Table 1 – Number of WTO disputes involving LCRs
(*continued*)

Year of consultation	Number of disputes
2019	2
2020	1
2021	1
Total	**67**
Average per year	**2.48**

Considering the total numbers of consultations requested by WTO Members until 2021 (607), consultations on LCRs account for around 11% of all disputes.

Involvement of developed and developing countries

As illustrated in Figure 1 and Table 2, 57% of the complaints were brought by developed country Members against developing country Members (38 requests for consultations), followed by consultations between developed country Members, which represented 19% of the disputes (13 requests for consultations). Approximately 15% of the disputes were brought by developing country Members against developed ones (10 requests for consultations) whilst consultations between developing country Members and between developed country Members and transition economies represented less than 5% of the cases (3 requests for consultations for each type of dispute).[248]

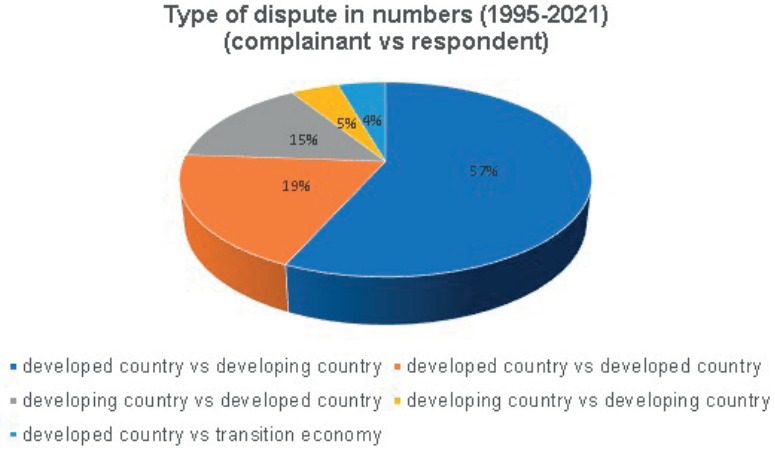

Figure 1 – Level of development of disputing parties

248 The classification of countries as developing, developed and transition economies followed the United Nation classification. See: United Nations (2021). World Economic Situation and Prospects, available at: https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/WESP2021_ANNEX.pdf.

Table 2 - Level of development of disputing parties

Type of dispute in numbers and percentage (1995-2021)					
Developed country Member vs developing country Member	**Developed country Member vs developed country Member**	**Developing country Member vs developed country Member**	**Developing country Member vs developing country Member**	**Developed country Member vs transition economy Member**	**Total**
38	13	10	3	3	67
56.72%	19.40%	14.93%	4.48%	4.48%	100.00%

In general, developing country Members were respondents in more than 60% of these consultations (Table 3), whilst in more than 80% of them developed countries acted as complainants (Table 4).

Table 3 - Level of development of the respondents (1995-2021)

Developed country Member	Developing country Member	Transition economy Member	Total
23	41	3	67
34.33%	61.19%	4.48%	100.00%

Table 4 - Level of development of the complainants (1995-2021)

Developed country Member	Developing country Member	Transition economy Member	Total
54	13	0	65
80.60%	19.40%	0.00%	100.00%

The numbers above show that while LCRs are implemented by both developed and developing country Members, more developed country Members bring complaints especially against developing country Members.

Affected sectors

The requests for consultations involved LCRs affecting a wide range of sectors. However, a significant portion of the complaints are related to the automotive (20 requests for consultations) and the renewable energy sectors (9 requests for consultations). Other sectors included agriculture, alcoholic drinks, financial services, mining, among others, as shown in Table 5.

Table 5 – Affected sectors in WTO disputes involving LCRs

Sector involved	Number of disputes
Agriculture	5
Aircraft	2
Airport construction	1
Alcoholic drinks	5
Automotive	18
Automotive and ICT	2
Capital goods	2
Electronics	1
Financial services	4
Goods in general	5
Goods in general and agricultural products	1
Intellectual Property/Pharmaceutical Industry	3
Mining	1
Publishing	2
Renewable energy	9
Shipbuilding	3
Telecom	1
Textile	2
Total	67

Cases involving renewable energy affect more developed country Members as they were respondents in almost 80% of the consultations involving this market (7 requests for consultations). In contrast, cases involving more traditional sectors impacted more developing countries. For instance, developing countries were respondents in 80% of the consultations (18 requests for consultation) involving the automotive sector.[249] This suggests that while developed countries are focusing their LCRs in new markets, developing countries are still struggling with fostering their economic development in traditional markets.

What happened to the requests for consultations?

The majority of the consultations failed, and a panel proceeding was initiated, which resulted in rulings by a panel and, when these rulings were appealed, in rulings by the

249 Developing countries together with transition economies were respondents in 90% of the consultations involving the automotive sector.

Appellate Body.[250] Considering the rulings that have been circulated, in all cases, except one,[251] there were findings of violation in respect of all or some of the challenged LCRs.[252]

A more in-depth analysis of these cases from a legal perspective is set forth in the subsequent sections, which analyse how WTO rules applicable to LCRs are interpreted by panels and the Appellate Body.

II.1.2 Overview of the legality of LCRs under WTO law and jurisprudence

The implementation of local content policies requires government intervention. However, WTO agreements limit policy space, hindering relevant government actions in the field of LCRs. Of relevance for the purposes of assessing WTO restrictions on LCRs are the GATT 1994, the TRIM Agreement, SCM Agreement, the GATS and, to a lesser extent, the GPA.

The focus of the discussion is on how panels and the Appellate Body have interpreted this type of requirement in the case law. The findings expressed here are the result of the analysis of 18 cases[253] where LCRs were disputed before the WTO Dispute Settlement System (DSS) from 1995 to 2021.

The main provisions of the WTO agreements challenged in the disputes concerning LCRs involve:

- Article III:2 of GATT 1994
- Article III:4 of GATT 1994

250 *Canada – Periodicals* (DS31) (1997); *Indonesia – Autos* (DS54, DS55, DS59 and DS64) (1998); *US – FSC* (DS108) (2000); *Canada - Autos* (DS139 and DS142) (2000); *Korea — Procurement* (DS163) (2000); *India — Autos* (DS146 and DS175) (2002); *US — Upland Cotton* (DS267) (2005); *Canada — Wheat Exports and Grain Imports* (DS276) (2004); *EC - Export Subsidies on Sugar* (DS283) (2005); *Turkey – Rice* (DS334) (2007); *China - Auto Parts* (DS339, DS340 and DS342) (2009); *China – Publications and Audiovisual Products* (DS363) (2010); *China – Electronic Payment Services* (DS413) (2012); *Canada – Renewable Energy/Canada - Feed-in Tariff Program* (DS412 and DS426) (2013); *Argentina – Import Measures* (DS438, DS444 and DS445) (2015); *India – Solar Cells* (DS456) (2016); *US – Tax Incentives* (DS487) (2017); *Brazil – Taxation* (DS497 and DS472) (2019); *US – Renewable Energy* (DS510) (2019).

251 *Korea – Procurement* (2000).

252 Note, though, that in *EC - Export Subsidies on Sugar* (2005), there was a finding of violation, but the panel did not analyse the local content dimension of the measure even though the request for consultations indicated it as a local content measure.

253 *Canada – Periodicals* (DS31) (1997), *Indonesia – Autos* (DS54, DS55, DS59 And DS64) (1998), *US – FCS*(Ds108), *US– FSC (Article 21.5 – Ec)* (DS108) (2002), *Canada - Autos* (DS139 and DS142) (2000), *Korea – Procurement* (DS163) (2000), *India – Autos* (DS164 and DS175) (2002), *US – Upland Cotton* (DS267) (2005), *Canada – Wheat Exports and Grain Imports* (DS276) (2004), *Turkey – Rice* (DS334) (2007), *China – Auto Parts* (DS339, DS340, DS342) (2009), *China – Publications and Audiovisual Products* (DS363) (2010), *Canada – Renewable Energy / Canada — Feed-In Tariff Program* (DS412, DS426) (2013), *China – Electronic Payment Services* (DS413) (2012), *Argentina – Import Measures* (DS438, DS444 and DS 445) (2015), *India – Solar Cells* (DS456) (2016), *US – Tax Incentives* (DS487) (2017) and *Brazil – Taxation* (DS472 and DS497) (2019).

- Article III:5 of GATT 1994
- Article 2.1 of the TRIMs Agreement and its Illustrative List
- Article 3.1(b) of the SCM Agreement

Respondents have tried to avoid the application of those provisions and to justify an otherwise GATT-inconsistent measure or by alleging certain derogations and exceptions in WTO agreements, in particular:

- Article III:8(a) of GATT 1994[254]
- Article III:8(b) of GATT 1994[255]
- Article XX(a) of the GATT 1994[256]
- Article XX(b) of the GATT 1994[257]
- Article XX(d) of the GATT 1994[258]
- Article XX(g) of the GATT 1994[259]
- Article XX(j) of the GATT 1994[260]
- Article XVIII of the GATT 1994[261]

Please note that while other provisions can be raised in cases involving LCRs, this chapter will focus on those articles which were discussed in the case law under analysis.

Note, however, that this chapter will also discuss the relevant provisions of the TRIPS Agreement affecting local working requirements of patents, although, to date, panels and the Appellate Body have not analysed this situation as disputes involving the local working of patents have been settled or the complainant did not proceed with the relevant claim of inconsistency.[262]

Although panels and, in particular, the Appellate Body take into account policy concerns of the respondents and make efforts to advance interpretations – sometimes considered activist - that allow for policy considerations, the overall impression in cases involving LCRs is that the core principle of non-discrimination in the international trading system

254 *Canada – Renewable Energy / Canada — Feed-In Tariff Program* (DS412, DS426) (2013), *India – Solar Cells* (DS456) (2016) and *Brazil – Taxation* (DS472 and DS497) (2019).
255 *Canada – Periodicals* (DS31) (1997), *India – Autos* (DS164 and DS175) (2002) and *Brazil – Taxation* (DS472 and DS497) (2019).
256 *China – Publications and Audiovisual Products* (DS363) (2010); *Brazil – Taxation* (DS472 and DS497) (2019).
257 *Brazil – Taxation* (DS472 and DS497) (2019).
258 *China – Auto Parts* (DS339, 340 and 342) (2009) and *India – Solar Cells* (DS456) (2016).
259 *Brazil – Taxation* (DS472 and DS497) (2019).
260 *India – Solar Cells* (DS456) (2016).
261 *India – Autos* (DS164 and DS175) (2002).
262 See *Brazil — Measures Affecting Patent Protection* (DS199) (2000); *United States — US Patents Code* (DS224) (2001); and *Turkey — Certain Measures concerning the Production, Importation and Marketing of Pharmaceutical Products* (DS583) (2019).

ultimately supersedes any attempts to justify LCRs on public policy grounds.[263] In general, little space has been found in WTO law to argue public policy issues in LCR cases and even when this space exists, the respondents have generally not met the requirements, as interpreted by panels and the Appellate Body, to succeed in their arguments justifying the relevant LCRs. Also, it is important to stress that only in an insignificant number of cases (3) the disputing parties raised development-related arguments,[264] which reveals that there is an important gap in the arguments raised by disputing parties which possibly do not fully explore the development dimension of their LCRs.

The GATT 1994

The non-discrimination principle embodied in the national treatment obligation under Article III of the GATT 1994 is very strong and has a very broad scope according to WTO jurisprudence.[265] Of relevance for the analysis of LCRs are subparagraphs 2, 4 and 5 of Article III.

As LCRs require that a given percentage of domestic value-added or domestic components be embodied in a specified final product[266], discrimination against foreign products is at the root and part of the very nature of LCR definition. In this sense, the Panel in *Indonesia – Autos* (1998) stated, when analysing LCRs in the context of the automotive industry, that "the nature of the discrimination, which is to promote a national industry by giving it advantages vis-à-vis imported products, is clearly designed so as to afford protection to domestic production, contrary to the second sentence of Article III:2 of GATT".[267]

In addition, LCRs are understood to have an impact on manufacturers' choices as to the origin of parts and components to be used in manufacturing the products. That is because in order to receive a benefit, they will be encouraged to use domestic over imported goods. Given the discriminatory nature of LCRs, their illegality has unsurprisingly

263 In this sense, Umberto Celli Junior commented that "since the cases involving local content requirements in the traditional automotive sectors until those which reflect a transition to a low-carbon economy with strong incentives to the development of renewable energy, the panel and the Appellate Body have ensured the application of the basic international trade principle which is the non-discrimination" (free translation from Portuguese to English). Celli Junior, *OMC: Jurisprudência e Requisitos de Conteúdo Local como Política Industrial*, 242.

264 See *China – Autos Parts* (DS342), *India – Autos* (DS146 and DS175) (2002) and *Indonesia – Autos* (DS54).

265 In *Brazil – Taxation* (2019), the Appellate Body stressed that "the national treatment obligation under Article III of the GATT 1994, by the terms of that provision, has a broad scope of application. In particular, a discussion of the relevant WTO jurisprudence reveals that, although the national treatment obligation in Articles III:2 and III:4 is made effective in the context of "products", this does not ipso facto suggest that measures that are primarily directed at "producers" are excluded from that obligation" [Appellate Body Reports, *Brazil – Taxation* (2019), para. 5.101].

266 Grossman, "The Theory of Domestic Content Protection and Content Preference," 563.

267 Panel Report, *Indonesia – Autos* (1998), para. 14.115.

been found in most of the cases under analysis. Indeed, in *Brazil – Taxation* (2019), the Panel made it clear that when a requirement to use domestic goods exists, the finding of violation to Article III:4 of GATT 1994 is certain. There is no need to assess the actual impact of the measure on trade. As a result, the Panel stated that "[I]f the Panel finds that the alleged requirement to use domestic goods exists, the Panel considers that this will lead *ipso facto* to the further finding of inconsistency with Article III:4 of the GATT 1994."[268]

Even LCRs that are not strictly government-imposed requirements but reflect a voluntary action by a private party incentivised or influenced by the State may be considered inconsistent with the national treatment principle.[269]

LCRs may also violate Article III:5 of the GATT 1994. However, whenever panels have found a violation of Article III:2 or III:4 of the GATT 1994, they refrained from assessing a violation of Article III:5 for reasons of judicial economy.[270]

Even the requirement to carry out production steps within a country shall be considered a violation of Article III of the GATT. In *Brazil – Taxation* (2019), the Appellate Body ruled that:

> given the structure of the BPPs [basic productive process], which comprises a number of sequential production steps, it is likely that components and subassemblies produced in compliance with BPPs will be used as inputs in the subsequent production steps. Accordingly, given that

268 Panel Reports, *Brazil – Taxation* (2019), para. 7.738, emphasis added.

269 In *Canada – Autos* (2000), the panel analysed commitments made by Canadian car manufacturers to increase the value added to cars in their Canadian plants. The panel stated that: "A determination of whether private action amounts to a "requirement" under Article III:4 must therefore necessarily rest on a finding that there is a nexus between that action and the action of a government such that the government must be held responsible for that action. We do not believe that such a nexus can exist only if a government makes undertakings of private parties legally enforceable, as in the situation considered by the Panel on Canada – FIRA, or if a government conditions the grant of an advantage on undertakings made by private parties, as in the situation considered by the Panel on EEC – Parts and Components. We note in this respect that the word "requirement" has been defined to mean "1. The action of requiring something; a request. 2. A thing required or needed, a want, a need. Also the action or an instance of needing or wanting something. 3. Something called for or demanded; a condition which must be complied with."857 The word "requirements" in its ordinary meaning and in light of its context in Article III:4 clearly implies government action involving a demand, request or the imposition of a condition but in our view this term does not carry a particular connotation with respect to the legal form in which such government action is taken. In this respect, we consider that, in applying the concept of "requirements" in Article III:4 to situations involving actions by private parties, it is necessary to take into account that there is a broad variety of forms of government of action that can be effective in influencing the conduct of private parties." See: Panel Report, *Canada – Autos* (2000), para. 10.107.

270 See Kuntze and Moerenhout, *Local Content Requirements and the Renewable Energy Industry - A Good Match?*, 28.

> compliance with the BPPs is mandatory in order for a company to qualify for the tax incentives and that, in complying with the BPPs, the producers of an incentivized product will be likely to use domestic components and subassemblies, we consider that the main BPPs without nested BPPs provide an incentive to use domestic over imported goods. By doing so, the main BPPs in the Informatics programme accord treatment less favourable to imported goods than that accorded to like domestic goods inconsistently with Article III:4 of the GATT 1994.[271]

LCRs have also been questioned under Article XI.1 of GATT 1994,[272] which articulates a general prohibition on quantitative restrictions. As certain LCRs may have the effect of limiting the companies' ability to import, they may be unsurprisingly found inconsistent with Article XI:1, which entails a very broad prohibition.

The TRIMs Agreement

Furthermore, LCRs which are considered "investment measures related to trade in goods" and found "inconsistent with the provisions of Article III or Article XI of GATT 1994" will automatically be found in violation of Article 2.1 of the TRIMs Agreement. In this sense, the Panel, in *Brazil – Taxation* (2019), by making reference to other cases, stated that "if a Panel finds that a particular measure is a TRIM, and that such a measure contains a so-called local content requirement, then that local content requirement is necessarily inconsistent with both Article III:4 of the GATT 1994 and Article 2.1 of the TRIMs Agreement."[273] Indeed, in LCR cases, these measures are easily found to be a violation to Article 2.1 of the TRIMs Agreement. Not to mention that certain types of LCRs are explicitly listed in Paragraph 1(a) of the Illustrative List in the Annex to the TRIMs Agreement.[274]

This Illustrative List provides that the TRIMs which are inconsistent with the GATT obligation of national treatment include those which are mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage, and which require the purchase or use by an enterprise of products

271 Panel Reports, *Brazil – Taxation* (2019), para. 5.284.

272 See *India – Autos* (2002), *Turkey – Rice* (2007) and *Argentina – Import Measures* (2015)

273 Panel Reports, *Brazil – Taxation* (2019), para. 7.41. See also Panel Reports, *Indonesia – Autos* (1998), para. 14.61 ("The TRIMs Agreement and Article III:4 prohibit local content requirements that are TRIMs and therefore can be said to cover the same subject matter."); *India – Solar Cells* (2016), para. 7.54 ("TRIMs falling under paragraph 1(a) of the TRIMs Illustrative List are necessarily inconsistent with Article III:4 of the GATT 1994").

274 See Panel reports in *Indonesia – Autos* (1998), *Canada – Renewable Energy/Feed-in Tariff Program* (2013) and *Brazil – Taxation* (2019). See also Sadeq Z. Bigdeli, "Clash of Rationalities: Revisiting the Trade and Environment Debate in Light of WTO Disputes over Green Industrial Policy," *Trade, Law and Development* 6, no. 1 (2014): 188.

of domestic origin or from any domestic source, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production.

In addition, pursuant to the Illustrative List in the Annex to the TRIMS Agreement, TRIMs that are inconsistent with the GATT obligation of general elimination of quantitative restrictions include those which are mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage, and which restrict: (i) the importation by an enterprise of products used in or related to its local production, generally or to an amount related to the volume or value of local production that it exports; or (ii) the exportation or sale for export by an enterprise of products, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production.

The SCM Agreement

LCRs in the form of subsidies are also restricted under the SCM Agreement. Article 3.1(b) of this agreement expressly prohibits the so-called "import-substitution subsidies" or "local content subsidies", i.e., "subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods".

In recent cases, in particular *US – Tax Incentives* (2017) and *Brazil – Taxation* (2019), the Appellate Body has made efforts to define the contours of LCRs and their legality under the SCM Agreement. Specifically, the Appellate Body has stated that Article 3.1(b) of the SCM Agreement "does not prohibit *per se* conditioning eligibility for tax incentives on conducting certain production, processing, or assembly steps domestically. Inherent effects of production subsidies are not sufficient for a finding of contingency upon import substitution"[275] Consequently, the Appellate Body established a strict conditionality or contingency test for Article 3.1(b) of the SCM Agreement. What is important is "whether the measure requires the recipient to use domestic over imported goods as a condition for receiving the subsidy."[276] In particular, according to the Appellate Body, "the relevant question in determining the existence of contingency under Article 3.1(b) is not whether a condition for eligibility under a subsidy may *result* in the use of more domestic and fewer imported goods. Rather, the question is whether *a condition requiring* the use of domestic over imported goods can be discerned from the terms of the measure itself, or inferred from the measure's design, structure, and modalities of operation, in light of the

275 Appellate Body Reports, *Brazil – Taxation* (2019), para. 5.282.
276 Appellate Body Report, *US – Tax Incentives* (2017), para. 5.17.

relevant factual circumstances that provide the context for understanding the measure and its operation."[277]

Ultimately, the goal of the Appellate Body was to make a distinction between permitted domestic production subsidies (or subsidies contingent on "localisation" or on performance of "production steps") and prohibited import-substitution subsidies. Governments commonly provide tax incentives and other financial contributions to encourage companies to locate factories and offices in their jurisdiction. A major issue in the case "was how to determine exactly when incentives granted by governments in order to attract significant manufacturing activities to their territorial jurisdictions become subsidies prohibited within the meaning of Article 3.1(b) of the SCM, for being targeted at import substitution."[278]

The Appellate Body clarified that "(….) by its terms, Article 3.1(b) does not prohibit the subsidization of domestic "production" per se but rather the granting of subsidies contingent upon the 'use', by the subsidy recipient, of domestic over imported goods. Subsidies that relate to domestic production are therefore not, for that reason alone, prohibited under Article 3 of the SCM Agreement. We note in this respect that such subsidies can ordinarily be expected to increase the supply of the subsidized domestic goods in the relevant market, thereby increasing the use of these goods downstream and adversely affecting imports, without necessarily requiring the use of domestic over imported goods as a condition for granting the subsidy."[279]

The Appellate Body further explained that:

> We further observe that both import substitution subsidies and other subsidies that relate to domestic production may have adverse effects in respect of imported goods. Subsidies contingent upon import substitution, by their nature, adversely affect competitive conditions of imported products. Yet, also subsidies that relate to the production of certain goods in a Member's domestic territory can ordinarily be expected to increase the supply of the subsidized domestic goods in the relevant market, which would have the consequence of increasing the use of these subsidized domestic goods downstream and adversely affecting imports. In the specific case of subsidies granted for the production of both an input and a final good, subsidy recipients would likely both "produce" and

277 Appellate Body Report, *US – Tax Incentives* (2017), para. 5.71.
278 Spadano, "Local content requirements: perspectives under WTO law and other international norms," 232.
279 Appellate Body Report, *US – Tax Incentives*, para. 5.15, footnotes ommitted.

> "use" the subsidized inputs in the production of the subsidized final good. Indeed, such subsidies would have consequences for the subsidized producers' input-sourcing decisions to the extent that, having been required to produce an input domestically, and for reasons of production costs and efficiency, they would likely use at least some of these inputs in their downstream production activities. This is even more so in instances where the subsidized input is specialized in nature or where vertical integration between the upstream and downstream stages of the production chain exists. However, while such subsidies may foster the use of subsidized domestic goods and result in displacement in respect of imported goods, such effects do not, in and of themselves, demonstrate the existence of a requirement to use domestic over imported goods.[280]

The main problem, however, lies in the fact that, in providing localisation subsidies, governments wish to maximise domestic economic activity. Therefore, they may not only grant subsidies for companies to locate production of the final product, but also may expand the subsidies to cover the production of local inputs. In this case, the localisation subsidy for the production of the relevant final product might not be prohibited by the SCM Agreement, even if it encourages domestic economic activity; however, a subsidy for locating the production of its inputs could become a subsidy contingent upon the use of domestic goods.

In trying to make the distinction between permitted domestic production subsidies (or subsidies contingent on "localisation" or on performance of "production steps") and prohibited import-substitution subsidies, the Appellate Body made a controversial ruling on the scope and limits of import-substitution subsidies, advancing a single legal standard for both *de jure* and *de facto contingency*. In theory, *de facto* contingency analysis under Article 3.1(b) of the SCM Agreement requires a holistic assessment of the design, structure and operation of the measure while *de jure* analysis involves an examination of the terms of the measure itself. However, to the extent that the Appellate Body defined that a *condition requiring the use of domestic goods* has to be identified in both *de facto* and *de jure* contingency analysis, such thredshold blurred the distinction between the two types of contingency and made the analysis of *de facto* and *de jure* contingency very similar and formalistic.[281] Such narrow reading of contingency may enable the continuity of many governmental programs incentivising the local production of goods

280 Appellate Body Report, *US – Tax Incentives*, para. 5.49.

281 Kristy; Buzard and Panagiotis Delimatsis, *Subsidies and Investment Promotion Reaching New Heights in the Aviation Sector. The US – Tax Incentives Dispute* Robert Schuman Centre for Advanced Studies Research Paper No. RSCAS 2018/54 (2018), 12, https://doi.org/http://dx.doi.org/10.2139/ssrn.3293756

and development of domestic industry as they may not be considered *per se* prohibited subsidies under Article 3.1(b) of the SCM Agreement. Ultimately, provided that subsidies to producers are made contingent on the location of economic activity but not on the use of domestic inputs over foreign inputs, those subsidies may not necessarily violate Article 3.1(b) of the SCM Agreement.

Nevertheless, in so far as these measures provide an incentive to use domestic over imported goods, they can still fall afoul of Article III of GATT 1994 and may be actionable under Article 5 of the SCM Agreement.

Also, as relates environmental subsidies in particular, the Panel and Appellate Body's rulings in *Canada – Renewable Energy/Canada – Feed-in Tariff Program* (2013) have shown that the determination of the existence of a benefit under 1.1(b) of the SCM Agreement is controversial in these markets requiring governmental intervention. As a result, the LCR aspects of these measures may be most likely be contested under Article III of the GATT 1994, as it was the case not only for *Canada – Renewable Energy/Canada – Feed-in Tariff Program* (2013) but also for *India – Solar Cells* (2016). In the latter case, certain LCRs were contested only in view of GATT 1994 and the TRIMs Agreement, but not in view of the SCM Agreement.

The GATS

WTO Members retain, under GATS, a wide scope of policy space for implementing LCRs affecting services and service providers to the extent that Members will only be bound to the market access and national treatment obligations if they made specific commitments under their Service Schedules and subject to any limitations inscribed in the relevant column of the Services Schedule.

Nonetheless, if specific commitments are made, the market access obligations may limit a country's ability to: (i) favour the domestic industry by restraining foreign investors' ability to access the host country's market; (ii) restrict the ability to apply LCRs to secure employment of local workforce; (iii) prevent a WTO Member from requiring foreign firms to partner with local companies, or to make an investment through an established subsidiary in the host country and (iv) impede WTO Members from requiring firms to have a certain percentage of domestic equity.

In addition, the GATS' national treatment principle limits "governments' abilities to impose on foreign-owned service firms measures that are not similarly imposed on

domestic-owned entities, and to provide domestic-owned entities fiscal, financial, or other incentives that are not similarly provided to foreign-owned firms." [282]

Canada – Autos (2000), *China – Publications and Audiovisual Products* (2010) and *China – Electronic Payment Services* (2012) are illustrative cases where LCRs having an impact on service providers were found inconsistent with GATS provisions.

The GPA

The GPA signed in Marrakesh on 15 April 1994 ("GPA 1994") as well as its revised version entered into force on 6 April 2014 ("Revised GPA") prevent that government procurements establish conditions that encourage local development or improve a Party's balance-of-payments accounts (the so called "offsets"). These conditions expressly include local content requirements.

Nonetheless, considering that the GPA is a plurilateral agreement, only those Members that expressly acceded to it may have certain form of offsets expressly restricted under this agreement.

It is important to note, though, that given the narrow interpretation of the procurement derogation in Article III:8(a) of the GATT 1994 detailed below, even those countries which did not accede to the GPA may have certain forms of government procurement establishing LCRs prohibited under the Article III of the GATT 1994.

The TRIPS Agreement

WTO Members' general obligations in connection with patent rights are established in Articles 27 and 28 of the TRIPS Agreement. Article 27(1) sets forth that patent rights shall be enjoyable without discrimination as between products that are imported or locally produced.[283] This potentially limit the ability of a WTO Member to impose local working requirements.

Possible exemptions and defences for LCRs

(i) Exemptions and defences for LCRs under the GATT 1994

282 Lise Johnson, *Space for Local Content Policies and Strategies: A Crucial Time to Revisit an Old Debate*, ed. GIZ (Columbia Center on Sustainable Investment, 2017), 17.

283 Paul; Champ and Amir Attaran, "Patent rights and local working under WTO TRIPS agreement: An analysis of the US-Brazil patent dispute," *Yale Journal of International Law* 27 (2002): 367.

As regards the defences that can be raised by the respondents in LCR cases, the GATT 1994 contains an important exemption/derogation from national treatment principle, which is established in Article III:8(a) of the GATT 1994 and an exception set forth in Article III:8(b) of the same legal instrument. In addition, this agreement has general exceptions in Article XX and security exceptions in Article XXI which could allegedly be raised to justify violations to Article III and XI of the GATT 1994. Furthermore, developing countries could allegedly raise defences based on the discipline of Governmental Assistance to Economic Development established in Article XVIII of the GATT 1994.

This chapter notes, however, that the Appellate Body has expressed a very narrow interpretation of the procurement derogation in Article III:8(a) by requiring a competitive relationship test between the product being procured and that subject to discrimination which may be at odds with the object and purpose of the WTO Agreement. In this sense, where the relevant measure involves LCRs in public procurement contexts, parties most likely will not be able to argue Article III:8(a) as an exemption against the application of the national treatment principle.

The Appellate Body also reduced the possibility of raising a defence for local content subsidies based on Article III:8(b) of the GATT 1994. In *Brazil – Taxation* (2019), the Appellate Body concluded that:

> Article III:8(b) carves out from the national treatment obligation in Article III the payment of subsidies exclusively to domestic producers. Insofar as the payment of subsidies exclusively to domestic producers of a given product affects the conditions of competition between such a product and the like imported product, resulting in an inconsistency with the national treatment obligation in Article III, such a payment would be justified under Article III:8(b), provided that the conditions thereunder are met. Moreover, conditions for eligibility for the payment of subsidies that define the class of eligible "domestic producers" by reference to their activities in the subsidized products' markets would also be justified under Article III:8(b). By contrast, a requirement to use domestic over imported goods in order to have access to the subsidy would not be covered by the exception in Article III:8(b) and would therefore continue to be subject to the national treatment obligation in Article III. Furthermore, an examination of the text and context of Article III:8(b), in light of its object and purpose and as confirmed by the negotiating history, suggests that the term "payment of subsidies" in Article III:8(b) does not include within its

> scope the exemption or reduction of internal taxes affecting the conditions of competition between like products."[284]

Also, in none of the LCR cases where Article XX of the GATT 1994 was raised, panels and the Appellate Body found that the respondent met the requirements of the general exceptions to justify their LCRs under that provision. This shows that it is very difficult for disputing parties to meet the thresholds established by WTO jurisprudence in connection with Article XX of the GATT 1994 and therefore it may be extremely difficult to justify LCRs on general exception grounds.[285]

It is well-known that WTO panels and the Appellate Body conduct a two-tier analysis of the general exceptions, first analysing whether the measures are provisionally justified under the one of the paragraphs of Article XX and then, whether the provisionally justified measures meet the requirements of the chapeau of the provision. In all the cases, the panels did not even reach the second step of the analysis and considered the LCRs were not provisionally justified under the relevant paragraph raised by the defendant. In some cases, where the necessity test was applicable, the panels considered that there were less-trade restrictive measures that could be implemented instead of the LCR.[286] In others, the panel considered that the defendant was not able to establish a nexus between the measure and the interest protected.[287]

It is important to note, however, that the Panel in *Brazil – Taxation* (2019) made an important recognition to the extent that it considered that "it is not inconceivable to the Panel that under certain circumstances, discriminatory measures could indeed contribute to the claimed objectives in a manner similar to that explained by Brazil."[288] In this sense, it recognised that LCRs can indeed contribute to the achievement of relevant non-trade

284 Appellate Body Reports, *Brazil – Taxation* (2019), para. 5.124.

285 Since the conclusion of this work is that, under current WTO jurisprudence, parties may likely not succeed in justifying LCRs under the general exceptions, we will not discuss whether GATT exceptions would be available to other agreements. For a discussion on this topic, see: Tran, "Using GATT, Art XX to Justify Climate Change Measures in Claims Under the WTO Agreements "; Kuntze and Moerenhout, *Local Content Requirements and the Renewable Energy Industry - A Good Match?*

286 See Panel Report, *China – Publications and Audiovisual Products* (2010), paras. 7.869 to 7.911 and Panel Reports, *Brazil – Taxation* (2019), para. 7.960.

287 See Panel Reports, *China – Auto Parts* (2009), para. 7.346 and Panel Report, *India – Solar Cells* (2016), para. 7.368.

288 Panel Reports, *Brazil – Taxation* (2019), para. 7.581.

objectives. The Panel also recognised in this case that, under certain circumstances, protection of the domestic industry could contribute to achieve those objectives.[289]

Nevertheless, although the Panel recognised that LCRs can *potentially* contribute to the claimed non-trade objectives, in examining whether the discriminatory aspects of the measure were "necessary" to achieve the claimed objectives, the Panel recalled that it involved "a holistic analysis, involving weighing and balancing the importance of the interest being protected, the contribution of the measure to the protection of that interest, and the trade-restrictiveness of the measure."[290] Although the Panel recognised that the measures entailed important policy objective, it considered in the analysis of the contribution of the measure to the protection of the relevant interest that it would not or did not, *in fact*, contribute to the realisation of Brazil's policy goal. In addition, in assessing less trade-restrictive alternatives, the Panel concluded that alternative measures suggested by the complaining parties were reasonably available to Brazil, WTO-consistent, less trade-restrictive than the challenged measure, and were likely to result in a greater contribution to the stated objective.

Therefore, while WTO jurisprudence continues skewed in favour of the "least trade restrictive" measures where the necessity test is applicable, LCRs will probably not be justified under GATT general exceptions.[291]

In addition, resorting to arguments based on the discipline of Governmental Assistance to Economic Development, in particular, the support of infant industries and remedying balance of payments' problems, under Article XVIII of the GATT 1994 seems of no use for developing countries' intending to justify LCRs. Allegedly, not all developing Members may be able to raise the defences set forth in Article XVIII of the GATT 1994, only those that *support low standards of living and are in the early stages of development*", as established in subparagraph 1. In addition, this provision has strict requirements and notification procedures that significantly limit the practical availability of this article to

289 "(…) the Panel considers that in a situation where domestic producers could not compete with foreign imports absent government protection, it is conceivable that the protection afforded to domestic producers could allow such producers to develop their industry. The development of the industry could enable an otherwise uncompetitive domestic industry to become competitive to such an extent that it could supply the market alongside foreign imports in an open, competitive market, resulting in a lower price for consumers and therefore a net welfare benefit in terms of "social inclusion" and "access to information". (…). Nevertheless, the Panel agrees with Brazil that this is one way in which the discriminatory aspects of the measure at issue could potentially contribute to the protection of public morals" [Panel Reports, *Brazil – Taxation* (2019), para. 7.582].

290 Panel Reports, *Brazil – Taxation* (2019), para. 7.584.

291 A more in-depth analysis of Article XX and its potential in linking trade and development-related objectives, will be made in Chapter 4.

justify LCRs.[292] Furthermore, the fact that developing countries may have to provide compensation to other WTO agreements or suffer a suspension of equivalent concessions by those other Members also makes Article XVIII of the GATT 1994 of no practical relevance for justification of LCRs.

(ii) Defences for LCRs under the TRIMs Agreement

As regards possible defences for violations of the TRIMs Agreement, since the GATT derogations and exceptions listed above are also available for the TRIMs Agreement,[293] the same conclusions apply as to the limited effect of GATT derogations and exceptions as defences for justifying WTO-inconsistent LCRs.

(iii) Defences for LCRs under the SCM Agreement

Differently from the GATT 1994 and the GATS, the SCM Agreement does not have a "general exceptions" provision. So far, neither the Appellate Body not panels ruled on this matter. In addition, in none of the LCR cases have the defendants raised GATT exceptions to justify violations to the SCM Agreement.[294] In any case, WTO jurisprudence suggest that GATT exceptions are not available for the SCM Agreement. [295]

Also, despite the SCM Agreement has SDT provisions applicable to local content subsidies, developing countries are no longer benefiting from them as the transitional period stipulated under Article 27.3 has expired.

(iv) Defences for LCRs under the GATS

As mentioned, WTO Members are not required to subject themselves to GATS' market access and national obligation commitments unless they have chosen to do so and have expressed their commitments in relation to elected services in their Service Schedule. In any case, when specific commitments are made, Members may deviate from the obligations assumed if the measures are justified by certain policy interests falling within Article XIV of GATS and security exceptions under Article XIVbis.

292 Kuntze and Moerenhout, "Are Feed-In Tariff Schemes with Local Content Requirements Consistent with WTO Law?," 168-70.

293 Article 3 of the TRIMS Agreement. See also Appellate Body Reports, *Canada – Renewable Energy/Feed-In Tariff Program* (2013), para. 5.26; and Appellate Body Report, *China - Raw Materials* (2012), para. 303.

294 . For a discussion on this topic, see: Tran, "Using GATT, Art XX to Justify Climate Change Measures in Claims Under the WTO Agreements "; Kuntze and Moerenhout, *Local Content Requirements and the Renewable Energy Industry - A Good Match?*

295 Kuntze and Moerenhout, "Are Feed-In Tariff Schemes with Local Content Requirements Consistent with WTO Law?," 167.

Also, government procurement is exempted from national treatment, MFN and market access obligations under Art XIII GATS, provided that the services purchased are for governmental purposes and not with a view to commercial resale or with a view to use in the supply of services for commercial sale.

In none of the LCR cases where there was an alleged violation to GATS, the general exceptions were raised as a defence. In any case, given the similarities of Article XX of the GATT 1994 and Article XIV of GATS, it is also possible that defences under the latter provision also have a limited effect as justifications for GATS-inconsistent LCRs.

Also, despite no LCR case so far has involved a defence under Article XIV bis of the GATS (security exceptions), it is possible for the WTO Members to resort to this provision in limited circumstances, especially in the case of data localisation barriers aimed at mitigating cybersecurity risks and the protection of information the disclosure of which they consider contrary to their essential security interests.

(v) Defences for LCRs under the GPA

Article III of the Revised GPA and article XXIII of the 1994 GPA establish certain security and general exceptions which, under certain conditions, may justify the violation of provisions of the Agreement. These exceptions were not raised in the single LCR case involving the GPA.[296]

In any case, given the similarities with GATT exceptions, it is also possible that defences under GPA exceptions also have a limited effect as justifications for GPA-inconsistent LCRs.

(vi) Defences for LCRs under the TRIPS Agreement

Article 27 of the TRIPS Agreement prohibiting discrimination as to whether the patent product is produced abroad or locally may be subject to specific exceptions contained in Article 30 and 31 of the TRIPS and possibly Article 5A of the Paris Convention for the Protection of Intellectual Property (Paris Convention).[297] Article 30 of the TRIPS Agreement allows limited exceptions to the exclusive rights conferred by a patent, provided

296 *Korea – Procurement* (2000).

297 United International Bureaux for the Protection of Intellectual Property (BIRPI). *Paris Convention for the Protection of Industrial Property of March 20, 1883, As Revised at Brussels on December 14, 1900, at Washington on June 2, 1911, at the Hague on November 6, 1925, at London on June 2, 1934, at Lisbon on October 31, 1958, and at Stockholm on July 14, 1967*. Geneva: United International Bureaux for the Protection of Intellectual Property (BIRPI), 1968.

that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties. Article 31, in turn, establishes conditions under which compulsory licensees can be granted. Article 5A of the Paris Convention,[298] which is incorporated to the TRIPS Agreement by Article 2.1,[299] allows for compulsory licencing in case of failure to work a patent. These provisions permit interpretation favourable to the grant of compulsory licence in the specific case the patentee fails to work the patent domestically, that is, fails to produce the patented product within the country granting the patent rights.

(vii) SDT provisions or development-oriented interpretation of WTO obligations raised by developing countries

Finally, in only 3 WTO disputes involving LCRs, defendants have adduced SDT provisions or raised arguments that required the panel to interpret a certain WTO provision considering their condition as a developing country.[300] However, they were not successful in their claims. This indicates the limited availability of SDT provisions for justifying LCRs.

Below the main provisions of the WTO agreements affecting LCRs are discussed in light of LCR cases decided by panels and the Appellate Body. The concluding section analyses what space is left for LCRs in view of WTO law and jurisprudence.

298 Paris Convention, article 5A: "(1) Importation by the patentee into the country where the patent has been granted of articles manufactured in any of the countries of the Union shall not entail forfeiture of the patent.
(2) Each country of the Union shall have the right to take legislative measures providing for the grant of compulsory licenses to prevent the abuses which might result from the exercise of the exclusive rights conferred by the patent, for example, failure to work.
(3) Forfeiture of the patent shall not be provided for except in cases where the grant of compulsory licenses would not have been sufficient to prevent the said abuses. No proceedings for the forfeiture or revocation of a patent may be instituted before the expiration of two years from the grant of the first compulsory license.
(4) A compulsory license may not be applied for on the ground of failure to work or insufficient working before the expiration of a period of four years from the date of filing of the patent application or three years from the date of the grant of the patent, whichever period expires last; it shall be refused if the patentee justifies his inaction by legitimate reasons. Such a compulsory license shall be non-exclusive and shall not be transferable, even in the form of the grant of a sub-license, except with that part of the enterprise or goodwill which exploits such license.
(5) The foregoing provisions shall be applicable, mutatis mutandis, to utility models."
299 TRIPS Agreement, article 2.1: "In respect of Parts II, III and IV of this Agreement, Members shall comply with Articles 1 through 12, and Article 19, of the Paris Convention (1967)."
300 See *China – Autos Parts* (2009), *India – Autos* (2002) and *Indonesia – Autos* (1998).

II.2 LEGALITY OF LCRS UNDER THE GATT 1994

II.2.1 GATT Article III – National Treatment

The most relevant provisions affecting local content measures are set forth in Article III of the GATT 1994 as it embodies the principle of national treatment.[301] This principle is set forth broadly in paragraph 1 of Article III of the GATT 1994, which informs the interpretation of the subsequent paragraphs. According to this provision:

> The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products *so as to afford protection to domestic production* (emphasis added)

The national treatment is one of the most important principles in the WTO as it has the purpose to avoid protectionist behaviour by prohibiting that internal measures are applied so as to afford protection to domestic production.[302]

This principle not only protects the equality of competitive conditions between imported and domestic goods, but also guarantees the "expectations" of equal competitive relations, as the actual trade distortive effect of the relevant measure is not dispositive of the consistency with Article III.[303]

LCRs generally violate at least one of the paragraphs of Article III because by their very nature they involve a discrimination against imported products as they condition a benefit to the use of domestic over imported goods, therefore discriminating products according to their origin (nationality). In most LCR cases, complainants have raised violations against Article III:4. Arguments relating to violations against Articles III:2[304] and III:5[305] appear in a limited number of instances.

301 Hestermeyer and Nielsen, "The Legality of Local Content Measures under WTO Law," 566.
302 Appellate Body Report, *Japan – Alcoholic Beverages II* (1996), para. 109.
303 Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization - Text, Cases and Materials*, 3rd ed., ed. Cambridge University Press (2013), 353.
304 *Indonesia – Autos* (1998), *China – Auto Parts* (2009), *Brazil – Taxation* (2019).
305 *China – Auto Parts* (2009) and *Brazil – Taxation* (2019).

While Article III.1 "articulates a general principle that internal measures should not be applied so as to afford protection to domestic production"[306], Article III:2 relates to measures of a fiscal nature ("internal taxes or other internal charges"). Article III:4 encompasses measures of a non-fiscal nature ("laws, regulations and requirements"). Article III:5 relates squarely to quantitative regulations relating to mixture proportions. The Panel in *Brazil – Taxation* (2019) explained in more details the differences between these paragraphs:

> Article III of the GATT 1994 generally prohibits discrimination against imported products. Paragraph 1 of Article III states clearly that, in all forms, governmental acts should not be applied to imported or domestic products "so as to afford protection to domestic production".
>
> Therefore, any type of governmental action (including both tax measures and domestic regulations) which favours domestic products over like imported products is contrary to Article III of the GATT 1994. While Article III:2 prohibits tax discrimination between imported and domestic like products, Article III:4 and III:5 deal with discrimination introduced through regulations. Specifically, Article III:4 prohibits regulatory discrimination between imported and like domestic products. (...), any regulatory measure that affects the conditions of competition in the domestic market to the detriment of imported like products is inconsistent with Article III:4. Measures prohibited by Article III:4 include, but are not limited to, requirements, conditions for obtaining an advantage, and other types of incentives that favour the use of domestic products over imported like products. (Similarly, trade-related investment measures in the form of requirements to purchase or use domestic products in order to obtain an advantage are inconsistent with the TRIMs Agreement, and subsidies contingent on the use of domestic over imported goods are inconsistent with the SCM Agreement.) Article III:5 focuses on discrimination between imported and like domestic products, imposed through quantitative regulations relating to mixture proportions.[307]

II.2.1.1 Article III:2 of the GATT 1994

Article III:2 establishes that:

306 Bossche and Zdouc, *The Law and Policy of the World Trade Organization - Text, Cases and Materials*, 355.
307 Panel Reports, *Brazil – Taxation* (2019), para. 7.32-7.33.

> The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.

In order to analyse if the national treatment obligation has been violated under GATT III:2, first sentence, WTO panels and the Appellate Body verify, under a three-tier test of consistency, (i) whether the measure at issue is an internal tax or other internal charge on products; (ii) whether the imported and domestic products are like products; and (iii) whether the imported products are taxed in excess of the domestic products.

As to the first requirement (whether the measure at issue is an internal tax or other internal charge on products), the Panel, in *China – Auto Parts* (2009), based on previous GATT and WTO panel rulings, considered that an important element that would indicate that a charge constituted an "internal tax or other internal charge" within the meaning of Article III:2 of the GATT 1994 was whether the obligation to pay such charge accrued because of an internal factor (e.g., because the product was re-sold internally or because the product was used internally), in the sense that such "internal factor" occurred after the importation of the product of one Member into the territory of another Member.[308]

In *Brazil – Taxation*, the Appellate Body reiterated that Article III:2, first sentence, of the GATT "has a broad scope of application by not only disciplining internal taxes that directly affect products but also internal taxes that indirectly affect products".[309] It also considered that "while the focus of Article III:2, first sentence is, in particular, "on the treatment accorded to 'products'", it does not exclude from its scope measures that are on their face directed at producers, which nevertheless subject the product concerned to taxation in excess, and thereby have an impact on the conditions of competition." [310]

As regards the second requirement (whether the imported and domestic products are like products), the Panel in *Indonesia-Autos* (1998) stated that:

> Under the Indonesian car programmes the distinction between the products for tax purposes is based on such factors as the nationality of

308 Panel Reports, *China – Auto Parts* (2009), para. 7.132.
309 Appellate Body Reports, *Brazil – Taxation* (2019), para. 5.15.
310 Appellate Body Reports, *Brazil – Taxation* (2019), para. 5.15.

> the producer or the origin of the parts and components contained in the product … In our view, such an origin-based distinction in respect of internal taxes suffices in itself to violate Article III:2, without the need to demonstrate the existence of actually traded like products.[311]

Accordingly, despite the three-tier test applicable to GATT Article III:2, first sentence, in LCR cases, the determination of likeness will not be a disputed issue, considering that the distinction between products is clearly origin-based.

In relation to the third requirement (whether the imported products are taxed in excess of the domestic products), the Appellate Body ruled that the prohibition of discriminatory taxes in Article III:2, first sentence, is not qualified by a 'de minimis' standard. In addition, it is not conditional on a 'trade effects' test.[312] In *Brazil – Taxation*, the Appellate Body has found that "a determination of whether an infringement of Article III:2, first sentence, exists must be made on the basis of an overall assessment of the actual tax burdens imposed on imported products, on the one hand, and like domestic products, on the other hand."[313]

In all LCR cases under analysis, the panels and/or the Appellate Body found a violation to Article III:2, first sentence, of the GATT 1994.[314]

In *Indonesia – Autos* (1998), the Panel also concluded that the sales tax discrimination aspects of the car programmes in favour of domestic motor vehicles incorporating a certain percentage value of domestic products violated the provisions of Article III:2 of the GATT 1994.

In *China – Auto Parts* (2009), vehicles that were assembled with up to a certain level of imported auto parts were charged a lower tax than those which exceeded the threshold of imported inputs. The Panel, upheld by the Appellate Body, concluded that the measure violated GATT Article III:2, as imported goods were charged taxes "in excess of" like domestic products.[315]

311 Panel Report, *Indonesia – Autos* (1998), para. 14.113.
312 Bossche and Zdouc, *The Law and Policy of the World Trade Organization - Text, Cases and Materials*, 368. Appellate Body Report, *Japan – Alcoholic Beverages II* (1996), para. 23 and 110.
313 Appellate Body Reports, *Brazil – Taxation* (2019), para. 5.35.
314 *Indonesia – Autos* (1998), *China – Auto Parts* (2009), *Brazil – Taxation* (2019).
315 Appellate Body Reports, *China – Auto Parts* (2009), para. 180 and para. 186.

In *Brazil – Taxation* (2019), the Panel, upheld by the Appellate Body, found that under a credit-debit system, purchases of non-incentivised[316] imported intermediate Information and Communication Technology, Automation and Related Goods ("ICT products") involved the payment of a tax upfront that was not faced by companies that purchased incentivised like domestic intermediate ICT products, which were exempted from the relevant taxes. Even in the case of tax reductions, companies purchasing incentivised like domestic intermediate ICT products would have to pay a lower tax compared to companies purchasing non-incentivised imported intermediate ICT products. In this sense, the Panel and Appellate Body concluded that imported intermediate ICT products were taxed in excess of like domestic incentivised intermediate ICT products contrary to Article III:2, first sentence of the GATT 1994.[317]

Therefore, when analysing LCRs under GATT III:2, first sentence, there is a high probability of finding that the relevant measure (i.e. an LCR that link the use of domestic products to a lower tax for products meeting local content requirement) is inconsistent with this provision, considering the three-tier test adopted by WTO jurisprudence. First, the concept of internal tax and charge is broad. Hence, different types of LCRs may be encompassed by this large definition. Second, foreign and domestic goods in LCRs cases are normally deemed "like" as the difference between them is based solely on their origin and not on other elements. Lastly, the discrimination against foreign products under GATT III:2, first sentence, commonly involve a higher tax burden imposed on imported products in comparison with domestic like product. Panels and the Appellate Body will not require demonstration of actual adverse impact on trade. Accordingly, the discriminatory design of LCRs will generally suffice to make them inconsistent with GATT III:2, first sentence, whenever they relate to internal taxes and charges.

II.2.1.2 Article III:4 of the GATT 1994

Article III:4 of the GATT provides that:

> The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the

316 A product is "incentivised" if the company producing them is accredited under a particular local content programme. Panel Reports, *Brazil – Taxation* (2019), para. 7.24

317 Appellate Body Reports, *Brazil – Taxation* (2019), para. 5.39-5.42.

> economic operation of the means of transport and not on the nationality of the product.

The Appellate Body also analyses alleged violations of the provision according to a three-tier test. As a result, the following elements have to be satisfied: (i) that the measure at issue is a 'law, regulation, or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution, or use'; (ii) that the imported and domestic products at issue are 'like products'; and (iii) that the imported products are accorded 'less favourable' treatment than that accorded to like domestic products.[318]

First, as mentioned in connection with Article III:2 of the GATT 1994, in LCR cases, establishing that imported and domestic products are like is not an issue, as the distinction between the products are origin-based. In other words, at the heart of the LCR is discrimination between domestic and imported goods. Therefore, imported and domestic products will automatically be found like.

For instance, in *Argentina – Import Measures* (2015), the Panel stated that in LCR cases the only distinguishing feature between an imported product and a domestic one, in terms of the application of this requirement, is its origin.[319] As a result, the Panel concluded that, with respect to the LCR, imported and domestic products were "like" for the purposes of Article III:4 of the GATT 1994.[320]

Second, in analysing whether the measure at issue is a 'law, regulation, or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution, or use', the Panel in *US – FSC (Article 21.5 – EC*) (2002) explained that this requirement related to the form of the measure, not its content:

> In considering these issues, we first consider the form of the measure in question. We agree with the views expressed in previous GATT and WTO Panel reports that Article III:4 applies also to measures in the form of conditions that must be satisfied in order to obtain an 'advantage' from the government.[321]

As clarified by Hestermeyer and Nielsen, "local content requirements always come in the form of conditions in order to obtain an advantage"[322]. Such requirements can be either

318 Appellate Body Report, *Korea – Various Measures on Beef* (2001), para. 133.
319 Panel Report, *Argentina – Import Measures* (2015), para. 6.275
320 Panel Report, *Argentina – Import Measures* (2015), para. 6.276.
321 Panel Report, *US – FSC (Article 21.5 – EC)* (2002), para. 8.139.
322 Hestermeyer and Nielsen, "The Legality of Local Content Measures under WTO Law," 569.

mandatory (and e.g., imposed by a statute) or voluntary schemes (such as the promise to use local content in a bid for a concession granted by the government), which private companies adhere to in order to receive a benefit from the government.

Indeed, in *India – Autos* (2002), the Panel stated that the term "'requirements' includes not only conditions that companies are legally bound to carry out, but also those that they might voluntarily accept in order to obtain an advantage from a government."[323]

The WTO jurisprudence also clarified the scope of the term "affecting", which qualifies the types of measures covered by Article III:4. In *China – Auto Parts* (2009), the Appellate Body determined that measures that create an incentive not to use imported products by definition affect their internal sale, offering for sale, purchase or use.[324] As a result, LCRs will always comply with this requirement under Article III:4. Furthermore, the Panel in *Brazil – Taxation* (2019) clarified that "if the application of a measure can potentially "affect" trade in products and treat imported products less favourably than domestic products, that measure can be considered to be inconsistent on its face with the national treatment obligation, even if the challenged regulation is written in terms of requirements on firms (as opposed to requirements on products)"[325]. Also, the Appellate Body in *China – Publications and Audiovisual Products* (2010) explained that restrictions imposed on investors, wholesalers, and manufacturers, as well as on points of sale and ports of entry, are inconsistent with Article III:4 of the GATT 1994.[326]

Thirdly, the requirement that the imported products are accorded 'less favourable' treatment than that accorded to like domestic products requires an examination whether the measure at issue modifies the conditions of competition in the relevant market to the detriment of imported products. In all cases where an LCR was found, the Panel and/or the Appellate Body concluded for a violation of Article III:4.[327]

In *US - FSC (Article 21.5 – EC)* (2002)**,** a panel was established to review the WTO consistency of a US legislation, which created new rules under which certain income from specific transactions was excluded from US taxation. For instance, tax exemption would be granted to income attributable to gross receipts involving "qualifying foreign trade property" ("QFTP"), which was defined as property that is: (A) manufactured, produced,

323 Panel Report, *India – Autos* (2002), para. 7.418. The same idea was shared by the Panel in *Turkey – Rice* (see Panel Report, 2007, para. 7.219).
324 Appellate Body Reports, *China – Auto Parts* (2009), paras. 194–195
325 Panel Reports, *Brazil – Taxation* (2019), para. 7.194.
326 Appellate Body Report, *China – Publications and Audiovisual Products* (2010), para. 227.
327 Except for the cases where the panel exerted judicial economy as to the analysis of Article III.4 of the GATT because it had already found a violation of another provision of the relevant WTO Agreements. See, for instance, the Panel Report in *Indonesia – Autos* (1998).

grown or extracted within or outside the United States; (B) held primarily for sale, lease or rental, in the ordinary course of business, for direct use, consumption, or disposition outside the United States; and (C) not more than 50 percent of the fair market value of which is attributable to: (i) articles manufactured, produced, grown, or extracted outside the United States; and (ii) direct costs for labour performed outside the United States.

The Panel found that, by reason of the foreign articles/labour limitation, the legislation accorded less favourable treatment within the meaning of Article III:4 of the GATT 1994 to imported products than to like products of US origin.

In particular, the Panel observed that "the foreign articles/labour limitation explicitly places a limit on the proportion of the fair market value of a product that can be derived from imported products (and foreign labour) only, and places no similar constraint on the proportion of the fair market value of a product that can be derived from domestic products and labour"[328]. Consequently, in the Panel's view, "an advantage is conferred upon the use of domestic products that is not conferred upon the use of imported products"[329], creating an incentive to use domestic rather than imported goods[330] and affording less favourable treatment to imported products than to like domestic products.

The US contested the Panel's finding that the measure "affected" the internal use of like imported products and argued that there was no "necessary relationship" between the fair market value rule and the internal use of imported products. The US emphasised that the fair market value rule is a "measure of general application that is not directed against imports".

The Appellate Body recalled that "the broad and fundamental purpose of Article III is to avoid protectionism in the application of internal tax and regulatory measures" and that, "toward this end, Article III obliges Members of the WTO to provide equality of competitive conditions for imported products in relation to domestic products".[331] In view of this general principle, it defended a "broad scope of application" for the word "affecting" in Article III:4 of the GATT 1994. In addition, it endorsed the Panel's view that the fair market value rule influenced the manufacturer's choice between like imported and domestic input products if it wished to obtain the tax exemption under the ETI measure.[332]

328 Panel Report, *US - FSC (Article 21.5 – EC)* (2002), para. 8.155.
329 Panel Report, *US - FSC (Article 21.5 – EC)* (2002), para. 8.156.
330 Panel Report, *US - FSC (Article 21.5 – EC)* (2002), para. 8.157.
331 Appellate Body Report, *US - FSC (Article 21.5 – EC)* (2002), para. 204.
332 Appellate Body Report, *US - FSC (Article 21.5 – EC)* (2002), para. 212.

The Appellate Body also recalled that the examination of whether a measure involves "less favourable treatment" of imported products within the meaning of Article III:4 of the GATT 1994 does not need not be based on the actual effects of the contested measure in the marketplace.[333] In this sense, in line with the Panel's conclusion, it confirmed that the fair market value rule "provides a considerable impetus, and, in some circumstances, in effect, a requirement, for manufacturers to use domestic input products, rather than like imported ones".[334]

In the Appellate Body's view, the fact that the fair market value rule does not give rise to less favourable treatment for like imported products in each and every case does not alter the latter conclusion. There may well be "property which does not require extensive material and labour inputs such that the fair market value rule would not, in those cases, bear upon the input choices manufacturers make. Even so, the fact remains that in an indefinite number of other cases, the fair market value rule operates, by its terms, as a significant constraint upon the use of imported input products." [335]

In *Canada – Autos* (2000), the Panel was called to analyse an import duty exemption granted by Canada to imports of automobiles, buses and specified commercial vehicles ("motor vehicles") by certain manufacturers. Such exemption was available to manufacturers of motor vehicles on imports, if the manufacturer complied with certain requirements including the "CVA requirement", that is, if the amount of Canadian value added (CVA) in the manufacturer's local production of motor vehicles had been "equal to or greater than" the amount of CVA in the local production of motor vehicles of that class during a certain "base year""[336]

The CVA used by a particular manufacturer was calculated based on "the cost of parts produced in Canada and of materials of Canadian origin that are incorporated in the motor vehicles; transportation costs; labour costs incurred in Canada; manufacturing overhead expenses incurred in Canada; general and administrative expenses incurred in Canada that are attributable to the production of motor vehicles; depreciation in respect of machinery and permanent plant equipment located in Canada that is attributable to the production of motor vehicles; and a capital cost allowance for land and buildings in Canada that are used in the production of motor vehicles." [337]

333 Appellate Body Report, *US - FSC (Article 21.5 – EC)* (2002), para. 215.
334 Appellate Body Report, *US - FSC (Article 21.5 – EC)* (2002), para. 220.
335 Appellate Body Report, *US - FSC (Article 21.5 – EC)* (2002), para. 221.
336 Appellate Body Report, *Canada – Autos* (2000), para. 9.
337 Appellate Body Report, *Canada – Autos* (2000), para. 9.

The Panel found that the CVA requirements forcing the use of domestic materials to be eligible for tax exemption resulted in less favourable treatment to imports under Art. III:4 of the GATT 1996 by adversely affecting the conditions of competition for imports, and, thus, considered it inconsistent with this provision.

Canada had argued that, because CVA amounts were at such a low level and could be easily met through labour costs alone and because the use of domestic products was not in law or in fact required, the CVA requirements played no role in parts' sourcing decisions, and therefore did not affect the "internal sale,…or use" of products nor provided less favourable treatment to imported products, as would be required by Article III:4 of GATT.[338] In Canada's view a value added requirement which did not necessitate the use of domestic products should receive a different treatment from a LCR which could only be met by the use of domestic products. Canada also submitted that the Illustrative List in the TRIMs Agreement confirmed its view that the use of domestic products had to be required in order for a local content or value-added requirement to be inconsistent with Article III:4."[339]

The Panel, however, disagreed with Canada's arguments. It found that it had been consistently held in WTO jurisprudence that a fundamental objective of Article III is the protection of expectations on the competitive relationship between imported and domestic products and, thus, a measure could be found to be inconsistent with Article III:4 because of its potential (as opposed to actual) discriminatory impact on imported products. As a result, the actual trade effects of a disputed measure were not a decisive criterion in determining whether the requirements of these provisions are met in a given case.[340]

The Panel noted that the definition of CVA included the costs of domestic, i.e. Canadian, parts, materials and non-permanent equipment but excluded the costs of imported parts, materials and non-permanent equipment. According to it, the exclusion of imported products from the calculation of the CVA meant that, whereas the use of domestic products by a manufacturer in Canada could contribute to the fulfilment of a condition necessary to obtain an advantage, the use of imported products could not contribute to the fulfilment of that condition.[341]

338 Panel Report, *Canada – Autos* (2000), para 10.75-10.77
339 Panel Report, *Canada – Autos* (2000), para. 10.77.
340 Panel Report, *Canada – Autos* (2000), para. 10.78
341 Panel Report, *Canada – Autos* (2000), para. 10.81.

Consequently, the Panel considered that a measure which provided that an advantage could be obtained by using domestic products but not by using imported products had an impact on the conditions of competition between domestic and imported products and thus affected the "internal sale,…or use" of imported products, even if the measure allowed for other means to obtain the advantage, such as the use of domestic services rather than products.[342]

The Panel then found that the CVA requirements accorded less favourable treatment within the meaning of Article III:4 to imported parts, materials and non-permanent equipment than to like domestic products because, "by conferring an advantage upon the use of domestic products but not upon the use of imported products, they adversely affect the equality of competitive opportunities of imported products in relation to like domestic products". [343]

In *India – Autos* (2002), the Panel analysed India's automotive components licensing policy, in particular, an "indigenisation" requirement, whereby each car manufacturer was obliged to achieve indigenisation, or local content, of a minimum level of 50 percent by the third year from the date of its first import of cars in the form of completely and semi-knocked down kits ("CKD/SKD kits"), or certain automobile components, and 70 percent by the fifth year from that date.

It noted that this indigenisation requirement had the effect of modifying the conditions of competition between the domestic and imported products, affecting the internal sale, offering for sale, purchase and use of imported parts and components in the Indian market within the meaning of Article III:4 of the GATT 1994.[344]

The Panel noted further that the requirement had an impact on manufacturers' choices as to the origin of parts and components to be used in manufacturing automotive vehicles, since they needed to take into account the requirement to use a certain proportion of products of domestic origin. Accordingly, car manufacturers were not free to choose to purchase imported parts and components over domestic parts and components in excess of a certain proportion. In these circumstances, imported products could not compete on an equal footing with Indian-origin parts and components because the indigenisation requirement explicitly set out the percentage of domestic parts and components that should be used.[345]

342 Panel Report, *Canada – Autos* (2000), para. 10.82.
343 Panel Report, *Canada – Autos* (2000), para. 10.85.
344 Panel Report, *India – Autos* (2002), para. 7.200-7.201.
345 Panel Report, *India – Autos* (2002), para. 7.201.

In *Canada – Wheat Exports and Grain Imports* (2004), the Panel considered that a Canadian measure restricting foreign grain from entering Canadian grain elevators violated Article III:4 of the GATT 1994 by imposing a requirement on foreign grain which was not applicable to like domestic grain.[346] The Panel also found that a Canadian law that restricted the mixing of foreign grain with grain from Eastern Canada was also inconsistent with GATT Article III:4. The Panel asserted that this provision meant that the standing and unconditional mixing authorisation granted by Section 56(1) only benefited Eastern Canadian grain.[347] The Panel considered that, under the provisions of Article III:4 of the GATT 1994, foreign grain that was like Eastern Canadian grain should, at a minimum, be conferred the same advantage conferred on like Eastern Canadian grain, namely, the advantage of standing mixing authorisation, obviating the need to first obtain authorisation.[348] In the Panel's view, it was clear that the competitive opportunities afforded to imported grain are less favourable than those available to like Eastern Canadian grain[349] and, consequently, this provision was inconsistent with Article III:4 of the GATT 1994.

In *Turkey – Rice* (2007), the United States challenged Turkey for requiring importers to purchase specified quantities of domestic rice, in order to be allowed to import specified quantities of rice at reduced tariff levels under tariff quotas ("domestic purchase requirement"). The Panel found that this measure was inconsistent with Art. III:4. According to the Panel, the domestic purchase requirement certainly "had an effect on" the competitive relationship between imported and domestic rice, and thus affected the decisions of operators on the purchase of imported and domestic rice.[350] In the Panel's view, the domestic purchase requirement modified the conditions of competition in the Turkish market to the detriment of imported rice. The purchase of domestic rice accorded an advantage that the purchase of the like imported product did not have, i.e., the option to buy imported rice at reduced tariff rates.[351] The Panel considered this option an advantage irrespective of whether operators ultimately found it economically advantageous or not to import rice under the measure.[352]

In *China – Auto Parts* (2009), the Panel also found that the relevant LCR inevitably influenced an automobile manufacturer's choice between domestic and imported auto parts and thus affected the internal use of imported auto parts.[353] In addition, it created

346 Panel Report, *Canada – Wheat Exports and Grain Imports* (2004), para. 6.185.
347 Panel Report, *Canada – Wheat Exports and Grain Imports* (2004), para. 6.276
348 Panel Report, *Canada – Wheat Exports and Grain Imports* (2004), para. 6.277.
349 Panel Report, *Canada – Wheat Exports and Grain Imports* (2004), para. 6.280.
350 Panel Report, *Turkey – Rice* (2007), para. 7.225.
351 Panel Report, *Turkey – Rice* (2007), para. 7.234.
352 Panel Report, *Turkey – Rice* (2007), para. 7.238.
353 Panel Reports, *China – Auto Parts* (2009), para. 7.256

a disincentive for auto manufacturers to use imported auto parts.[354] The Panel also found that, by subjecting imported auto parts to the administrative procedures not faced by like domestic products, which could cause a substantial delay throughout the entire assembly operations, the measures modified the conditions of competition in China's market to the detriment of imported auto parts.[355] In light of the foregoing, the Panel found that China's measures were inconsistent with its obligations under Article III:4 of the GATT 1994 to afford no less favourable treatment to like imported products.[356]

In *China – Publications and Audiovisual Products* (2010), China was found to be in violation of Article III:4 of the GATT due to a prohibition on foreign-invested enterprises to distribute imported books, newspapers, and periodicals, and a requirement that the distribution of imported newspapers and periodicals occurred only through subscription.[357]

In *Canada – Renewable Energy / Feed-in Tariff Program* (2013), the Panel analysed LCRs associated with a scheme implemented by the Government of the Province of Ontario and its agencies in 2009, through which generators of electricity produced from certain forms of renewable energy were paid premium rates for set periods. Both Panel and the Appellate Body easily concluded that the LCR element of Ontario's programme breached the prohibition of the non-discrimination clause set forth in GATT Art. III:4.

In *Argentina – Importation of Goods*, the Panel analysed LCRs applicable to a wide range of sectors such as foodstuffs, automobiles, motorcycles, mining equipment, electronic and office products, agricultural machinery, medicines, publications, and clothing and which were part of a policy implemented by the Argentine Government to reindustrialise the country. The Panel noted that the Argentine Government required economic operators to achieve a certain level of domestic content in order to be eligible to import or to benefit from certain advantages (e.g. tax credits). Consequently, the LCR imposed by the Argentine Government affected the conditions of competition of imported products in the Argentine market, violating Article III:4 of the GATT.[358]

In *India – Solar Cells* (2016), the Jawaharlal Nehru National Solar Mission (NSM) which had been created to establish India as a global leader in solar energy was also found to

354 Panel Reports, *China – Auto Parts* (2009), para. 7.270.
355 Panel Reports, *China – Auto Parts* (2009), para. 7.269.
356 Panel Reports, *China – Auto Parts* (2009), para. 7.272. The Appellate Body upheld the Panel's finding in this respect (Appellate Body Reports, *China- Auto Parts*, 2009, para. 196).
357 Panel Report in *China – Publications and Audiovisual Products* (2010), para. 7.1695-7.1697.
358 Panel Report, *Argentina – Import Measures* (2015), para. 6.292.

violate Article III:4 of the GATT, as India's power purchase agreements with solar power developers mandated the use of Indian-manufactured solar cells and modules.[359]

In *Brazil – Taxation* (2019), certain ICT programmes granted companies which carried out certain production steps in Brazil certain tax and other regulatory advantages. The Panel found that the accreditation requirements of the ICT programmes, by restricting access to the tax incentives only to domestic products, resulted in less favourable treatment being accorded to imported products than to like domestic products and thus violated Article III:4 of GATT 1994.[360]

In addition, because accredited companies could reduce the amount they were obliged to invest in R&D under the programmes by purchasing domestic products, the Panel considered that this modified the conditions of competition between domestic and like imported products to the detriment of the latter, in violation of Article III:4 of the GATT.[361] The Panel also found a violation of this provision on the fact that firms purchasing domestic products faced lower administrative burdens that those importing said products.[362]

In addition, in respect of the INOVAR-AUTO programme, which granted tax and regulatory advantages for automotive companies complying with manufacturing steps in Brazil and with requirements to use domestic inputs and components, the Panel also found a violation to Article III:4 of the GATT 1994.[363]

In this same dispute, it was made clear by the Appellate Body that Article III of the GATT 1994 has a broad application for restricting domestic production subsidies. The Appellate Body in establishing the difference between Article 3.1(b) of the SCM Agreement and Article III:4 of the GATT 1994, stated that:"the legal standard under Article 3.1(b) of the SCM Agreement is not the same as that under Article III:4 of the GATT 1994. In order to establish an inconsistency with Article 3.1(b) of the SCM Agreement, a measure must be "contingent …upon the use of the domestic over imported goods". By contrast, *to find an inconsistency with Article III:4 of the GATT, it is sufficient that the measure at issue alters the conditions of competition to the detriment of the imported products by providing an incentive to use domestic goods*.[364]

359 Panel Report, *India – Solar Cells* (2016), *para. 7.99.* The Panel decision upheld by the Appellate Body.
360 Panel Reports, *Brazil – Taxation* (2019), *para.* 7.230.
361 Panel Reports, *Brazil – Taxation* (2019), para. 7.240-7.243.
362 Panel Reports, *Brazil – Taxation* (2019), para. 7.255.
363 Panel Reports, *Brazil – Taxation* (2019), para. 7.772-7.773.
364 Appellate Body Report, *Brazil – Taxation* (2019), para. 5.254, emphasis added.

Given that, by implementing domestic production subsidies, governments generally wish to maximise local production networks, it becomes difficult to justify domestic production subsidies under Article III of the GATT 1994 provided that the exception set forth in Article III.8(b) – which has a narrow scope as discussed in item II.2.3.1(ii) - is applicable. As put by Spadano:

> In this world, the idea to permit subsidies to domestic producers – i.e. producers that carry out domestic manufacturing activities that presumably should add at least some value – while at the same time constraining subsidies that modify the conditions of competition of any "different set" of products (other than the subsidised ones), is plainly impracticable. The only way to reconcile those goals would be to consider that the policy space for members to provide subsidies exclusively to domestic producers consistently with the GATT would be to require the producers to carry out so-called very simple assembly or "screwdriving" activities.[365]

In *US – Renewable Energy* (2019), the Panel found that domestic content requirements and subsidies imposed by eight states in the energy sector were violative of Article III:4 of the GATT 1994.[366]

In sum, whenever an LCR involves a 'law, regulation, or requirement' affecting the 'internal sale, offering for sale, purchase, transportation, distribution, or use' of foreign products, it will probably be found inconsistent with Article III:4 of the GATT 1994.

First, because it is established in WTO jurisprudence that Article III:4 applies to measures in the form of conditions that must be satisfied in order to obtain an 'advantage' from the government. Such conditions, in turn, can be mandatory or voluntary. LCRs generally entail this type of mandatory or voluntary conditions for companies to obtain an advantage from the government in the form of tax incentives, subsidies or other forms of benefits.

Second, because LCR discrimination against foreign products is origin-based, the domestic and foreign products will automatically be found like.

Third, LCRs are on their face inconsistent with the national treatment obligation, as they are designed to accord to imported products 'less favourable' treatment than that

365 Spadano, "Local content requirements: perspectives under WTO law and other international norms," 395.
366 Panel Report, *US – Renewable Energy*, para. 7.339-7.341.

accorded to like domestic products. WTO jurisprudence, as in the case of Article II.2, first sentence, does not require that the measure actually affect trade, as the national treatment principle is also supposed to protect expectations of the Members to equality of competitive conditions for imported products in relation to domestic products. LCRs are by their own design and nature discriminatory, and therefore potentially modify the conditions of competition in the relevant market to the detriment of imported products, in violation of Article III:4 of the GATT 1994.

II.2.1.3 Article III:5 of the GATT 1994

Another important provision of the GATT 1994 for the analysis of the legality of LCR is Article III:5. This article sets forth that:

> No contracting party shall establish or maintain any internal quantitative regulation relating to the mixture, processing or use of products in specified amounts or proportions which requires, directly or indirectly, that any specified amount or proportion of any product which is the subject of the regulation must be supplied from domestic sources. Moreover, no contracting party shall otherwise apply internal quantitative regulations in a manner contrary to the principles set forth in paragraph 1.

Although this provision squarely addresses domestic content requirements, none of the WTO cases involving LCRs have found a violation of this provision, although the complainants have submitted arguments based on it. The cases analyse the measure under Article III:2 or III:4 of GATT first. Then, panels exercise judicial economy as to Article III:5, considering that addressing the case under the latter provisions is sufficient to solve the dispute raised by the complainants.[367]

Indeed, as the scope of Article III:5 is significantly narrower than that of Article III:4 of GATT 1994, in case of inconsistencies with Article III:4 are found, there would probably be no value in addressing additional claims under Article III:5, which justifies the discretion to exercise judicial economy by the Panel. In any case, drafters of the GATT 1947 seem to have inserted Article III:5 to deal specifically with mixing regulations imposed by the parties by the time of the negotiation of the agreement. The provision "aimed

367 See Panel Reports, *China – Auto Parts* (2009), para. 7.276 and Panel Reports, *Brazil – Taxation* (2019), para. 7.333-7.346.

at preventing only those internal quantitative regulations which were clearly directed against imported products for the purposes of protecting domestic products."[368]

The only case in which Article III:5 was actually interpreted was in the context of a GATT Panel. In *US – Tobacco* (1994), the GATT Panel was called to analyse a legislation which required each "domestic manufacturer of cigarettes" to certify to the Secretary of the US Department of Agriculture ("USDA"), for each calendar year, the percentage of domestically produced tobacco used by such manufacturer to produce cigarettes during the year. A domestic manufacturer that failed to make such a certification or to use at least 75 per cent domestic tobacco was subject to penalties in the form of a non-refundable marketing assessment and was required to purchase additional quantities of domestic burley and flue-cured tobacco.[369] The GATT Panel ultimately concluded that this requirement for certification was an internal quantitative regulation relating to the use of tobacco in specified amounts or proportions which required, directly or indirectly, that a minimum specified proportion of tobacco be supplied from domestic sources and was therefore inconsistent with Article III:5.[370]

In any case, although Article III:5 of GATT 1994 specifically addresses internal quantitative regulations which require that any specified amount or proportion of any product must be supplied from domestic origins, given the ample scope of Articles III:2 and III:4, it is expected that most disputes relating to LCRs will continue to be challenged under the latter provisions and Article III:5 may play a secondary role.

II.2.1.4 Are measures concerning production processes subject to the discipline of GATT 1994?

In *Brazil – Taxation* (2019), Brazil raised a broad defence in respect of the claims against the local content aspects of its ICT and INOVAR-AUTO programmes. In particular, Brazil submitted that Article III of the GATT 1994 did not apply to the challenged measures because the disciplines of Article III govern discrimination on *products*, whereas the challenged programmes were not product-related but rather imposed *process and production-step requirements*.[371] Similarly, Brazil argued that the disciplines of Article 2

368 United Nations - Economic and Social Council - [Preparatory Committee of the United Nations Conference on Trade and Employment] - Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment - Amendment Proposed by the Australian Delegation - Article 35 - Paragraph 2, 06/06/1947 (E/PC/T/W/170), p. 7.

369 GATT Panel Report, *US – Tobacco* (1994), para. 63

370 GATT Panel Report, *US – Tobacco* (1994), para. 68. In another GATT panel, judicial economy was also exercised in relation to Article III:5, since findings had been made in relation to Article III.4. See: GATT Panel Report, *US – Taxes on Automobiles* (1994), para. 5.68-5.69.

371 Brazil during the hearing of the Appellate Body dropped this argument completely. See Appellate Body Report, *Brazil – Taxation* (2019), para. 5.14.

of the TRIMs Agreement and Article 3 of the SCM Agreement relate to products, and are therefore equally inapplicable to the measures at issue.[372]

The Panel, however, disagreed with Brazil and stated that the broad language of Article III of the GATT could not be seen as limited to measures directed at products only once they are in the market. In the Panel's view, "not only is the language not limited in that way, logically there is no reason why a measure directed at a producer rather than a product could not 'affect' the internal sale, offering for sale, purchase, etc. of domestic and imported products". Furthermore, the Panel states that "if the formalistic approach advanced by Brazil were correct, it would be simple to entirely avoid the bedrock national treatment requirement of the multilateral trading system."[373] It concluded that the "Article III of the GATT 1994 is not *per se* inapplicable to certain measures, in particular 'pre-market' measures directed at producers".[374]

As relates to its ICT programmes, Brazil argued that they referred to basic production processes (the so-called BPPs),[375] and that none of these requirements could be presumed to relate to the origin of the inputs and products used in the production process, or to affect the conditions of competition of any product at the market. [376]

The Panel noted that in order for a company to become accredited and then obtain the tax benefits under the relevant programmes, it should produce the relevant technology and automation goods in accordance with the terms of particular product-specific BPPs or alternatively meet the criteria for a product to be considered "developed in Brazil".[377]

It also observed that that certain BPP production-step requirements should be performed by the company accredited as the producer of the incentivised finished or intermediate product that is the subject of the BPP, while other production-step requirements should be performed by "third parties" based in Brazil.[378]

The Panel further noted that in some cases that there is a BPP within a BPP (a so-called "nested BPP") and, in this case, all nested BPPs can be outsourced to a third party in Brazil.[379] Therefore, the company can perform alone all of the production steps itself

372 Panel Reports, *Brazil – Taxation* (2019), para. 7.58.
373 Panel Reports, *Brazil – Taxation* (2019), para. 7.63.
374 Panel Reports, *Brazil – Taxation* (2019), para. 7.70.
375 A basic productive process (BPP) is defined as "the minimum set of operations, in a manufacturing establishment, which characterizes the effective industrialization of given product".
376 Panel Reports, *Brazil – Taxation* (2019), para. 7.273.
377 Panel Reports, *Brazil – Taxation* (2019), para. 7.275-7.277.
378 Panel Reports, *Brazil – Taxation* (2019), para. 7.281.
379 Panel Reports, *Brazil – Taxation* (2019), para. 7.291.

in order to receive the tax advantages (the "in-house scenario") or it can outsource at least some of the required production steps to third parties, so long as those third parties themselves comply with the requirements of the BPP in respect of the steps they perform (the "outsourcing scenario"). [380]

The Panel considered that in the context of the outsourcing scenario, there would be a requirement to use domestic goods in the sense covered by Article III:4 of the GATT 1994 and Article 3.1(b) of the SCM Agreement.[381] To this effect, the Panel noted that: [382]

(i) all products produced in accordance with a BPP are, as such, Brazilian domestic products, by virtue of having been produced in Brazil from basic raw materials and other inputs through a specified mandatory manufacturing process.
(ii) the main BPPs that contain nested BPPs require that at least some minimum proportion of the components and subassemblies of the type covered by the nested BPPs must have been produced in accordance with those nested BPPs.
(iii) in most cases, the components and subassemblies that are the subject of the nested BPPs will be outsourced, rather than produced, by the producer of the product covered by the main BPP;

The Panel did not make any finding on the in-house scenario. In this matter, it stated that:

> The Panel again recalls that the WTO-inconsistency of a requirement for compliance with a law or regulation cannot be cured by the existence of an alternative, potentially WTO-consistent, option for compliance with that law or regulation. Given this, the Panel considers it unnecessary to address the in-house scenario. In particular, were the Panel to find, as Brazil implies, that that scenario does not involve a requirement to use domestic goods in the sense covered by Article III:4 of the GATT 1994 and Article 3.1(b) of the SCM Agreement, this would not alter the Panel's finding in respect of the outsourcing scenario that such measures are inconsistent with Article III:4 and constitute a contingency on the use of domestic over imported goods for purposes of the claims under Article 3.1(b) of the SCM Agreement.

This left a large degree of insecurity and unpredictability to the WTO Members. It was uncertain whether it would be considered GATT-consistent if companies simply

380 Panel Reports, *Brazil – Taxation* (2019), para. 7.292.
381 Panel Reports, *Brazil – Taxation* (2019), para. 7.297.
382 Panel Reports, *Brazil – Taxation* (2019), para. 7.298.

internalised the steps of the BPP and not outsourced them. On appeal, however, the Appellate Body clarified the issue. It explained that even in the in-house scenario, the BPPs would be inconsistent with Article III of the GATT 1994 as they incentivised the use of domestic over imported goods. In this sense, it ruled that.

> given the structure of the BPPs, which comprises a number of sequential production steps, it is likely that components and subassemblies produced in compliance with BPPs will be used as inputs in the subsequent production steps. Accordingly, given that compliance with the BPPs is mandatory in order for a company to qualify for the tax incentives and that, in complying with the BPPs, the producers of an incentivized product will be likely to use domestic components and subassemblies, we consider that the main BPPs without nested BPPs provide an incentive to use domestic over imported goods. By doing so, the main BPPs in the Informatics programme accord treatment less favourable to imported goods than that accorded to like domestic goods inconsistently with Article III:4 of the GATT 1994.[383]

It further clarified that LCRs "that alter the conditions of competition to the detriment of the imported products by providing an incentive to use domestic goods will be found to be inconsistent with Article III:4 of the GATT 1994." In the Appellate Body's view, for the purposes of analysis under Article III:4 of the GATT, as well as under Article 2.1 of the TRIMs Agreement, "whether a company produces goods in-house or whether it outsources its production would not be determinative. Instead, the relevant inquiry is whether the measure accords to imported products treatment less favourable than that accorded to the domestic products." [384]

In light of the above, the Appellate Body considered that "it did not matter, for purposes of the Panel's analysis, what factual scenarios were available for compliance with the requirements under the ICT and INOVAR-AUTO programmes".[385]. In this sense, the Appellate Body reversed the Panel's findings made in the context of its analysis under ICT programmes, to the extent that they could be understood as suggesting that the in-house scenario was not covered by the Panel's findings. [386]

383 Panel Reports, *Brazil – Taxation* (2019), para. 5.284.
384 Panel Reports, *Brazil – Taxation* (2019), para. 5.338.
385 Panel Reports, *Brazil – Taxation* (2019), para. 5.339.
386 Panel Reports, *Brazil – Taxation* (2019), para. 5.340.

Consequently, measures concerning production processes can fall afoul of GATT III to the extent that they incentivise the use of domestic inputs or products over imported ones. The argument that Article III governs discrimination only on *products*, and not on *process and production-step requirements* is not accepted under WTO jurisprudence.

II.2.2 GATT XI.1

LCRs may also have the effect of limiting the companies' ability to import. For this precise reason, complainants in *India – Autos* (2002), *Turkey – Rice* (2007) and *Argentina – Import Measures* (2015) made claims that the relevant local content measures violated not only Article IIi:4, but also Article XI.1 of the GATT 1994, which articulates a general prohibition on quantitative restrictions, as follows:

> No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

Differently from tariffs, quantitative restrictions impose absolute limits on imports. The term "prohibition" is defined as a "legal ban on the trade or importation of a specified commodity."[387] The term "restriction", in turn, has been interpreted broadly by the WTO jurisprudence.[388] As mentioned by the Panel in *India – Auto* (2002), "[A]lthough the title of Article XI refers to the elimination of "quantitative restrictions", the text of the provision makes no distinction between different types of restrictions on importation; on the contrary, the words '[n]o prohibitions or restrictions … whether made effective through quotas, import or export licenses or other measures' suggest an *intention to cover any type of measures restricting the entry of goods into the territory* of a Member, other than those specifically excluded, namely, duties, taxes or other charges".[389]

Complainants do not have to show that quantitative restrictions actually impede trade (e.g. because the level of imports or exports allowed is higher than the current level of trade), In *China – Raw Materials* (2012), the Panel considered that "the very potential to limit trade is sufficient to constitute a 'restriction' (…) within the meaning of Article XI:1 of the GATT 1994."[390] This conclusion was consistent with the Panel's findings on

387 Appellate Body Reports, *China – Raw Materials* (2012), para. 314.
388 Panel Report, *Colombia – Ports of Entry* (2009), para. 7.233 and Panel Report, *Dominican Republic – Import and Sale of Cigarettes* (2005), para. 7.248.
389 Panel Report, *India – Autos* (2002), para. 7.264, emphasis added.
390 Panel Report, *China – Raw Materials* (2012), para. 7.1081.

Colombia – Ports of Entry (2009) which recognised the "applicability of Article XI:1 to measures which create uncertainties and affect investment plans, restrict market access for imports or make importation prohibitively costly, all of which have implications on the competitive situation of an importer".[391] The Panel also noted that the analysis of consistency with such provision entails a verification of "the design of the measure and its potential to adversely affect importation, as opposed to a standalone analysis of the actual impact of the measure on trade flows."[392]

To illustrate some examples where a violation of Article XI.I was found, it is possible to cite *Colombia – Ports of Entry* (2009), where the Panel considered that the requirement imposed by the Colombian government in the ports of entry to import certain textiles, apparel and footwear arriving from Panama exclusively at ports of entry in Bogota and Barranquilla has limiting effects on the imports of Panama and therefore is a prohibited restriction within the meaning of Article XI:1 of the GATT 1994. In particular, the Panel considered that the uncertainties that arise from the ports of entry measure are substantial since importers may only access one seaport and one airport whenever the measure is temporarily imposed, instead of the 11 ports open to importers of goods from points of departure other than Panama. In addition, the Panel noted that restrictions on port access have been imposed, extended and removed, then subsequently reinstated, importers' expectations and planning have been affected, which has led importers to rearrange shipping schedules, in turn affecting scheduled importation of subject goods arriving from Panama.[393]

In *Brazil – Retreaded Tyres* (2007), the Panel found a violation of Article XI:1 where fines did not impose a per se restriction on importation, but acted as an absolute disincentive to importation by penalising it and making it "prohibitively costly".[394] In *EEC – Minimum Import Prices* (1978), a GATT Panel found that a minimum import price and security system for tomato concentrate resulted in a restriction under Article XI:1 even though it did not impose a per se quantitative limit on the amount of imports.[395]

Given the broad scope of a "restriction" under Article XI.I, a number of LCR-related measures can also be prohibited under Article XI.1. For instance, "administrative mechanisms aimed at fostering downstream beneficiation, through the restriction of the exportation or sale for export of products, irrespective of the legal status of the measure", "discretionary or non-automatic licensing requirements", "restrictions on ports of entry" leading to

391 Panel Report, *Colombia – Ports of Entry* (2009), para. 7.240.
392 Panel Report, *Colombia – Ports of Entry* (2009), para. 7.240.
393 Panel Report, *Colombia – Port of Entry* (2009), para. 7.274-7.275.
394 Panel Report, *Brazil – Retreaded Tyres* (2007), para. 7.370 – 7.372.
395 GATT Panel Report, *EEC – Minimum Import Prices* (1978), para. 4.9.

increases in costs for importers or exporters, "fines imposing limiting conditions in the relation to the imports acts as a restriction on imports that the measure" and a "combination of practices" resulting in export restrictions.[396]

In *Argentina – Importation of Goods*, the Panel analysed a measure consisting of a combination of one or more of trade-related requirements including: (i) to export a certain value of goods from Argentina related to the value of imports; (ii) to limit the volume of imports and/or reduce their price; (iii) to refrain from repatriating funds from Argentina to another country; (iv) to make or increase investments in Argentina (including in production facilities); and/or (v) to incorporate local content into domestically produced goods.

As relates the LCR, one of the complainants alleged that the Argentine Government was breaching Article XI:1 "by requiring entities to engage with a particular level of domestic content in order to import products".[397] Also the complainants alleged that the trade-related requirements operated as "practical thresholds on the importer's ability to import" and "increase the burden on economic operators to import thereby functioning as a disincentive".[398]

As the trade-related requirements, on their face, did not qualify as a quota or an import or export licence, the Panel analysed whether it qualified as an "other measure" within the meaning of Article XI:1 of the GATT 1994. By making reference to past case law, the Panel considered "other measures" as a "broad residual category"[399] and considered that the trade-related requirements constituted an "other measure" within the meaning of Article XI:1 of the GATT 1994

As to whether they constituted a "prohibition or restriction on imports", the Panel, based on past cases, acknowledged the ordinary interpretation given to the term by previous panels and the Appellate Body as any measure that has a limiting effect on imports.[400] Ultimately, the Panel considered that the trade-related requirements had limiting effects on the importation of goods into Argentina. [401] Specifically as relates to the required increase of local content, either by purchasing from domestic producers or by developing local manufacture, the Panel noted that it had a direct limiting effect on

396 Isabelle Ramdoo, *Local content, trade and investment: Is there policy space left for linkages development in resource-rich countries?*, Discussion Paper 205 (Maastricht: ECDPM, 2016), 16-17.
397 Panel Report, *Argentina – Import Measures* (2015), para. 6.235
398 Panel Report, *Argentina – Import Measures* (2015), para. 6.240.
399 Panel Report, *Argentina – Import Measures* (2015), para. 6.246-6.248.
400 Panel Report, *Argentina – Import Measures* (2015), para. 6.254.
401 Panel Report, *Argentina – Import Measures* (2015), para. 6.265

imports, because the measure was designed to force the substitution of imports in line with Argentinean policies.[402]

Therefore, the Panel found that the trade-related requirements, consisting of the Argentine authorities' imposition of one or more of the five requirements identified by the complainants as a condition to import, constituted a restriction on the importation of goods and was thus inconsistent with Article XI:1 of the GATT 1994.[403]

II.2.3 Possible defences for LCRs under GATT

Given the broad scope of the prohibitions of Article III and Article XI of the GATT 1994, the very discriminatory nature of LCRs and their potential limiting effects on imports, it is very difficult for defendants to make a defence based only on the elements of these provisions. They generally attempt to defend their measures on the grounds of GATT exemptions and exceptions, which provide for certain flexibilities in the application of WTO law.

In particular, the GATT 1994 contains an important derogation/exemption from national treatment principle in cases of public procurement, which is established in Article III:8(a). It also contains a specific exception set forth in Article III:8(b) in cases of domestic subsidies.

In addition, this agreement has general exceptions in Article XX and security exceptions in Article XXI which could allegedly be raised to justify violations to Article III and XI of the GATT 1994. Furthermore, developing countries could allegedly raise defences based on Article XVIII of the GATT 1994 (economic development exceptions).

The exceptions in the WTO law concern rules to reconcile trade liberalisation with other important societal values and interests such as environment, public health, public morals, employment, economic development, national security, among others.[404] As explained by Van den Bossche and Prévost:

> All these exceptions have in common that they allow Members, under specific conditions, to adopt and maintain measures that protect other important societal values and interests, even though this legislation or

402 Panel Report, *Argentina – Import Measures* (2015), para. 6.258.

403 Panel Report, *Argentina – Import Measures* (2015), para. 6.265. The Appellate Body upheld the Panel's finding that the trade-related requirements measure was a restriction on the importation of goods, inconsistent with Art. XI:1.

404 Peter Van den Bossche and Denise Prévost, *Essentials of WTO law* (Cambridge: Cambridge University Press, 2016), 83.

> these measures conflict with the substantive disciplines imposed by the GATT 1994 or the GATS. These exceptions clearly allow Members, under specific conditions, to give priority to certain societal values and interests over trade liberalisation.[405]

As regards LCR claims, defendants have raised the following provisions as defences in the relevant WTO cases:

- Article III:8 of the GATT 1994
- Article XX(a) of the GATT 1994[406]
- Article XX(b) of the GATT 1994[407]
- Article XX(d) of the GATT 1994[408]
- Article XX(g) of the GATT 1994[409]
- Article XX(j) of the GATT 1994[410]
- Article VIII.B of the GATT 1994[411]

Below, this chapter analyses the main derogations and exceptions raised by the defendants in LCR cases. Despite Article XXI (security exception) of the GATT 1994 never having been invoked by a Member, this chapter also briefly discusses the possible scope of such defence.

II.2.3.1 Article III:8 of the GATT 1994

At the outset, it is important to draw a distinction as to the nature of Article III:8(a) and Article III:8(b) of the GATT 1994. While Article III:8(a) is considered an exemption to the national treatment obligation, Article III:8(b) is considered an exception. In this sense, the Appellate Body in *Brazil – Taxation* (2019) has noted that the language of Article III:8(b) (the provisions of Article III *shall not prevent* the payment of subsidies exclusively to domestic producers) is comparable to the chapeau of Article XX of the GATT 1994 ("nothing in this Agreement shall be construed *to prevent* the adoption or enforcement by any Member of measures" enumerated in paragraphs (a)-(j) of Article). In contrast, Article III:8(a) begins with the words "[t]he provisions of this Article shall not apply to" the measures enumerated thereunder. [412]

405 Bossche and Prévost, *Essentials of WTO law*, 84.
406 *China – Publications and Audiovisual Products* (2010) and *Brazil – Taxation* (2019).
407 *Brazil – Taxation* (2019).
408 *China – Auto Parts* (2009) and *India – Solar Cells* (2016).
409 *Brazil – Taxation* (2019).
410 *India – Solar Cells* (2016).
411 *India – Autos* (2002).
412 Appellate Body Reports, *Brazil-Taxation* (2019), 5.83.

Consequently, Article III:8(a) of the GATT 1994 represents a "derogation limiting the scope of the national treatment obligation by making it inapplicable to certain government procurement activities. By contrast, the differently worded opening clause of Article III:8(b), which is similar to the text of the chapeau of Article XX, suggests (…) that the provision is akin to an exception to the national treatment obligation and serves as a justification or affirmative defence for measures that would otherwise be inconsistent with that obligation."[413]

A detailed interpretation of these provisions in LCR cases is provided below.

(i) Article III:8(a) of the GATT 1994

Article III:8(a) sets forth that "[T]he provisions of this Article [Article III] shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale."

The provision is therefore a derogation to the national treatment principle established in Article III of the GATT 1994 in cases of public procurement, provided that certain conditions are met. This procurement derogation was interpreted for the first time in an LCR case, in *Canada – Renewable Energy/Canada – Feed-in Tariff Program* (2013).

As will be shown below, the justification of LCRs on the public procurement derogation faces severe limitations.

The measure concerned the FIT Programme, which was a scheme implemented by the Government of the Province of Ontario and its agencies in 2009, through which generators of electricity produced from certain forms of renewable energy were paid premium rates for set periods. Participation in the FIT Programme was open to facilities located in Ontario. The meeting of minimum domestic content levels for energy generation equipment were among the conditions for being offered a contract.

Both Japan and the EU argued that the relevant LCRs infringed the GATT Article III:4 national treatment obligation on the basis that their energy generation equipment was being treated less favourably than like products of Ontarian origin.

413 Appellate Body Reports, *Brazil-Taxation* (2019), 5.84.

Both the Panel and the Appellate Body easily concluded that the LCR element of Ontario's programme breached the national treatment principle set forth in GATT Art. III:4, by discriminating products which were not of Ontarian origin.

The key question in Canada's defence was whether Article III:8(a) of the GATT 1994 applied to remove the challenged measures from the scope of Article III:4 of the GATT 1994. According to Canada, the FIT programme constituted "laws and requirements that govern the procurement of renewable electricity for the governmental purpose of securing an electricity supply for Ontario from clean sources, and 'not with a view to commercial resale or with a view to use in the production of goods for commercial sale'."[414]

(a) *"Laws, regulations or requirements governing the procurement by governmental agencies of products purchased"*

Whether the FIT Programme and Contracts could be characterised as "laws, regulations or requirements *governing* procurement" of electricity was an issue of main importance in the analysis carried out by the Panel and the Appellate Body. While the Panel's finding in this particular element was favourable towards the availability of this derogation to the FIT Programme, the Appellate Body overruled the Panel's finding and established strict requirements for the satisfaction of this condition.

The Panel found that a measure "governing" procurement was one that "controls, regulates or determines that procurement". With respect to the FIT Programme and Contracts, the Panel found that the LCRs for renewable energy generation equipment were a condition that should be satisfied by generators utilizing solar PV or wind power technologies in order to participate in the FIT Programme. The Panel explained that the domestic content requirements thus compelled the purchase and use of certain generation equipment originating in Ontario as a prerequisite for the procurement of electricity by the Government of Ontario to take place. Accordingly, the Panel found that the domestic content requirements were requirements "governing" the procurement of electricity by the Government of Ontario under the FIT Programme and Contracts. The Panel found further support in the fact that the electricity procured by the Government of Ontario was produced using the very same generation equipment that was subject to the domestic content requirements. Thus, for the Panel, there was a "close relationship" between the products affected by the domestic content requirements (renewable energy generation equipment) and the product procured (electricity).

414 Appellate Body Reports, *Canada – Renewable Energy/Feed-in Tariff Program* (2013), para 1.10.

The Appellate Body, however, laying the ground for a more restrictive interpretation of Article III:8(a), "paid particular attention to the phrase 'products purchased' when deciding whether the domestic content requirements governed the procurement. The core idea here was that the derogation had to be understood in relation to the obligations of Article III."[415]

In this sense, according to the Appellate Body, Article III:8(a) concerns, in the first instance, the product that is subject to the discrimination. As such, the coverage of Article III:8(a) extends not only to products that are identical to the product that is purchased, but also to "like" products. In accordance with the Ad Note to Article III:2, it also extends to products that are directly competitive to or substitutable with the product purchased under the challenged measure. For convenience, this range of products can, in the Appellate Body's perspective, be described as products that are in a competitive relationship. What constitutes a competitive relationship between products may require a consideration of the inputs and processes of production used to produce the product.

In other words, the Appellate Body found that, to qualify for this derogation, the product of foreign origin allegedly being discriminated against must be in a competitive relationship with the product purchased by the government. In these disputes, the product being procured by the Government of Ontario was electricity, whereas the foreign product being discriminated due to the LCRs was electricity generation equipment. These two products were not in a competitive relationship. Therefore, the Appellate Body found that the discrimination against foreign generation equipment was not covered by the derogation.

On this basis, the Appellate Body reversed the Panel's findings that the minimum required domestic content levels of the FIT Programme were laws, regulations, or requirements governing the procurement by governmental agencies of electricity within the meaning of Article III:8(a) of the GATT 1994. Instead, it found that the minimum required domestic content levels could not be characterised as "laws, regulations or requirements governing the procurement by governmental agencies" of electricity within the meaning of Article III:8(a).

According to Henok Birhanu Asmelash:

415 Arwel Davies, "The GATT Article III:8(a) Procurement Derogation and Canada - Renewable Energy," *Journal of International Economic Law* 18, no. 3 (2015): 545.

> This finding shuts the door on perhaps the most feasible legal shelter for discriminatory FITs. The Appellate Body did not explicitly say that domestic content requirements attached to FITs could not be justified as government procurement programme under GATT Article III:8(a). What it said instead is that the products procured by a government and less favourably treated must be the same. However, what governments procure under FITs is electricity generated from renewable sources of energy, while the products they (want to) discriminate against are not renewable electricity (as they hardly face competition from such imports), but equipment used in the generation of renewable electricity, such as solar panels and wind turbines.[416]

A different perspective on the interpretation of Article III:8(a) of the GATT 1994 could be envisaged if one considers the scope of Article III:8(a) in comparison with the scope of the GPA. Should the Members have wanted to apply the principle of national treatment to public procurements, they would not have drafted a specific derogation in Article III:8(a) of the GATT and created a specific plurilateral agreement for those WTO Members willing to apply such principle to their public procurements. The GPA is the special instance where WTO Members shall seek to guarantee national treatment and non-discrimination for their suppliers with respect to procurement of covered goods, services and construction services as set out in each party's schedules.

In this sense, a strict interpretation of the procurement derogation in the GATT 1994, such as that GATT Article III:4 applies to domestic content requirements applied in the context of government procurement may not be consistent with the object and purpose of the WTO Agreement viewed from an interdependent and holistic perspective. National treatment obligation should only apply under the GPA. In this sense, Arwel Davies notes that:

> If it is interpreted, restrictively, such that GATT Article III:4 applies to domestic content requirements applied in the context of government procurement, the consequence may be that obligations which only some WTO members have acceded to under the GPA, or even obligations which no GPA party has acceded to, are multilateralized. This is surely a consideration which the Appellate Body ought to have had in mind. In terms of the object and purpose of the derogation and the WTO Agreement, the origin

416 Henok Birhanu Asmelash, "Energy Subsidies and WTO Dispute Settlement: Why Only Renewable Energy Subsidies Are Challenged," *Journal of International Economic Law* 18, no. 2 (2015): 276.

> and development of procurement market liberalization at the WTO indicates that the locus is the plurilateral GPA rather than GATT Article III. In turn, this indicates that the derogation should be interpreted reasonably broadly, or at least sufficiently broadly to cover a paradigm situation. (…) the Appellate Body's narrow interpretation may mean that the derogation is not available in such a situation. GATT Article III:4 may now apply to areas conventionally thought to be covered by the derogation.[417]

In *India – Solar Cells* (2016), the Panel, following the Appellate Body's rationale in *Canada – Renewable Energy/Canada – Feed-in Tariff Program* (2013), found that the measures were not covered by the derogation under Art.III:8(a) because the product being procured (electricity) was not in a "competitive relationship" with the product discriminated against (solar cells and modules). In other words, while the Indian government procured electricity, the discriminatory LCR related to solar cells and modules.

On appeal, India argued that the Appellate Body in *Canada – Renewable Energy / Canada – Feed-in Tariff Program* (2013) suggested that the scope of Article III:8(a) may extend, in some cases, to "inputs" and "processes of production", regardless of whether the product subject to discrimination is in a competitive relationship with the product purchased.[418]

The Appellate Body, however, confirmed the competitive relationship test and submitted that the Appellate Body in *Canada – Renewable Energy / Canada – Feed-in Tariff Program* (2013) did not decide whether "the cover of Article III:8(a) may also extend to discrimination relating to inputs and processes of production used in respect of products purchased by way of procurement."[419]

Therefore, the Appellate Body's interpretation of Article III:8(a) in *India – Solar Cells* (2016) further restricted the understanding expressed in *Canada – Renewable Energy/ Canada – Feed-in Tariff Program* (2013) to the extent that it did not leave space for an in-

417 Davies, "The GATT Article III:8(a) Procurement Derogation and Canada - Renewable Energy," 549.

418 Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program* (2013), para.5.24.

419 Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program* (2013), para. 5.63 (fn omitted). According to the Appellate Body in *India – Solar Cells* (2016): this question arises only after the product subject to discrimination has been found to be like, directly competitive with, or substitutable for – in other words, in a competitive relationship with – the product purchased. In respect of the latter issue, although a consideration of inputs and processes of production may inform the question of whether the product purchased is in a competitive relationship with the product being discriminated against, it does not displace the competitive relationship standard. Under Article III:8(a) of the GATT 1994, the foreign product discriminated against must necessarily be in a competitive relationship with the product purchased by way of procurement. Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program* (2013), para.5.24.

terpretation according to which the derogation would be available when goods subject to discrimination are physical inputs of the product being procured.

To the extent that the Appellate Body affirmed in *Canada – Renewable Energy/Canada – Feed-in Tariff Program* (2013) that "what constitutes a competitive relationship between products may require consideration of inputs and processes of production used to produce the product",[420] there was some doubt whether the Appellate Body would in future cases make available the derogation under these circumstances. However, in *India – Solar Cells* (2016), the Appellate Body stressed the preponderance of the competitive relationship standard, thus, crystallising a very strict construction of the procurement derogation.

(b) *"for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale."*

Another important point of analysis of Article III(8)(a) is whether procurement is "for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale."

In *Canada – Renewable Energy/Canada – Feed-in Tariff Program* (2013), the Panel noted that the parties had advanced different meanings of the term "for governmental purposes". Canada had suggested that a purchase "for governmental purposes" may exist whenever a government purchases a product for a stated aim of the government. Japan, on the contrary, had proposed that a purchase "for governmental purposes" covers only purchases of products for governmental use, consumption, or benefit; and the European Union had submitted that the term "for governmental purposes" refers to purchases for governmental needs, including the purchase of products consumed by the government itself and products necessary for a government's provision of public services.

The Panel stated that the ordinary meaning of the term "for governmental purposes" was relatively broad and that it could encompass all three meanings advanced by the parties. The Panel, however, also considered that the immediately following phrase "and not with a view to commercial resale" informed and limited the otherwise relatively broad ordinary meaning of the term "governmental purposes", and that procurement of products purchased "for governmental purposes" could not at the same time be "procurement … with a view to commercial resale or with a view to use in the production

420 Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program* (2013), para. 5.63 (fn omitted).

of goods for commercial sale". The Panel then stated that, if it found that procurement of electricity by the Government of Ontario was undertaken "with a view to commercial resale or with a view to use in the production of goods for commercial sale", such procurement would not be covered by Article III:8(a). Without making a finding on whether the FIT Programme and Contracts involved purchases "for governmental purposes", the Panel turned to assess whether the Government of Ontario purchased electricity "with a view to commercial resale or with a view to use in the production of goods for commercial sale".

The Panel stated that, under the interpretation advanced by the complainants, the Government of Ontario's purchases of electricity under the FIT Programme and Contracts were undertaken "with a view to commercial resale", because the purchased electricity was introduced into commerce in competition with private-sector electricity retailers. Additionally, the Panel found it evident that the Government of Ontario and municipal governments profited from the resale of electricity. The Panel emphasised that it was not of the view that "commercial resale" would always necessarily involve profit, but that, because the Government of Ontario and municipal governments profited from the resale of electricity under the FIT Programme and Contracts, and because the resales of electricity were made in competition with licensed electricity retailers, the purchases of electricity by the Government of Ontario are undertaken "with a view to commercial resale".

On this basis, the Panel concluded that the FIT Programme and Contracts were not covered by Article III:8(a) and that they were therefore subject to the disciplines of Article III:4 of the GATT 1994 and Article 2.1 of the TRIM Agreement.

The Appellate Body noted that ultimately the Panel did not define "governmental purposes". Instead, based on the proposition that a purchase "for governmental purposes" cannot at the same time amount to a government purchase of goods "with a view to commercial resale", the Panel did not conclude whether the FIT Programme and Contracts involve purchases of electricity for "governmental purposes".[421]

In interpreting the expression "governmental purposes, the Appellate Body was of the view that the phrase "products purchased for governmental purposes" in Article III:8(a) was limited to what is consumed by government or what is provided by government to

421 Appellate Body Reports, *Canada – Renewable Energy/Canada – Feed-in Tariff Program* (2013), para. 5.65.

recipients in the discharge of its public functions. The scope of these functions is to be determined on a case-by-case basis.[422]

In addition, for the Appellate Body, the terms "for governmental purposes" and "not with a view to commercial resale" were cumulative requirements and therefore the requirement of purchases not being made with a view to commercial resale should be met in addition to the requirement of purchases being made for governmental purposes. In this sense, it disagreed with the Panel's proposition that where a government purchase of goods is made "with a view to commercial resale", it is for that reason also not a purchase "for governmental purposes".[423]

The Appellate Body noted that whether a transaction constituted a "commercial resale" should be assessed having regard to the entire transaction. In doing so, the assessment should look at the transaction from the seller's and the buyers' perspective and at whether the transaction is oriented at generating a profit for the seller. The Appellate Body saw profit-orientation generally as an indication that a resale is at arm's length, although it recognised that, as the Panel observed, there are circumstances where a seller enters into a transaction out of his or her own interest without making a profit.[424]

As to the clause "not … with a view to use in the production of goods for commercial sale" in Article III:8(a), the Appellate Body considered that where the provision uses the same words as in the phrase "not with a view to commercial resale", both clauses refer essentially to the same type of sales transactions.[425]

In summary, WTO Members in the context of public procurements may only be exempted from the national treatment obligation under WTO jurisprudence where the product procured is in competitive relationship with the product being discriminated. Consequently, public procurement involving LCRs may generally be considered WTO inconsistent because the product being procured may not be in a competitive relation with the product being discriminated. For instance, as shown above, in LCR cases in the renewable energy sector, where governments' main purpose is to encourage the development of local technology, the relevant local content measurs were considered inconsistent with the national treatment obligation because what governments ultimately incentivised was the production of renewable energy equipment locally. In other

422 Appellate Body Reports, *Canada – Renewable Energy/Canada – Feed-in Tariff Program* (2013), para. 5.68.
423 Appellate Body Reports, *Canada – Renewable Energy/Canada – Feed-in Tariff Program* (2013), para. 5.69.
424 Appellate Body Reports, *Canada – Renewable Energy/Canada – Feed-in Tariff Program* (2013), para. 5.71.
425 Appellate Body Reports, *Canada – Renewable Energy/Canada – Feed-in Tariff Program* (2013), para. 5.72.

words, the product under discrimination is energy equipment and not energy itself (the product being procured).

Another difficulty in justifying LCRs involving public procurement under Article III:8(a) is that the products purchased under the public procurement have to be "for governmental purposes" and "not with a view to commercial resale or with a view to use in the production of goods for commercial sale". A product may be purchased for governmental purpose when it is consumed by government or provided by government to recipients in the discharge of its public functions. The scope of public functions, however, is not precisely defined under WTO jurisprudence and neither is the concept of "commercial resale" or "commercial sale", which generates insecurity to WTO Members establishing conditions for their public procurements.

(ii) Article III:8(b) of the GATT 1994

Article III:8(b) provides that: "[T]he provisions of this Article shall not prevent the payment of subsidies exclusively to domestic producers, including payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of this Article and subsidies effected through governmental purchases of domestic products."

Depending on how the expression *payment of subsidies exclusively to domestic producers* is interpreted, Members may have more or less regulatory space to implement domestic instruments that deviate from the national treatment obligation. Panels and the Appellate Body have analysed this provision in certain cases and the interpretation restricts the types of subsidies which fall under this exception.

A defence for LCR measures based on this provision was raised in *Canada – Periodicals* (1997), *Indonesia – Autos* (1998) and *Brazil – Taxation* (2019). As it will be demonstrated below, the defence of LCRs based on this derogation is restricted, although there are some vacillating opinions within the Appellate Body that suggest that interpretation could be more flexible in the future.

The first case connected to LCRs under the WTO regime was *Canada – Periodicals* (1997). It concerned, among other measures, the provision of funds, by the Canadian government, to the Canadian Post so that it could support special rates of postage for Canadian-owned and -controlled paid circulation publications that were published and printed in Canada. The idea behind the provision of "funded" postal rates was to promote

Canadian culture.[426] Imported magazines were not granted funded rates. Instead, they were subject to higher prices.

The complainant required the Panel to find that the application by Canada Post of lower postal rates to domestically produced periodicals under the "funded" system was inconsistent with Article III:4 of GATT 1994. Canada, in turn, defended that the funds paid to Canada Post for the "funded" rates were allowable subsidies pursuant to Article III:8(b) of GATT 1994.

The Panel found that the scheme of "funded" rates was clearly designed to promote domestic production of periodicals with Canadian content. The fact that rates applicable to Canadian magazines were lower than those applicable to imported magazines strongly suggested that the scheme was operated so as to afford protection to domestic production. In this case, it was deemed inconsistent with Article III:4 of GATT 1994.

However, according to the Panel's view, these "funded" rates were justified under Article III:8(b) of GATT 1994. The Panel recalled that "a series of GATT 1947 panel reports had interpreted Article III:8(b) very narrowly to hold that the only subsidies subject to exclusion from the national treatment provisions of Article III are those subsidies that are paid directly to domestic producers."[427] It submitted that Canada's postal subsidy met the requirement of directness, because a payment by government for the exclusive benefit of the producers was being made. It was only the mechanics of payment that were indirect.[428]

Because governmental funds were paid to the Canada Post, which in turn, provided Canadian publishers with reduced postal rates, the US had argued that the funds were not paid *directly* to the beneficiaries. The Panel, however, stated that the position held by the US was based on a difference of form, not substance. The specific form in which the subsidy was paid was, according to the Panel, irrelevant to the operation of Article III:8(b), provided that a payment is made by the government for the exclusive benefit of domestic producers. Whether the subsidy is paid to Canada Post or paid directly to the publishers, the economic effect is the same, namely that the eligible publishers are the beneficiaries of the subsidy.[429]

426 Panel Report, *Canada – Periodicals* (1997), para. 2.12.
427 Panel Report, *Canada – Periodicals* (1997), para. 3.183.
428 Panel Report, *Canada – Periodicals* (1997), para. 3.185.
429 Panel Report, *Canada – Periodicals* (1997), para. 3.186.

The Appellate Body, though, reversed the Panel's finding and sedimented the view that "an examination of the text, context, and object and purpose of Article III:8(b) suggests that it was intended to exempt from the obligations of Article III only the payment of subsidies which involves the expenditure of revenue by a government."[430] Under Canada's postal rate scheme at issue, however, no subsidy payments were made to private entities, and certain companies simply received a reduction in postal rates.[431] Consequently, it reversed the Panel's findings and conclusions that Canada's "funded" postal rates scheme for periodicals was justified under Article III:8(b) of the GATT 1994.

In *Indonesia – Autos* (1998), the Panel was called to analyse whether certain tax reliefs and exemptions connected with LCRs were justified under Article III:8(b) of the GATT 1994.

Indonesia maintained the view that "the payment of subsidies" in Article III:8(b) of GATT should refer to all subsidies identified in Article 1 of the SCM Agreement, not merely to the subset of "direct" subsidies. Under this approach, any measure which constituted a subsidy within the meaning of the SCM Agreement would not be subject to Article III of GATT.[432]

Nevertheless, the Panel was of the view that Article III:8(b) of GATT did not provide Indonesia with a defence to the claims that its car programmes violated the provisions of Article III:2 of GATT. In the Panel's view:

> the purpose of Article III:8(b) is to confirm that subsidies to producers do not violate Article III, so long as they do not have any component that introduces discrimination between imported and domestic products. In our view the wording "payment of subsidies exclusively to domestic producers" exists so as to ensure that only subsidies provided to producers, and not tax or other forms of discrimination on products, be considered subsidies for the purpose of Article III:8(b) of GATT.[433]

It further explained that:

> Article III:8(b) should be interpreted to mean that: 1) if the subsidy benefit to producers derives from indirect taxes, there must be a prior collection

430 Appellate Body Report, *Canada – Periodicals* (1997), p. 34.
431 Appellate Body Report, *Canada – Periodicals* (1997), p. 34.
432 Panel Report, *Indonesia — Autos* (1998), para. 14.41.
433 Panel Report, *Indonesia — Autos* (1998), para 14.113.

> on a non-discriminatory basis of such taxes; 2) the subsidies must have been provided directly to the producers, that is to say that Article III:8(b) does not cover a financial advantage that benefits producers indirectly (for example subsidies paid to consumers of products, produced by domestic producers).[434]

Therefore, in *Indonesia – Auto*s (1998), the Panel ratified the restrictive understanding of the Appellate Body in *Canada – Periodicals* (1997) that only the payment of subsidies *directly* to producers should be covered under Article III:8(b) derogation. In addition, it made it clear that local content subsidies, or subsidies that introduce a discrimination between imported and domestic products are not within the scope of the exemption of Article III:8(a).

Brazil – Taxation (2019), in turn, raised an important issue to the extent that it discussed whether LCRs were exempted from the application of Article III of the GATT 1994 provided that it involved a subsidy to domestic producers under Article III:8(b).

At the core of the discussion was the meaning of LCRs. Under Article III:8(b) of the GATT 1994, Members may give subsidies "exclusively" to domestic producers, including production-subsidies, which typically include conditions that must be satisfied by the recipient of the subsidy. The difficulty, however, is in identifying which sorts of conditions linked to subsidies to domestic producers fall afoul of the prohibitions in Article III:4 of the GATT.

In the view of some Members, if a subsidy is conditional not on the purchase of a locally made input product, but instead on the subsidy recipient's production of some inputs for its own final product, or is conditional on the subsidy recipient's performance of production-step requirements, such requirements would not constitute a WTO-inconsistent requirement to "use" domestic goods. In the view of these Members, subsidies of these types are for "production", not "use" of domestic goods, and thus are generally permitted. Under this interpretation of Article III:8(b) of the GATT 1994, it is necessary that the recipient of the subsidy itself perform the required production-steps or produce the inputs in question, for these requirements to be WTO-consistent.

On the other hand, other Members argued that any production-step or other requirement that results in the creation of any input (a component) that must be incorporated into the final product, is a WTO-inconsistent LCR, even where it is a subsidy recipient

434 Panel Report, *Indonesia — Autos* (1998), para 14.119

itself that is creating its own inputs in-house. Indeed, for the complainant, the production step requirements on which the entire functioning of the Brazilian programmes was based, where benefits were subject to activities taking place in Brazil, constituted WTO-inconsistent LCRs. Under this approach, any domestic-production-step requirement, because by definition it cannot be fulfilled by imports, constitutes WTO-inconsistent discrimination against imported products. This view therefore makes most production-step requirements associated with subsidies WTO-inconsistent requirements to "use" domestic goods.

The Panel argued that "measures in the form of subsidies provided exclusively to domestic producers are not for that reason alone exempted from the disciplines of Article III of the GATT 1994, because (…) aspects of a subsidy resulting in product discrimination (including requirements to use domestic goods, as prohibited by Article 3.1 of the SCM Agreement) are not exempted from the disciplines of Article III pursuant to Article III:8(b)."[435]

The Panel found that, at a minimum, Article III:8(b) of the GATT 1994 makes explicit that Article III does not require subsidisation of foreign producers in tandem with domestic producers, that is, the provision of subsidies only to domestic producers and not to foreign producers cannot in itself be inconsistent with Article III. [436] Based on the Panel report on *Indonesia – Autos* (1998), it also stated that "Article III:8(b) confirms that subsidies to domestic producers do not violate Article III so long as they do not have any component that introduces discrimination between imported and domestic products.[437]

As regards the element of discrimination that could be introduced by a subsidy, the Panel, based on the findings in *Indonesia – Autos* (1998), concluded that:

> the language of Article III:8(b) itself confirms that even if a measure is a subsidy that is provided exclusively to domestic producers, this fact is not sufficient to remove the measure from the application of Article III. In particular in respect of measures based on product taxes (the kind of measure specifically at issue in this dispute), Article III:8(b) indicates that WTO Members can provide subsidies exclusively to their domestic producers using the proceeds of internal taxes or charges so long as those taxes or charges are applied consistently with Article III. That is, a Member can collect a product tax on a non-discriminatory basis, and then use the

435 Panel Reports, *Brazil – Taxation* (2019), para. 7.88.
436 Panel Reports, *Brazil – Taxation* (2019), para. 7.79.
437 Panel Reports, *Brazil – Taxation* (2019), para. 7.83-84.

> funds collected to subsidize only its domestic producers, without violating Article III. (…) Thus, Article III:8(b) does not change the applicability of Article III to discriminatory application of a product tax, even where such a discriminatory application constituted a subsidy exclusively to domestic producers. Indeed, this point was explicitly debated during the negotiations of the Havana Charter, and a proposal that would have allowed precisely such discriminatory application of product taxes as a means of indirect subsidization of domestic producers was rejected. Nor are discriminatory non-tax regulatory measures that involve the provision of a subsidy exclusively to domestic producers, for that reason alone, placed outside the disciplines of Article III.[438]

Although the Appellate Body reversed the Panel's findings in some aspects, it agreed to it in the sense that "a requirement to use domestic over imported goods in order to have access to the subsidy would not be covered by the exception in Article III:8(b) and would therefore continue to be subject to the national treatment obligation in Article III."[439]

According to the Appellate Body,

> insofar as Article III:8(b) justifies the payment by WTO Members of subsidies exclusively to domestic producers, conditions for eligibility that define the class of eligible "domestic producers" by *reference to their activities in the subsidized products' markets would be justified under Article III:8(b)*. By contrast, a requirement to use domestic over imported goods in order to have access to the subsidy may, however, not be covered by the exception in Article III:8(b) and would therefore continue to be subject to the national treatment obligation in Article III. This is because, while the payment of subsidies and certain eligibility criteria may affect the conditions of competition between the product produced by the producer receiving the subsidy and the like imported products, a requirement to use domestic products in order to have access to the subsidy would impact the conditions of competition between a *different set of domestic and like imported products*, namely, the domestic product whose use is mandated and the like imported product.[440]

438 Panel Reports, *Brazil – Taxation* (2019), para. 7.85-7.86.
439 Appellate Body Reports, *Brazil – Taxation* (2019), para. 5.124.
440 Appellate Body Reports, *Brazil – Taxation* (2019), para. 5.94, emphasis added.

In other words, a subsidy to a domestic producer, in order to be justified under Article III:8(b) shall affect the market of the subsidised product. If, for instance, the government pays subsidies to car producers, the subsidised product is car. However, if the conditions for eligibility to the subsidy includes LCRs, this may not only affect the car market, but also the car input's market. In this sense, this subsidy to domestic producer contingent on an LCR would not be justified under Article III:8(b).

According to the Appellate Body, "the scope of Article III:8(b) suggests that the focus of inquiry under that provision ought to be on whether the domestic entity at issue is a producer of the product with respect to which a violation of the national treatment obligation arising from the "payment of subsidies" is alleged. This is because Article III:8(b) serves as a justification **only** for discrimination resulting from the effects of the payment of a subsidy on the conditions of competition in the relevant product market(s)." [441] A LCR-related subsidy would not only affect the end product of the "domestic producer" but would impact another market, that of intermediate products. Therefore, it would not be considered justified under Article III:8(b), according to the Appellate Body's view.

Another important discussion in *Brazil – Taxation* (2019) was the scope of the term *"payment of subsidies"* in Article III:8(b) of the GATT 1994. The majority of the Appellate Body's members reproduced the narrow interpretation in *Canada – Periodicals* (1997), according to which Article III:8(b) "was intended to exempt from the obligations of Article III only the payment of subsidies which involves the expenditure of revenue by a government."[442][443] However, a separate opinion of one of the Appellate Body's members endorsed a broader view.

Pursuant to the dissenting opinion, "the restrictive interpretation of 'payment of subsidies' as excluding "revenue foregone" arrived at by the majority denies effect to the key legal terms of the SCM Agreement."[444] Under this perspective, the term "payment of subsidies" in Article III:8(b) refers to the provision by a WTO Member, whether through monetary or non-monetary transfers having an equivalent effect, of a subsidy, as defined in Article 1.1 of the SCM Agreement. According to the dissenting opinion, this is the only interpretation that, consistently with the customary rules of treaty interpretation, gives meaning and effect to the precise terms of Article III:8(b), while at the same time respecting the carefully negotiated balance of rights and obligations under the SCM Agreement, which forms part of the single package under the WTO Agreement. [445]

441 Appellate Body Reports, *Brazil Taxation* (2019), para. 5.96.
442 Appellate Body Report, *Canada – Periodicals* (1997), p. 34.
443 Appellate Body Reports, *Brazil – Taxation* (2019), para. 5.124.
444 Appellate Body Reports, *Brazil Taxation* (2019), para.5.135.
445 Appellate Body Reports, *Brazil – Taxation* (2019), para. 5.126-5;137.

Insofar as they constitute the "payment of subsidies exclusively to domestic producers", the tax reductions within the INOVAR-AUTO Programme, as well as any conditions for eligibility for the payment of subsidies that define the class of eligible "domestic producers" by reference to their activities in the subsidised products' markets, would, in the view of the dissenting opinion, be justified under Article III:8(b).[446]

As further explained by Spadano:

> Also importantly, and here lies probably the strongest argument of the dissenting member of the Appellate Body, the way the majority interpreted Article III:8(b), rather than rendering Article III:2 of the GATT 1994 inutile, actually not only "denies effect to key legal terms of the SCM Agreement" (i.e. the definition of subsidy), but also risks "rendering redundant the actionable subsidies disciplines of the SCM Agreement insofar as subsidies in the form of the foregoing of revenue are concerned".
>
> Indeed, if subsidies in the form of tax incentives to domestic producers can never be justified under Article III:8(b), they will, by definition, be inconsistent with Article III:2 of the GATT 1994, because if they incentivise domestic production their result will necessarily be to tax imported products in excess of like domestic goods. Should that reasoning be correct, it would be difficult to understand the purpose of detailed SCM Agreement disciplines on actionable subsidies, as far as those granted in the form of "fiscal incentives such as tax credits" (as per the legal definition of a subsidy in Article 1.1) are concerned. Clearly, there would no point for a Member in going through the trouble of demonstrating the adverse effects and the serious prejudice caused by another Member's tax incentives if it could simply challenge the tax incentives under GATT Article III:2, where no evidence of adverse effects is required at all, it being sufficient to prove the higher taxation of imported goods vis-à-vis like domestic products, no matter how small the difference.924
>
> Thus, a correct application of the principle of effectiveness requires accepting that subsidies in the form of tax incentives to domestic producers can be justified by Article III:8(b), under penalty of rendering useless

446 Appellate Body Reports, *Brazil – Taxation* (2019), para. 5.138.

> the disciplines on actionable subsidies insofar as that type of subsidy is concerned.[447]

Indeed, the Appellate Body majority's interpretation of Article III:8(b) overly restricts its scope to the extent that it limits the type of subsidies set forth in this provision to only those involving the "expenditure of revenue by a government". Subsidies can take different forms as defined in Article 1.1 of the SCM Agreement (e.g. grants, loans, price support). Adding the word *"including"* in Article III:8(b) of the GATT 1994 right after the *"payment of subsidies exclusively to domestic producers"* gives the idea of addition/plurarity and not limitation of the forms of subsidies that can be distinguished under Article III:8(b).In other words, governments could provide different types of subsidies, "including payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of this Article and subsidies effected through governmental purchases of domestic products." It is true that, under this second sentence, subsidies that are paid through the proceeds of discriminatory internal taxes applied, directly or indirectly, on products continue to be subject to the obligations in Article III. However, this does not necessarity limit the types of subsidies that could be paid exclusively to domestic producers under Article III:8(b).

For instance, price support or the grant of loans exclusively to domestic producers does not necessarily involve subsidisation based on the proceeds of discriminatory internal taxes. Governments could obtain funds to grant loans or to support prices of domestic producers from proceeds of income taxes charged from their citizens. Furthermore, the grant of loans or price support do not necessarily involve the expenditure of revenue by a government and, still, could be included in the scope of Article III:8(b), as they do not necessarily involve the use of proceeds of discriminatory internal taxation. In addition, although the word "payment" of subsidies could be interpreted restrictively, meaning an expenditure of an amount, it could also be construed more broadly, as giving something or an advantage. In the French version of the GATT 1994, Article III:8(b) uses the expression "l'attribution…de subventions", which is broader than the concept of payment as expenditure of an amount.

The dissenting opinion, therefore, is reasonable to the extent that it attempts to give a more balanced interpretation of the scope of Article III:8(b), by expandind the possibilities of application of this provision beyond the situations involving "expenditure of revenue by a government". In addition, the restriction of the definition of subsidies

447 Spadano, "Local content requirements: perspectives under WTO law and other international norms," 372-73.

under this provision indeed renders redundant the actionable subsidies' discipline of the SCM Agreement to the extent that other types of domestic subsidies (except for those involving the "expenditure of revenue by a government") could be more easily challenged under Article III of the GATT 1994 and the discipline of actionable subsidies under the SCM Agreement would be inutile.

Also, a broader definition of subsidies under Article III.8(b) of the GATT 1994 would more adequately preserve the Members' policy space in connection with domestic production subsidies which seems to have been the Appellate Body's rationale in *US-Tax Incentive*s when it adopted a strict conditionality test for the interpretation of Article 3.1(b) of the SCM Agreement preventing that domestic production subsidies that only *incentivise* the use of domestic over imported products do not fall within the rigid discipline of prohibited subsidies, provided that they do not entail a *requirement* to use domestic over imported goods.[448]

The dissenting opinion, however, is not very clear as to the treatment of LCR-related subsidies paid exclusively to domestic producers. Nevertheless, since it states that "*any* conditions for eligibility for the payment of subsidies that define the class of eligible "domestic producers" by reference to their activities in the subsidised products' markets" would be justified under Article III:8(b), this could, in theory, include conditions for eligibility that entail compliance with LCRs. In any case, no definitive conclusion can be inferred.

In summary, according to established WTO jurisprudence, subsidies to national producers involving a requirement to use domestic over imported goods would not be covered by the exception in Article III:8(b) and would therefore continue to be subject to the national treatment obligation in Article III. Tax and other forms of discrimination on products may not be considered subsidies for the purposes of Article III:8(b) of the GATT, as the provision entails a narrow definion involving the expenditure of revenue by a government.

A dissenting opinion from an Appellate Body Member, however, challenged the strict view on the interpretation of 'payment of subsidies' under of Article III:8(b) of the GATT and could be resorted to in future cases so as to expand the types of domestic production subsidies that could be justified under this provision, by reference to the the definition of subsidy in Article 1 of the SCM Agreement. In this sense, domestic produc-

448 For a discussion on the interpretation of Article 3.1(b) of the SCM Agreement, please refer to section II.4.2 below.

tion subsidies involving government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits) could also be justified under Article III:8(b) of the GATT.

II.2.3.2 General exceptions (Art. XX)

Article XX of the GATT 1994 provides for general exceptions to violations of Article III of the GATT 1994 and Article 2.1 of the TRIMs Agreement in view of certain non-trade values. It establishes as follows:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
>
> (a) necessary to protect public morals;
>
> (b) necessary to protect human, animal or plant life or health;
>
> (c) (..)
>
> (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trademarks and copyrights, and the prevention of deceptive practices;
>
> (e) (…)
>
> (f) (…)
>
> (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;
>
> (h) (…)
>
> (i) (…)
>
> (j) essential to the acquisition or distribution of products in general or local short supply; Provided that any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other

> provisions of the Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist.[449]

As it will be seen below, the justification of LCRs under general exceptions can face some difficulties.

According to the Appellate Body, the evaluation of a defence under Article XX of the GATT 1994 involves a two-tiered analysis, in which a measure must first be provisionally justified under one of the paragraphs of Article XX, and then the application of the provisionally justified measure must be consistent with the requirements of the chapeau of Article XX.[450] This, in the Appellate Body's view, reflects the "fundamental structure and logic of Article XX of the GATT 1994."[451]Regarding the first part of the analysis, it is well established in WTO jurisprudence that, for a responding party to justify provisionally a measure under an Article XX exception, two elements must be shown: first, that the measure addresses the particular interest specified in that paragraph;[452] and, second, that there is a sufficient nexus between the measure and the interest protected.[453] Article XX uses different terms in its different subparagraphs: "necessary" – in subparagraphs (a), (b), and (d); "essential" – in subparagraph (j); "relating to" – in subparagraphs (c), (e), and (g); "for the protection of" – in subparagraph (f); "in pursuance of" – in subparagraph (h); and "involving" – in subparagraph (i). These different terms suggest that the negotiators of the GATT did not intend to require, in respect of each and every category, the same kind or degree of connection or relationship between the measure under appraisal and the state interest or policy sought to be promoted or realised.[454]

Consequently, "paragraphs of Article XX contain different requirements regarding the relationship of the measure at issue and the societal value pursued. Some measures need

449 Paragraphs that are not relevant in the context of LCRs have been omitted.

450 See Appellate Body Report, *US – Gasoline* (1996), p. 22. See also Appellate Body Reports, *Dominican Republic – Import and Sale of Cigarettes* (2005), para. 64; *US – Shrimp* (1998), paras. 119-120; and *EC – Seal Products* (2014), para. 5.169; *India – Solar Cells* (2016), para. 5.56; Panel Reports, *China – Auto Parts* (2009), para. 7.280; Appellate Body Report, *China – Rare Earths* (2014), para. 5.86 (referring to Appellate Body Report, *US – Shrimp* (1998), para. 119).

451 Appellate Body Report, *US – Shrimp* (1998), para. 119.

452 The Appellate Body has previously considered the need to "examine 'the design of the challenged measure, including its content, structure and expected operation', with a view to ensuring that the measure is "not incapable of" protecting public morals. Following this approach, if a panel finds that a measure is incapable of protecting the values considered by the responding Member as public morals, there is no relationship between the measure and the protection of public morals that would meet the requirements of the 'design' step.If, on the other hand, a panel finds the measure to be 'not incapable of protecting public morals, this indicates the existence of a relationship between the measure and the protection of public morals' that would meet the requirement of the design test." (Panel Report, *US — Tariff Measures* (2020), para. 7.145).

453 Appellate Body Report, *India – Solar Cells* (2016), para. 5.57.

454 Appellate Body Report, *China - Rare Earths* (2014), para. 5.87; Appellate Body Report, *US – Gasoline* (1996), p. 17-18.

to be 'necessary' for the protection and promotion of the societal value they pursue (…) while for other measures it suffices that they 'relate to' the societal value they pursue."[455]

In analysing whether the measure is *necessary* to protect the declared policy objective (paragraphs (a), (b) and (d) of the GATT 1994), panels and the Appellate Body, under the so called "necessity test", weight and balance several factors, including: the importance of the objective, the contribution of the measure to that objective, the trade-restrictiveness of the measure, and "whether a WTO-consistent alternative measure which the Member concerned could 'reasonably be expected to employ' is available, or whether a less WTO-inconsistent measure is 'reasonably available'".[456]

In LCR cases, panels may well recognise that a measure addresses a particular interest as it was the case in *China – Publications and Audiovisual Products* (2010) and *Brazil – Taxation* (2019). However, the justification of LCRs becomes more difficult in light of the parameters established by the WTO jurisprudence when it comes to analysing whether there is sufficient nexus between the measure and the interest protected under "the necessity test" set forth in paragraphs (a), (b) and (d) of the GATT 1994.

Especially considering the parameter of analysis of Article XX, it is very difficult to justify LCRs. The Appellate Body in *China – Publications and Audiovisual Products* (2010) stated that "[t]he less restrictive the effects of the measure, the more likely it is to be characterized as 'necessary'".[457] Given the trade restrictive effect of LCRs, it may be difficult for them to pass the "necessity test".

WTO jurisprudence has often recognised less-trade restrictive alternatives in comparison with measures imposing LCRs under the necessity test.[458] In the weighing and balancing exercise made by panels and the Appelate Body, they generally give much weight to these alternative measures.

The difficulties in complying with the panels and the Appellate Body's standards for justifying measures under Article XX of the GATT 1994 is reflected in the fact that in none of the LCR cases decided so far the analysis of the general exceptions passed to the second step, that is, the assessment of whether the measure has been "applied in a man-

455 Bossche and Zdouc, *The Law and Policy of the World Trade Organization - Text, Cases and Materials*, 554.
456 Appellate Body Report, *EC – Seal Products* (2014), para. 5.214 (referring to Appellate Body Reports, *Brazil – Retreaded Tyres* (2007), para. 182; and *US – Gambling* (2005), para. 307 (referring to Appellate Body Report, *Korea – Various Measures on Beef*, 2001, para. 166)). See also Appellate Body Report, *Colombia – Textiles* (2016), paras. 5.70-5.75; Panel Reports, *Brazil – Taxation* (2019), para. 7.524.
457 Appellate Body Report, *China – Publications and Audiovisual Products*, 2010, para. 310.
458 Panel Report, *China – Publications and Audiovisual Products* (2010); Panel Reports, *Brazil – Taxation* (2019).

ner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade" according to the chapeau of Article XXof the GATT 1994. In all cases, the LCRs were not found to be provisionally justified under one of the subparagraphs of Article XX of the GATT 1994.

In any case, the examination of LCRs in light of the chapeau of Article XX makes their justification even more complex.

As stated by the Appellate Body, the function of the chapeau is to "prevent the abuse or misuse of a Member's right to invoke [Article XX] exceptions".[459] The Appellate Body further clarified that "the chapeau operates to preserve the balance between a Member's right to invoke the exceptions of Article XX, and the rights of other Members to be protected from conduct proscribed under the GATT 1994."[460] In the Appellate Body's view, "the negotiating history of Article XX confirms that the paragraphs of Article XX set forth *limited and conditional* exceptions from the obligations of the substantive provisions of the GATT 1994. Any measure, to qualify finally for exception, must also satisfy the requirements of the chapeau. This is a fundamental part of the balance of rights and obligations struck by the original framers of the GATT 1947."[461]

In assessing whether the discrimination is arbitrary or unjustified, the Appellate Body found in *US-Shrimp* (1998) that "in order for a measure to be applied in a manner which would constitute "arbitrary or unjustifiable discrimination between countries where the same conditions prevail", three elements must exist. First, the application of the measure must result in discrimination. As we stated in *US – Gasoline* (1996), the nature and quality of this discrimination is different from the discrimination in the treatment of products which was already found to be inconsistent with one of the substantive obligations of the GATT 1994, such as Articles I, III or XI. Second, the discrimination must be arbitrary or unjustifiable in character. (…) Third, this discrimination must occur between countries where the same conditions prevail."[462]

The Appellate Body also stated that the analysis should focus on the cause of the discrimination, or the rationale put forward to explain its existence and should be made in light of the objective of the measure. It also noted that discrimination will be arbitrary or unjustifiable when the reasons given for the discrimination bear no rational connec-

459 Appellate Body Report, *EC – Seal Products* (2014), para. 5.297.
460 Appellate Body Report, *EC – Seal Products* (2014), para. 5.297 (referring to Appellate Body Report, *US – Shrimp* (1998), para. 156).
461 Appellate Body Report, *US – Shrimp* (1998), para. 157.
462 Appellate Body, *US – Shrimp* (1998), para. 150.

tion to the objective or would go against that objective. In summary, it stressed the importance of "examining the question of whether the discrimination can be reconciled with, or is rationally related to, the policy objective of the measure. In addition, however, depending on the nature of the measure at issue and the circumstances of the case at hand, additional factors could also be relevant to the analysis."[463]

The Panel in *China – Rare Earths* (2014) seems to have created an additional requirement for interpreting the chapeau. It reiterated the need for demonstrating non-existence of WTO-consistent alternative measures. It stated that "(…) discrimination may also be arbitrary or unjustifiable in cases where it is avoidable and foreseeable. This will be the case where alternative measures exist which would have avoided or at least diminished the discriminatory treatment. In sum, the chapeau of Article XX allows for a degree of discrimination provided it is justified and not arbitrary and where the complainants are unable to demonstrate the availability of a WTO-consistent alternative measure."[464] Therefore, the same problem in justifying LCRs provisionally under the necessity test would exist in justifying them under the chapeau of Article XX. WTO adjudicating bodies, considering current jurisprudence, may find less trade-restrictive alternatives for LCRs and these measures may never be justified under Article XX, considering this parameter.

It is important to note, however, that, in *US-Shrimp* (1998), although the Appellate Body did not expressly link the analysis of chapeau to the existence of alternative measures, it was concerned with analysing situations where the discrimination could be avoided, and the measure made it difficult to establish the appropriatedness of its regulatory objective. In this sense, the Appellate Body considered in this case that the Inter-American Convention provided "convincing demonstration that an alternative course of action was reasonably open to the United States for securing the legitimate policy goal of its measure, a course of action other than the unilateral and non-consensual procedures of the import prohibition under Section 609.(…) The unjustifiable nature of this discrimination emerges clearly when we consider the cumulative effects of the failure of the United States to pursue negotiations for establishing consensual means of protection and conservation of the living marine resources here involved, notwithstanding the explicit statutory direction in Section 609 itself to initiate negotiations as soon as possible for the development of bilateral and multilateral agreements."[465]

Parties have raised defences based on the GATT general exceptions to justify their LCR-related policies in four cases.

463 Appellate Body Report, *US - Tuna II (Mexico)* (2012), para. 7.316.
464 Panel Report, *China – Rare Earths* (2014), para. 7.354.
465 Appellate Body, *US – Shrimp* (1998), para. 171-172.

In *China – Auto Parts* (2009), China raised Article XX(d) of the GATT 1994 ("compliance with laws or regulations") in order to justify a violation of Article III of the GATT 1994 caused by a charge imposed by China on imported auto parts.

In *China – Publications and Audiovisual Products* (2010), China argued that restrictions on the number of entities importing certain publication and audio-visual products were based on public moral grounds, that is, it was justified under Article XX(a) of the GATT 1994.

In *India – Solar Cells* (2016), India argued that its LCRs which required solar power developers to acquire Indian solar cells and modules were "essential to the acquisition or distribution of products in short supply" within the meaning of Article XX(j), given India's lack of domestic manufacturing capacity and dependence on imports. It also submitted that the LCRs were necessary, under Article XX(d), to "secure compliance" with certain international and national laws and regulations related to energy security and climate change to the extent that they reduced the risk of a disruption in Indian solar power developers' access to a continuous and affordable supply of the solar cells and modules needed to generate solar power.

In *Brazil – Taxation* (2019), Brazil argued that local content aspects of one of its information and communications technology (ICT) programmes was justified under Article XX(a) (public morals) because it was created to bridge the digital gap in the Brazilian population and promote social inclusion.

In addition, it argued that its INOVAR-AUTO Program was justified under Articles XX(b) and XX(g) of the GATT 1994. In defending that the INOVAR-AUTO programme was justified under sub-paragraph (b) of Article XX, which refers to measures "necessary to protect human, animal or plant life or health", Brazil argued that this programme was part of a set of Brazilian policies aimed at (i) improving vehicle safety and (ii) reducing CO2 emissions. With respect to Article XX(g), Brazil contended INOVAR-AUTO programme related to the conservation of petroleum and its by-products, including gasoline, because the different tax treatment it provided directly aimed to reduce gasoline consumption by increasing vehicle energy efficiency.

In none of these cases, however, the relevant local content measure was considered justified under the general exceptions.

(i) China – Auto Parts

In *China – Auto Parts* (2009), China had adopted a bound duty rate of 25 per cent on complete vehicles when it acceded to the WTO, but only 10 per cent on auto parts. In 2004/2005, China adopted measures that imposed a 25 per cent charge on auto parts that were imported and then assembled into complete vehicles in China. This higher rate for auto parts was challenged in the dispute.

China submitted that the challenged measure was necessary to secure compliance with China's tariff schedule by preventing the importation and assembly of auto parts as a means of circumventing China's tariff provisions relating to motor vehicles. Specifically, China alleged that this so-called "circumvention" occurred when manufacturers evaded the higher duty rate for motor vehicles by structuring their imports of auto parts and components in multiple shipments so that no single shipment had the essential character of a motor vehicle, even if those parts and components had been classified as a motor vehicle had they entered China in a single shipment.[466]

The Panel stated that "for a measure, otherwise inconsistent with GATT 1994, to be justified under Article XX, two elements must be proved: first, the measure falls under one or more of the exceptions provided in Article XX; and, second, the measure satisfies the requirements under the chapeau of Article XX."[467]

In analysing whether the measure fell under Article XX(d), the Panel, following the Appellate Body in *Korea – Various Measures on Beef* (2001) made a two-step verification: (i) whether the measure is designed to 'secure compliance' and in fact secure compliance with laws or regulations that are not themselves inconsistent with some provision of the GATT; and (ii) whether the measure is 'necessary' to secure such compliance.[468]

In the Panel's view, China did not discharge its burden to prove that the measures "secure compliance" with its tariff schedule, because China did not satisfactorily explain how the types of actions that China claimed amounted to "circumvention" of the tariff provisions for motor vehicles (i.e. importing and assembling auto parts in China, with or without any intention to avoid/evade the higher tariff duties for motor vehicles) were inconsistent with the obligations under its tariff schedule and hence needed to be prevented through the measures.[469]

466 Panel Reports, *China – Auto Parts* (2009), para. 7.316.
467 Panel Reports, *China – Auto Parts* (2009), para. 7.280.
468 Panel Reports, *China – Auto Parts* (2009), para. 7.282 and para. 7.299.
469 Panel Reports, *China – Auto Parts* (2009), para. 7.346.

In any event, the Panel did not consider that the measures "secured compliance" with China's tariff schedule. The Panel stated that "the notions of 'circumvention' and 'anti-circumvention' are not contemplated in the relation to ordinary customs duties."[470] It added that considering China's tariff schedule structure, "any importer, automobile manufacturers … would, in the normal operation of their business, decide to import auto parts and assemble them into motor vehicles, to the extent allowed under their business requirements". [471] According to the Panel, "China itself has also acknowledged that the incentive to import auto parts instead of motor vehicles (because of the higher tariff rate for motor vehicles) is a characteristic that is inherent to China's Schedule of Concessions that China negotiated".[472]

The Panel also found that the measures could not be considered as "necessary" to secure compliance with China's tariff schedule. It reasoned that the scope of the measure was too broad to be viewed as allegedly preventing importers from falsely declaring their imports or from avoiding higher tariff duties.[473]

(ii) China – Publications and Audiovisual Products

In *China – Publications and Audiovisual Products* (2010), China argued that restricting importing entities of certain publication and audio-visual products to state-owned enterprises (with the exclusion of foreign-invested companies) was justified under Article XX(a) of the GATT 1994.

China explained that the US had challenged a series of measures that established a content review mechanism and a system for the selection of import entities for specific types of goods that China considered to be "cultural goods". China emphasised characteristics of cultural goods, including their impact on societal and individual morals. China explained that its existing regulatory regime defined the content that China considered to have a negative impact on public morals and, in order to ensure that such content was not imported into China, it established a mechanism for content review of relevant products that was based upon the selection of import entities.[474]

The Panel begun its analysis by stressing that undoubtedly "the protection of public morals ranks among the most important values or interests pursued by Members as a matter of public policy"[475] and that "it is up to each Member to determine what level of

470 Panel Reports, *China – Auto Parts* (2009), para. 7.334.
471 Panel Reports, *China – Auto Parts* (2009), para. 7.336.
472 Panel Reports, *China – Auto Parts* (2009), para. 7.336.
473 Panel Reports, *China – Auto Parts* (2009), para. 7.361.
474 Panel Report, *China – Publications and Audiovisual Products* (2010), para. 7.715.
475 Panel report, *China – Publications and Audiovisual Products* (2010), para. 7.819.

protection is appropriate in a given situation". [476] Based on previous cases, it conducted a "necessity test" to evaluate whether China's restrictions of the right to import relevant products were "necessary" to protect public morals. In doing so, it conducted "a process of weighing and balancing a series of factors", including (i) the contribution of the measure to the realisation of the ends pursued by it; (ii) the trade restrictiveness of the measure, and (iii) possible less trade-restrictive alternative measures which can provide an equivalent contribution to the achievement of the objective.[477]

The Panel ultimately concluded that China had not persuaded it that requiring publication import entities to be wholly state-owned contributed to the protection of public morals in China. It also ruled that the measure was very trade-restrictive to the extent that the requirement completely denied the right to import to enterprises in China that were not wholly state-owned, including foreign-invested enterprises.[478] Finally, the Panel found that China failed to satisfy the "necessity" standard also because the United States identified other, less trade-restrictive means for China to achieve its objectives.

In particular, the United States proposed that the Chinese Government be given sole responsibility for conducting content review.[479] Under this proposed alternative, there would be no restriction on who could import the relevant products, and import entities would have no role in the content review process. Rather, the Chinese Government would conduct content review and take a final decision before any imported products could clear customs.[480]

The Panel considered that the US proposal for the Chinese Government to conduct content review would be significantly less restrictive and would make a contribution to the protection of public morals in China that was at least equivalent to the contribution made by the suitable organisation and qualified personnel requirement and the State plan requirement. The Panel then examined whether the proposed alternative was reasonably available to China and concluded that China had not demonstrated that this alternative was not "reasonably available"[481]

The Panel considered that China had not demonstrated that the alternative proposed by the United States would impose on China an undue burden, whether financial or

476 Panel report, *China – Publications and Audiovisual Products* (2010), para. 7.819.
477 Panel report, *China – Publications and Audiovisual Products* (2010), para. 7.782-7.786.
478 Panel report, *China – Publications and Audiovisual Products* (2010), para. 7.862.
479 Appellate Body Report, *China – Publications and Audiovisual Products* (2010), para. 312.
480 Appellate Body Report, *China – Publications and Audiovisual Products* (2010), para. 315.
481 Appellate Body Report, *China – Publications and Audiovisual Products* (2010), para. 312.

otherwise[482] It stressed that China did not provide any data or estimate that would suggest that the cost to the Chinese Government would be unreasonably high or even prohibitive.[483] The Panel also found that "it is not apparent to us that the cost to the Chinese Government would be any higher if the US proposal were implemented"[484] and that "it would appear that China could in any event lessen any burden by charging appropriate fees".[485]

The Appellate Body upheld the Panel's conclusion that China had not demonstrated that the relevant provisions were "necessary" to protect public morals, and that, as a result, China had not established that these provisions were justified under Art. XX(a).

China appealed the Panel's finding that the alternative measure proposed by the US was "reasonably available". China argued that the proposed measure was merely theoretical in nature and would impose an undue and excessive burden on China. [486]

The Appellate Body considered that China did not provide evidence to the Panel substantiating the likely nature or magnitude of the costs that would be associated with the proposed alternative, as compared to the current system. Nor had China, in its appeal, pointed to specific evidence in the Panel record that would allow the Appellate Body to conclude that the Panel erred in failing to attribute sufficient significance to the evidence of financial and administrative burden that could attach to the proposed alternative measure. Instead, in the Appellate Body's view, China simply argued that the proposal would involve "tremendous restructuring" and would "obviously put on China an excessively heavy financial and administrative burden".[487]

(iii) India – Solar Cells

In *India – Solar Cells* (2016), Article XX(j) of the GATT 1994 was interpreted for the first time. India justified its LCRs which encouraged solar power developers to acquire solar cells and modules produced in India in pursuit of policy objectives related to energy security and sustainable development, ecologically sustainable growth and climate change. It argued that, in order to achieve those objectives, it needed to ensure adequate supply of clean electricity, generated from solar power, at reasonable prices and reduce its reliance on imported oil and coal.[488]

482 Panel Report, *China – Publications and Audiovisual Products* (2010), para. 7.906
483 Panel Report, *China – Publications and Audiovisual Products* (2010), para. 7.905.
484 Panel Report, *China – Publications and Audiovisual Products* (2010), para. 7.904.
485 Panel Report, *China – Publications and Audiovisual Products* (2010), para. 7.906
486 Appellate Body Report, *China – Publications and Audiovisual Products* (2010), para. 313.
487 Appellate Body Report, *China – Publications and Audiovisual Products* (2010), para. 316.
488 Panel Report, *India – Solar Cells* (2017), para. 7.189.

According to India, ensuring an adequate supply of clean energy generated from solar power was only possible if Indian solar power developers had access to a continuous and affordable supply of the solar cells and modules they used to generate that solar power. India emphasised that its solar power developers depended predominantly on foreign solar cells and modules for that purpose, and, according to India, that dependence on imports of foreign solar cells and modules created a risk of disruption in the continuous and affordable supply of solar cells and modules. India submitted that it was therefore necessary to ensure that there was an adequate reserve of domestic manufacturing capacity for solar cells and modules in case there was a disruption in supply of foreign solar cells and modules.[489]

Accordingly, India claimed that the LCRs were "essential to the acquisition or distribution of products in short supply" within the meaning of Article XX(j). Specifically, India argued that solar cells and modules were "products in general or local short supply" in India on account of its lack of domestic manufacturing capacity. India has also argued that the risk of solar power developers being unable to access these products made them "products in general or local short supply" in India. India further submitted that the LCRs were "essential" to the acquisition of solar cells and modules by solar power developers because they were the only means that India had to increase domestic manufacturing capacity of cells and modules, and thereby reduce the risk of a disruption in Indian solar power developers' access to a continuous and affordable supply of the solar cells and modules needed to generate solar power. [490]

Both Panel and the Appellate Body disagreed with India's argument that a lack of sufficient domestic manufacturing capacity would necessarily constitute a product shortage in a particular market. This, by its terms, makes it difficult for parties to justify LCRs based on this provision.

Based on its analysis of the text and context of Article XX(j) of the GATT 1994, the Panel found that the terms 'products in general or local short supply' refer to a situation in which the quantity of available supply of a product, from all sources, does not meet demand in a relevant geographical area or market"[491] and that they "do not refer to products in respect of which there merely is a lack of domestic manufacturing capacity".[492] The Panel ultimately found that "India ha[d] not argued that the quantity of solar cells and

489 Panel Report, *India – Solar Cells* (2016), para. 7.189.
490 Panel Report, *India – Solar Cells* (2016), para. 7.190.
491 Panel Report, *India – Solar Cells* (2016), para. 7.234
492 Panel Report, *India – Solar Cells* (2016), para. 7.236

modules available from all sources, i.e. both international and domestic, is inadequate to meet the demand of Indian SPDs [solar power developers] or other purchasers." [493]

Following the same rationale, the Appellate Body ruled that an assessment of whether there is a "deficiency" or "amount lacking" in the "quantity" of a product that is available would "involve a comparison between 'supply' and 'demand', such that products can be said to be 'in short supply' when the 'quantity' of a product that is 'available' does not meet 'demand' for that product."[494] In the Appellate Body's view, a situation of short supply must be examined "within the territory of the Member invoking Article XX(j)". [495]

However, as to the origin of the products that may be "available" in a particular geographical area or market, the Appellate Body noted that:

> the phrase "products in general or local short supply" is immediately preceded by the terms "acquisition or distribution of". The word "acquisition" refers generally to "[t]he action of acquiring something", and "distribution" is defined as "[t]he action of spreading or dispersing throughout a region". Article XX(j) therefore contemplates measures that seek to redress situations of "short supply" by providing for the "acquisition or distribution of" given products. By its terms, Article XX(j) does not limit the scope of potential sources of supply to "domestic" products manufactured in a particular country that may be "available" for purchase in a given market. Nor does it exclude the possibility that products from sources outside a particular geographical area or market may also be "available" to satisfy demand. [496]

Therefore, for the Appellate Body, when analysing whether the product is in "general or short supply", stated that "the responding party has the burden of demonstrating that the quantity of "available" supply from both domestic and international sources in the relevant geographical market is insufficient to meet demand." [497]

The Appellate Body considered that its interpretation of Article XX(j) of the GATT 1994 is "in consonance with the preamble of the Marrakesh Agreement, [498] which refers to the "optimal use of the world's resources in accordance with the objective of sustainable

493 Panel Report, *India – Solar Cells* (2016), para. 7.236
494 Appellate Body Report, *India – Solar Cells* (2016), para. 5.66.
495 Appellate Body Report, *India – Solar Cells* (2016), para. 5.67.
496 Appellate Body Report, *India – Solar Cells* (2016), para. 5.68.
497 Appellate Body Report, *India – Solar Cells* (2016), para. 5.71.
498 Appellate Body Report, *India – Solar Cells* (2016), para. 5.72.

development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with [Members'] respective needs and concerns at different levels of economic development". From its standpoint, "the different levels of economic development of Members may, depending on the circumstances, impact the availability of supply of a product in a given market. Developing countries may, for example, have less domestic production, and may be more vulnerable to disruptions in supply than developed countries. Such factors may be relevant in assessing the availability of a product in a particular case, and thus in assessing whether a product is in 'general or local short supply'".[499]

As to India's broader policy considerations, the Appellate Body submitted that while they may inform the nature and extent of supply and demand, "they do not relieve the responding party invoking the exception in Article XX(j) from the burden to demonstrate that imported products are not 'available' to meet demand and that the products at issue are 'in general or local short supply'".[500]

As noted elsewhere, LCRs have the purpose of encouraging domestic industries. Once Panels and the Appellate Body ruled that the definition of general or local short supply must take into account the supply from all sources, including foreign sources (and not only domestic capacity), parties may no longer use Article XX(j) to justify LCRs when only domestic capacity is insufficient, and the product is available from international sources.

Also, in *India – Solar Cells* (2016), India attempted to justify its LCRs based on Article XX(d). It argued that it had the obligation "to ensure ecologically sustainable growth while addressing India's energy security challenge and ensuring compliance with its obligations relating to climate change". According to India, this obligation was reflected in (a) four international instruments, namely, (i) the preamble of the WTO Agreement; (ii) the United Nations Framework Convention on Climate Change;[501] (iii) the Rio Declaration on Environment and Development (Rio Declaration);[502] and (iv) UN Resolution A/RES/66/288 (Rio+20 Document: "The Future We Want")[503]; and (b) four domestic instruments. According to India, both sets of instruments qualified as "laws or regulations" within the meaning of Article XX(d) of the GATT 1994. India claimed that its LCRs "secure compliance" with these "laws or regulations" because they "reduce the risk of a disrup-

499 Appellate Body Report, *India – Solar Cells* (2016), para. 5.72.
500 Appellate Body Report, *India – Solar Cells* (2016), para. 5.79.
501 UN General Assembly, *United Nations Framework Convention on Climate Change: resolution adopted by the General Assembly*, 20 January 1994, A/RES/48/189.
502 United Nations Conference on Environment and Development. *Rio Declaration on Environment and Development* (1992) U.N. Doc. A/CONF.151/5/Rev.1, 31 I.L.M. 874.
503 UN General Assembly, *66/288. The future we want*, resolution adopted by the General Assembly on 27 July 2012, A/RES/66/288.

tion in Indian solar power developers' access to a continuous and affordable supply of the solar cells and modules needed to generate solar power". India further argued that its LCRs were "necessary" because they were the only means it had to incentivise local manufacturing of solar cells and modules, and thereby reduce this risk.[504]

The Panel considered whether "laws and regulations" included international instruments. Based on the Appellate Body decision in *Mexico — Taxes on Soft Drinks* (2006), according to which "laws or regulations" in Article XX(d) refer to "rules that form part of the domestic legal system of a WTO Member",[505] the Panel ruled that international agreements (or other sources of international law) may constitute "laws or regulations" only as far as they have been incorporated, or have "direct effect", within a Member's domestic legal system.[506]

Although India argued that rules of international law are accommodated into India's domestic legal system "without express legislative sanction, provided they do not run into conflict with laws enacted by the Parliament", the Panel, upheld by the Appellate Body, considered that it failed to demonstrate that the relevant international instruments had "direct effect" in India.

When analysing the domestic instruments that India had identified qualify as "laws or regulations", the Panel identified only one domestic instrument (as a "statute" and legally enforceable, while the other documents, which were expressly entitled a "policy" or "plan", the Panel ruled that the language of the provisions and passages in these instruments did "not suggest the existence of any legally enforceable rules", and was instead "hortatory, aspirational, declaratory, and at times solely descriptive".[507] After analysing the passages and provisions of the remaining domestic instruments identified by India, the Appellate Body noted, as did the Panel, that the text of these passages and provisions "is hortatory, aspirational, declaratory, and at times solely descriptive".[508]

In summary, of the international and domestic instruments identified by India, the Panel found that only one domestic instrument, Section 3 of the Electricity Act, was a "law or regulation" within the meaning of Article XX(d). It then examined whether Section 3 of the Electricity Act was "not inconsistent with the provisions of" the GATT 1994 and whether the relevant LCR measures were measures "to secure compliance" with Section

504 Appellate Body Report, *India – Solar Cells* (2016), para. 5.94.
505 Panel Report, *India – Solar Cells* (2016), paras. 7.290 and 7.293 (quoting Appellate Body Report, *Mexico – Taxes on Soft Drinks* (2006), paras. 69-70 and 79).
506 Panel Report, *India – Solar Cells* (2016), para. 7.293.
507 Panel Report, *India – Solar Cells* (2016), para. 7.313.
508 Appellate Body Report, *India – Solar Cells* (2016), para. 5.133.

3 of the Electricity Act. Ultimately, however, the Panel noted no link or nexus between the relevant LCR measures and Section 3 of the Electricity Act. In the Panel's view, "it is insufficient for the DCR [domestic content requirement] measures to merely ensure the attainment of, or be consistent with, objectives referenced in Section 3 of the Electricity Act. Rather, it would be necessary to demonstrate that the DCR measures serve to enforce the specific obligations contained in the law at issue." Based on the foregoing, the Panel concluded that India had failed to demonstrate that its LCR measures are measures "to secure compliance" with the legal obligations in Section 3 of the Electricity Act.[509]

UltimatelyAlso, the Appellate Body upheld the Panel's finding that India did not demonstrate that the passages and provisions of the domestic instruments it identified, when read together, set out a legal obligation with the required level of normativity to qualify as "laws or regulations" under Article XX(d) of the GATT 1994. In addition, it uphold the Panel's finding that India failed to demonstrate that the international instruments identified by it also qualified as "laws or regulations" under Article XX(d) of the GATT 1994.[510]

(iv) Brazil – Taxation

ICT programme

In *Brazil – Taxation* (2019), Brazil invoked Article XX(a) of the GATT 1994 to justify certain inconsistencies in respect of one of its ICT programmes, the Support Program for the Technological Development of the Digital TV Equipment Industry – PATVD, which also involved certain LCRs. Brazil argued that the digital television is an important means to bridge the digital gap in Brazilian population and it is considered a predominant source of information in the country. It explained that it would enable a universal network of distance learning, encourage R&D, and foster the expansion of Brazilian technologies to guarantee access to information at costs compatible with viewers' income. It mentioned that the PATVD was created to facilitate the integration and operation of the digital technology in the country and that there had been an interest in fomenting the local capacity to develop and manufacture this equipment, to ensure that there would be no risk of discontinuity in the supply of the transmitting equipment required to carry out the transition as planned. For these reasons, it argued that the programme was justified under Article XX(a) of the GATT 1994 ("necessary to protect public morals").[511]

The Panel recalled that in order to establish whether a measure is justified under Article XX(a), it must conduct a two-step analysis. First, a Panel must assess whether the measure

509 Panel Report, *India – Solar Cells* (2016), para. 7.332.
510 Appellate Body Report, *India – Solar Cells* (2016), para. 5.151.
511 Panel Reports, *Brazil – Taxation* (2019), paras. 7.544-7.547.

at issue is provisionally justified under the subparagraph of Article XX invoked. Second, if the Panel finds that the measure is provisionally justified, it must examine whether the application of the measure satisfies the requirements of the chapeau of Article XX.

According to the Panel, in order to verify if the measure is provisionally justified under Article XX(a), first, it shall define whether the measure is 'designed' to protect public morals and then verify whether it is 'necessary' to protect public morals. [512] In examining this first element, a Panel must assess whether the claimed objective is a "public morals" objective within the meaning of Article XX(a), and whether the measure is "designed" to protect that objective (in other words, whether the measure is not incapable of contributing to that objective).[513] As regards the second element, the Panel noted that it must weigh and balance a series of elements, including the importance of the interests or values that the measure is intended to protect, the contribution of the measure to the objective pursued and the trade-restrictiveness of the measure. Following this weighting and balancing exercise, it will verify whether a WTO-consistent alternative measure which the Member concerned could 'reasonably be expected to employ' is available, or whether a less WTO-inconsistent measure is 'reasonably available'.[514]

In analysing whether the claimed objective was a "public morals" objective within the meaning of Article XX(a), the Panel considered that Brazil identified at least two objectives of the PATVD programme: bridging the digital divide and promoting social inclusion. The Panel also considered the objective identified by Brazil relating to the establishment and promotion of a domestic Brazilian industry capable of supplying digital television equipment to the domestic market "was merely intermediate to an overarching objective contained in the legislation establishing the SBTVD standard, namely bridging the so-called "digital divide" and promoting social inclusion."[515]

In assessing whether the PATVD Programme was "designed" to protect public morals, the Panel was concerned about the discriminatory aspects of the programme. It noted that the information submitted by Brazil suggested that the end goal of the programme was to foster Brazilian technology and to promote Brazilian production of instruments and services, and not necessarily bridge the social divide and promote social inclusion.[516]

512 Panel Reports, *Brazil – Taxation* (2019), para. 7.517, citing the Appellate Body Report in *Colombia – Textiles* (2016), para. 5.67.
513 Panel Reports, *Brazil – Taxation* (2019), para. 7.519.
514 Panel Reports, *Brazil – Taxation* (2019), para. 7.525-7.531.
515 Panel Reports, *Brazil – Taxation* (2019), para. 7.559 and para. 7.565.
516 Panel Reports, *Brazil – Taxation* (2019), para. 7.574, 7.575, 7.579.

However, ultimately, the Panel recognised that LCRs could potentially contribute to those claimed objectives. [517]

The Panel also suggested that Brazil could as well have raised the infant industry argument to justify discriminatory measures aiming at ultimately tackling social inclusion. In this sense, the Panel ruled that:

> Although the functioning of the measure appears to contradict its raison d'être, the Panel considers that in a situation where domestic producers could not compete with foreign imports absent government protection, it is conceivable that the protection afforded to domestic producers could allow such producers to develop their industry. The development of the industry could enable an otherwise uncompetitive domestic industry to become competitive to such an extent that it could supply the market alongside foreign imports in an open, competitive market, resulting in a lower price for consumers and therefore a net welfare benefit in terms of "social inclusion" and "access to information". In other words, more people could afford digital television, meaning more social inclusion and access to information. The Panel recognizes that this is a scenario that has not been shown to exist (nor has it been shown that such a scenario is even likely). Indeed, Brazil has not presented any evidence in support of its assertions that domestic producers required protecting, nor has it taken into account the capacity of foreign producers to supply the Brazilian market in order to secure access to digital television equipment, at least in the present circumstances. Nevertheless, the Panel agrees with Brazil that this is one way in which the discriminatory aspects of the measure at issue could potentially contribute to the protection of public morals. [518]

Based on the above the Panel found that it was not in a position to conclude that PATVD is "incapable" of contributing to the bridging of the digital divide and promoting social inclusion. It consequently found that Brazil had demonstrated that the measure was designed to protect public morals within the meaning of Article XX(a).

Next, the Panel examined whether the measure was "necessary" to protect public morals.

517 Panel Reports, *Brazil – Taxation* (2019), para. 7.581.
518 Panel Reports, *Brazil – Taxation* (2019), para 7.582.

In analysing the importance of the objective, the Panel noted that the objective of bridging the digital divide and promoting social inclusion objective is internationally recognised as an important policy objective, and indeed is recognised as a target of the United Nations Millennium Development Goals - UN MDGs. As a result, it submitted that the importance of the MDGs should not be understated. It made specific reference to the importance of this objective to developing countries and, in particular, Brazil, where the percentage of households and individuals with internet access or computer access is low. The Panel therefore considered that the objective of bridging the digital divide and social inclusion and access to information was a reasonably important policy objective.[519]

In verifying the contribution of the measure to the objective, the Panel considered that "although it is possible that the PATVD programme will contribute to the objective of the bridging the digital divide and promoting social inclusion, the evidence before the Panel indicates that the PATVD is unlikely to actually make much, if any, contribution to this objective".[520]

In assessing the trade-restrictiveness of the discriminatory aspects of the PATVD programme, the Panel recognised that a determination of this nature should be as precise as possible. However, it stated that it was not in a position to make a quantitative estimation of the level of trade-restrictiveness. It limited its analysis to stating that "the discriminatory aspects of the PATVD programme result in a disincentive to purchase imported products (both finished products and the components used to produce those finished products), which in the view of the Panel will have a material impact on imports of those products" [521] and that "the actual and potential overall trade-restrictiveness of the PATVD programme is material".[522]

In verifying whether a WTO-consistent alternative measure which the Member concerned could 'reasonably be expected to employ' is available or whether a less WTO-inconsistent measure is 'reasonably available', the Panel addressed three reasonably available alternatives that, in the Panel's view, were not only WTO-consistent and less trade-restrictive but were likely to contribute to a greater extent than the discriminatory aspects of the PATVD programme to the objective. The first alternative was for Brazil to exempt from IPI, PIS-PASEP, COFINS, PIS/PASEP Importation, and COFINS-Importation contributions, the sales of all digital television transmitters that complied with Brazil's

519 Panel Reports, *Brazil – Taxation* (2019), para 7.592.
520 Panel Reports, *Brazil – Taxation* (2019), para 7.598.
521 Panel Reports, *Brazil – Taxation* (2019), para 7.607.
522 Panel Reports, *Brazil – Taxation* (2019), para 7.607.

digital television standards, regardless of whether they are imported or domestically produced. The second alternative was for Brazil to exempt from custom duties all digital television transmitters that were currently incentivised under the programme. The third alternative was for Brazil to provide subsidies directly to producers of digital television equipment, regardless of the origin of the manufactured products.

Brazil argued that these alternative measures were not reasonably available because the PATVD programme had multiple objectives, one of which includes the promotion of "local capability and investments in R&D of [digital television] technologies in Brazil". The panel, however, considered that Brazil had not argued that the objective of promoting its domestic industry is a public morals objective, nor had Brazil argued that this objective was covered by any other paragraph of Article XX of the GATT 1994.[523] The Panel clarified that "in order for an aspect of a measure that is found to be GATT-inconsistent to be justified under Article XX, the objective being pursued must fit within one of the paragraphs of Article XX".[524]

The Panel considered that any of the three proposed alternatives would be not only WTO-consistent and less trade-restrictive than the discriminatory aspects of the PATVD programme, but could make a more substantial contribution to the claimed objective than the discriminatory aspects of the PATVD programme. Furthermore, according to the Panel, Brazil had not demonstrated that these alternatives are not "reasonably available" to Brazil.[525]

Having weighed and balanced the factors which are relevant for determining whether the measure is 'necessary' to protect public morals, the Panel concluded that, considering the above and particularly in light of the existence reasonably available less-trade restrictive alternatives, Brazil did not demonstrate that the aspects of the measure found to be inconsistent with provisions of the GATT 1994 were "necessary" to achieve social inclusion and access to information, within the meaning of Article XX(a) of the GATT 1994.

The INOVAR-AUTO programme

The general exceptions were raised by Brazil also in relation to the INOVAR-AUTO programme, which made use of LCRs in the automotive industry. One defence was raised in connection with paragraph (b) of Article XX of the GATT 1994; and the other in connection with paragraph (g).

523 Panel Reports, *Brazil – Taxation* (2019), para 7.616.
524 Panel Reports, *Brazil – Taxation* (2019), para 7.617.
525 Panel Reports, *Brazil – Taxation* (2019), para 7.618.

In defending that the INOVAR-AUTO programme was justified under paragraph (b) of Article XX, which refers to measures "necessary to protect human, animal or plant life or health", Brazil argued that this programme was part of a set of Brazilian policies aimed at (i) improving vehicle safety and (ii) reducing CO2 emissions. Brazil contended that the INOVAR-AUTO programme contributed to the objective of protecting human life and health by providing incentives for the production of safer vehicles. It also argued that the R&D and production requirements as well as the method of calculating and using the presumed IPI credit were established in order to enhance the contribution of the INOVAR-AUTO programme to Brazil's safety and environmental objectives. In Brazil's view, it was not feasible to achieve the desired level of technological advance in the auto industry without the proper incentives to R&D, productive capacity and a highly developed auto parts industry[526]

The Panel examined whether the claimed policy objectives; i.e. increase vehicle safety and reduce CO2 emissions, were objectives that fell within the range of policies aimed at protecting human life or health. It also assessed whether aspects of the INOVAR-AUTO programme found to be GATT-inconsistent were designed to increase vehicle safety and reduce CO2 emissions.

The Panel considered that that Brazil had provided sufficient evidence to demonstrate that there was a risk for human life and health caused by car accidents and increasing vehicle safety contributes to protecting human life and health, by contributing to a lower number of casualties.[527] In addition, it ruled that Brazil had demonstrated that the reduction of CO2 emissions was one of the policies covered by paragraph (b) of Article XX, given that it could fall within the range of policies that protect human life or health. It thus found that both increasing vehicle safety and the reduction of CO2 emissions are policy objectives that are covered by paragraph (b) of Article XX of the GATT 1994.

The Panel also ruled Brazil had demonstrated that the measure was not incapable of contributing to the objective of increasing vehicle safety and reducing CO2 emissions within the meaning of Article XX(b), and therefore could potentially contribute to these objectives. It consequently found that Brazil had demonstrated that the measure was designed to protect human life and health within the meaning of Article XX(b).[528]

As regards the 'necessity test', the Panel found that the level of importance of the interests pursued by Brazil (i.e. increase of vehicle safety and reduction of CO2 emissions)

526 Brazil's second written submission, *Brazil – Taxation* (2019), para. 148.
527 Panel Reports, *Brazil – Taxation* (2019), para. 7.877.
528 Panel Reports, *Brazil – Taxation* (2019), para. 7.904.

is high.[529] However, it ruled that it was likely that the INOVAR-AUTO programme would not make much, if any, contribution to these objectives. In coming to this conclusion, the Panel noted that Brazil had not submitted any evidence, quantitative or qualitative, to support its assertion that the discriminatory aspects of the programme contributed to the stated objectives that the discrimination strengthened the domestic industry, thereby facilitating the technological development of the industry. In the Panel's view, Brazil had not demonstrated that the discriminatory aspects of the INOVAR-AUTO programme had led, would lead, or were apt to lead, to an increase in vehicle safety or energy efficiency. [530]

With relation to the trade restrictiveness of the measure, the Panel stated that it was not in a position to make a quantitative estimation of the level of trade-restrictiveness. Nevertheless, it considered that the trade-restrictiveness of the discriminatory aspects of the INOVAR-AUTO Programme was material.[531]

The Panel then assessed five alternative measures that the complaining parties considered to be reasonably available, less trade-restrictive than the challenged measures, and able to contribute to the achievement of the objectives alleged by Brazil. It considered that requiring certain energy efficiency and vehicle safety standards to products, regardless of their origin, to benefit from tax exemptions would definitely contribute to the achievement of the claimed policy objectives. It considered that the elimination or reduction of customs duties on products that comply with certain standards would be WTO-consistent, since it would apply to any product, either domestic or imported, that meet certain standards relating to its levels of energy efficiency and vehicle safety and would increase the flexibility that Brazil would enjoy in terms of implementation. It considered that granting IPI tax credits, or other types of tax credits, to all cars and components that satisfy specific efficiency targets would be WTO-consistent, since it would apply to any product, either domestic or imported, that satisfies specific efficiency targets, and would be less trade-restrictive than the challenged measure, since the measure would not be applied in a discriminatory manner. The Panel also considered that Brazil would be in a position to implement this measure because, under INOVAR-AUTO, Brazil was already providing tax credits to products that satisfy certain conditions, the difference being that these conditions are related not just to energy efficiency but also to other aspects. It also found that providing subsidies for all the products that comply with Brazil's energy efficiency and vehicle safety standards, regardless of the origin of the product and imposing direct requirements on energy efficiency and vehicle

529 Panel Reports, *Brazil – Taxation* (2019), para. 7.916.
530 Panel Reports, *Brazil – Taxation* (2019), para. 7.921.
531 Panel Reports, *Brazil – Taxation* (2019), para. 7.929.

safety standards to be met by all products, regardless of their origin would also be WTO-consistent alternatives.[532]

In light of the above analysis, and particularly in light of reasonably available alternatives that in the Panel's view were not only WTO-consistent and less trade-restrictive but are likely to contribute to a greater extent than the discriminatory aspects of the INOVAR-AUTO programme to the objective, the Panel considered that Brazil did not demonstrate that the aspects of the measure found to be inconsistent with the provisions of Article III of the GATT 1994 were "necessary" to protect public health and life. [533]

In light of its findings that the measures were not provisionally justified under Article XX(b), the Panel did not make findings on whether Brazil had demonstrated that its defence under Article XX(b) met the requirements of the chapeau to Article XX. It concluded that those aspects of the INOVAR-AUTO programme found to be inconsistent with Article III of the GATT 1994 and Article 2.1 of the TRIMs Agreement were not justified under Article XX(b),

Finally, the Panel examined whether the discriminatory aspects of the INOVAR-AUTO programme were justified under Article XX(g) ("relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption").

Brazil contended that the INOVAR-AUTO programme related to the conservation of petroleum and its by-products, including gasoline, because the different tax treatment it provided directly aimed to reduce gasoline consumption by increasing vehicle energy efficiency.

The Panel firstly noted that the general exception of paragraph (g) of Article XX of the GATT 1994 presents two differences to the two general exceptions examined above (those of paragraphs (a) and (b) of Article XX of the GATT 1994). First, the nexus between the measure and the interest protected, in Article XX(g), is expressed by the term "relating to" and not "necessary to". Second, the text of the provision incorporates a conditional clause that is not part of any other general exception under Article XX of the GATT 1994, namely: "if such measures are made effective in conjunction with restrictions on domestic production or consumption".[534]

532 Panel Reports, *Brazil – Taxation* (2019), para. 7.930-7.960.
533 Panel Reports, *Brazil – Taxation* (2019), para. 7.961.
534 Panel Reports, *Brazil – Taxation* (2019), para. 7.970.

It submitted that the first step of a Panel's analysis under Article XX(g) encompassed two elements: (i) whether the measures at issue related to the conservation of exhaustible natural resources; and (ii) whether the measures at issue were made effective in conjunction with restrictions on domestic production or consumption. [535]

The Panel considered that Brazil had not demonstrated the discriminatory aspects of the measure would in fact make any contribution to the objective of increasing energy efficiency, thereby conserving petroleum. Accordingly, the Panel considered that Brazil had not demonstrated that there is a close and genuine relationship of ends and means between the discriminatory aspects of the INOVAR-AUTO programme and the objective of increasing energy efficiency. The Panel therefore considered that Brazil has not demonstrated that the discriminatory aspects of the INOVAR-AUTO programme were related to conservation of exhaustible natural resources. [536]

The Panel further found that the discriminatory aspects of the measure did not work "together with" those domestic restrictions to achieve the objective, and therefore could not be considered "even-handed". Therefore, Brazil had not demonstrated that the discriminatory aspects of the measure were "made effective" in conjunction with the domestic restrictions.[537] Having found that the measure was not provisionally justified under Article XX(g), the Panel did not consider it necessary to make findings on whether Brazil had demonstrated that its defence under Article XX(g) met the requirements of the chapeau to Article XX. It concluded that those aspects of the INOVARAUTO programme found to be inconsistent with Article III of the GATT 1994 and Article 2.1 of the TRIMs Agreement were not justified under Article XX(g) of the GATT 1994.

v) Conclusions on the general exceptions

In view of the cases demonstrated above, it is possible to conclude that it is practically impossible to justify LCRs under GATT exceptions. When the case involved the "necessity test" – which is required under Article paragraphs (a), (b) or (d) of XX of the GATT 1994 - the relevant LCRs did not satisfy the step of the analysis which requires proof of unavailability of less trade-restrictive measures. For instance, in *China – Publications and Audiovisual Products* (2010) and *Brazil – Taxation* (2019), other WTO-consistent measures were found to be available.

In addition, LCRs may not be justified under paragraph (g) of Article XX of the GATT 1994 since it requires that the measures be "made effective in conjunction with restrictions

535 Panel Reports, *Brazil – Taxation* (2019), para. 7.974.
536 Panel Reports, *Brazil – Taxation* (2019), para. 7.996.
537 Panel Reports, *Brazil – Taxation* (2019), para. 7.1005-7.1006.

on domestic production or consumption." LCRs, by their nature, incentivise domestic production and do not pose restrictions on it. Therefore, they may never comply with this requirement of paragraph (g).

Also, the Panel and the Appellate Body's rulings in *India – Solar Cells* (2016) restricted the possibility of justifying LCRs based on Article XX(j) ("essential to the acquisition or distribution of products in general or local short supply"). Given that the Panel and the Appellate Body, in defining "general or local short supply", considered that the supply from all sources, including foreign sources (and not only domestic capacity) must be taken into account, WTO Members may not use Article XX(j) to justify LCRs when only domestic capacity is insufficient, and the product is available from international sources. However, the Appellate Body may be open to analyse potential risks of supply disruptions in interpreting this provision.

An important point that contributed to the failure of the defendants in justifying their measures in accordance with Article XX is the fact that they presented poor evidence that their measure (and the discriminatory effect thereof) could actually contribute to the realisation of the ends allegedly pursued.

II.2.3.3 Security exceptions (Art. XXI)

The security exceptions established in Article XXI of the GATT 1994 have never been invoked as an affirmative defence for LCRs in the WTO. Actually, this provision was analysed for the first time in 2019 in *Russia — Traffic in Transit* (2019). The dispute concerned restrictions imposed by Russia that prevented Ukraine from using road or rail transit routes across the Ukraine-Russia border for all traffic in transit destined for Kazakstan. In this case, the Panel confirmed that it has the power to review whether the requirements of the provision are met, rather than leaving it to the self-judgment of the invoking Member.[538]

Article XXI of GATT 1994 provides that:

> Nothing in this Agreement shall be construed:

538 Russia, in response to the allegations of Ukraine that it had violated Article V of the GATT 1994 and related commitments in Russia's Accession Protocol, invoked Article XXI(b)(iii) of the GATT 1994 considering the conflicts involving Russia and Ukraine in relation to Crimea. It requested the Panel, for lack of jurisdiction, to limit its findings to recognizing that Russia had invoked a provision of Article XXI of the GATT 1994, without engaging further to evaluate the merits of Ukraine's claims. Russia considered that the Panel lacked jurisdiction to evaluate measures in respect of which Article XXI of the GATT 1994 is invoked, as, according to this WTO Member, this provision is "self-judging".

(a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or

(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests

(i) relating to fissionable materials or the materials from which they are derived;

(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;

(iii) taken in time of war or other emergency in international relations; or

(c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

For the purposes of LCRs, it is possible to think that Article XXI could be relevant for justifying LCRs in connection to goods which may be considered essential for a Member's security interests. To illustrate, governments could provide incentives for local production of medical devices or the use of local medical inputs considering the shortage during the COVID-19 public health emergency. Ultimately, Article XXI(b)(iii) sets forth that *"nothing in this agreement shall be construed to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests taken in time of war or other emergency in international relations."*

The concepts established in Article XXI(b)(iii), however, relate to very specific circumstances as noted by the Panel in *Russia – Traffic in Transit* (2019). War relates to armed conflict[539] while "emergency in international economic relations" involves "a situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state. Such situations give rise to particular types of interests for the Member in question, i.e. defence or military interests, or maintenance of law and public order interests."[540] As the Panel observed, "political or economic differences between Members are not sufficient, of themselves, to constitute an emergency in international relations." [541] In this sense, there is doubt whether the COVID pandemic could be specifically interpreted as a situation of emergency in international relations

539 Panel Report, *Russia – Traffic in Transit* (2019), para. 7.72.
540 Panel Report, *Russia – Traffic in Transit* (2019), para. 7.76.
541 Panel Report, *Russia – Traffic in Transit* (2019), para. 7.75.

under the scope of Article XXI(b)(iii), especially if emergency is connected to an idea of conflict involving some level of violence

Other paragraphs of Article XXI seem of rare use for the purposes of justifying LCRs. Paragraph (a) allows Members to adopt measures to prevent the disclosure of information which they consider contrary to their essential security interests. While it is difficult to think about GATT-inconsistent LCRs that could be justified under Article XXI(a), the equivalent provision in Article XIV bis 1(a) of the GATS could be used to justify data localisation measures requiring that any entity that processes the data of a given country's citizens must store that data on servers within that country's borders. Paragraph (c), in turn, relates to more systemic issues concerning international peace and security which seem to be outside the scope and purpose of local content measures, which in general intend to encourage industrial development.

In sum, the security exceptions under Article XXI may be of limited use for justifying LCRs. Resort to Article XXI may be rare and exceptional i.e., only in circumstances where the use of LCRs is triggered by the specific situations of war and "emergency in international relations" as narrowly defined by the Panel in *Russia – Traffic in Transit* (2019).

It is interesting, however, to note the differences of interpretation of Article XX and Article XXI of the GATT 1994. While under the necessity test carried out in connection with the general exceptions, the Panel evaluates whether the measure can actually contribute to goals alleged pursued, under Article XXI, the Panel assessed only if the measures are not implausible as measures protective of these interests, suggesting a stricter requirement of analysis under Article XX.

In detail, in interpreting the text of the chapeau of Article XXI(b) the Panel found that the expression "which it considers" is not a carte blanche for a Member to determine, at its own discretion, whether it complies with the requirements of the enumerated subparagraphs. While the Member can determine the necessity of the measures for the protection of its essential security interests,[542] the Panel has the power to review whether the requirements of the enumerated subparagraphs are met. For action to fall within the scope of Article XXI(b), it must objectively be found to meet the requirements in one of the enumerated subparagraphs of that provision. In any case, while evaluating the necessity of the measure, Members shall also be informed by the good-faith obligation.

542 See Panel Report, *Russia – Traffic in Transit* (2019), para. 7.146.

According to the Panel, "it would be entirely contrary to the security and predictability of the multilateral trading system established by the GATT 1994 and the WTO Agreements, including the concessions that allow for departures from obligations in specific circumstances, to interpret Article XXI as an outright potestative condition, subjecting the existence of a Member's GATT and WTO obligations to a mere expression of the unilateral will of that Member."[543] As a result, the Panel considered that "the ordinary meaning of Article XXI(b)(iii), in its context and in light of the object and purpose of the GATT 1994 and the WTO Agreement more generally, is that the adjectival clause 'which it considers' in the chapeau of Article XXI(b) does not qualify the determination of the circumstances in subparagraph (iii). Rather, for action to fall within the scope of Article XXI(b), it must objectively be found to meet the requirements in one of the enumerated subparagraphs of that provision.[544]

According to the Panel, this conclusion is supporterd by the the negotiating history of the GATT 1947, which demonstrates that the drafters considered that:

a. the matters later reflected in Article XX and Article XXI of the GATT 1947 were considered to have a different character, as evident from their separation into two articles;
b. the "balance" that was struck by the security exceptions was that Members would have 'some latitude' to determine what their essential security interests are, and the necessity of action to protect those interests, while potential abuse of the exceptions would be curtailed by limiting the circumstances in which the exceptions could be invoked to those specified in the subparagraphs of Article XXI(b)[545]

In determining whether the conditions of the chapeau of Article XXI(b) of the GATT 1994 were satisfied, the Panel point out that, although it is up to the Members to define their "essential security interests", they shall be constricted to the obligation of good faith so that they do not use such provision as an excuse to circumvent their multilateral obligations.[546]

According to the Panel, this obligation of good-faith "is crystallized in demanding that the measures at issue meet a minimum requirement of plausibility in relation to the

543 Panel Report, *Russia – Traffic in Transit* (2019), para.7.79.
544 Panel Report, *Russia – Traffic in Transit* (2019), para.7.82.
545 Panel Report, *Russia – Traffic in Transit* (2019), para. 7.98.
546 See Panel Report, *Russia – Traffic in Transit* (2019), para. 7.130-7.133.

proffered essential security interests, i.e. that they are not implausible as measures protective of these interests."[547] In view of the above, the Panel considered that it is "incumbent on the invoking Member to articulate the essential security interests said to arise from the emergency in international relations sufficiently enough to demonstrate their veracity." [548]

II.2.3.4 Government Assistance to Economic Development (Art. XVIII)

Article XVIII of the GATT 1994 is seen as an exemption from certain GATT obligations for the benefit of developing countries facing balance-of-payments difficulties or seeking to nurture an infant industry.[549] As stated by Isabelle Ramdoo, Article XVIII of the GATT, named "Government Assistance to Economic Development", "is an explicit recognition of the position of developing countries and their need for derogations from some trade measures with respect to the GATT Articles, including the support of Infant Industries and remedying Balance of Payments problems".[550]

Nevertheless, this Article is of limited, if any, practical use, as a defence in LCR cases.

First, there is an alleged limitation for the types of developing countries which can raise this provision. Paragraph 1 makes reference to "those contracting parties the economies of which can only *support low standards of living* and are in the early stages of development*" (emphasis added). Since the Appellate Body recognised, although in a different context,[551] that developing countries have "different needs according to their levels of development and particular circumstances,"[552] not all developing Members may be able to raise the defences set forth in Article XVIII of the GATT 1994, only those that meet the requirements established in subparagraph 1.

Second, a defence under Article XVIII of the GATT 1994 only allows, in principle, and after following strict requirement and procedures, for "flexibilities in their [developing countries'] tariff structure to be able to grant the tariff protection required for the establishment of a particular industry" and "quantitative restrictions for balance of payments purposes", as per aragraph 2 of the provision. In other words, Section A and Section B of Article XVIII allows developing parties limited action if they wish to raise arguments on infant industry protection and imbalances in the balance of payment. In the first case,

547 Panel Report, *Russia – Traffic in Transit* (2019), para. 7.138.
548 Panel Report, *Russia – Traffic in Transit* (2019), para. 7.134.
549 Appellate Body Report, *EC – Tariff Preferences* (2004), fn 232.
550 Ramdoo, *Local content, trade and investment: Is there policy space left for linkages development in resource-rich countries?*, 37-38.
551 The Appellate Body was analysing the Enabling Clause.
552 Appellate Body Report, *EC – Tariff Preferences* (2004), para. 161.

developing Members will be allowed certain 'tariff flexibilities'; and in the second case, 'quantitative restrictions for balance of payment purposes.' Note, however, that paragraph 2 of the Understanding on the Balance-of-Payments Provisions of the General Agreement on Tariffs and Trade 1994 also allows, and indicates a clear preference for, price-based measures (e.g. import surcharges, import deposit requirements or other equivalent trade measures with an impact on the price of imported goods).

Other deviations from other WTO agreements, for instance through the use of LCRs, are in principle prohibited unless there are circumstances where no measure consistent with Sections A and B was "practicable to permit a contracting party in the process of economic development to grant the governmental assistance required to promote the establishment of particular industries with a view to raising the general standard of living of its people." In this specific context, deviations from other WTO agreements and provisions are possible under limited circumstances, but subject to the strict procedures set forth in Sections C and D.

Under the infant industry argument, a WTO developing Member may, in order to promote the establishment of a particular industry with a view to raising the general standard of living of its people, notify other Members of its intention to modify or withdraw a concession included in the appropriate Schedule annexed to this Agreement. Such an argument therefore is not a general defence for LCRs specifically, but an alternative for developing Members wishing to impose higher import tariffs.

In addition, the developing Member raising this infant industry defence shall provide another Member with a compensatory adjustment in case the former proceeds with the modification or withdrawal of a concession. As stated by Ramdoo, "the possibility to modify tariff structures, is therefore subject to negotiations with other WTO Members, and potentially, to compensation, in the form of greater market access for other products. This may end up being more costly to developing countries."[553]

In addition, if compensation is not considered adequate, the other Member can modify or withdraw substantially equivalent concessions. The fact that other WTO Members can suspend concessions in response to the imposition of LCRs may prevent a developing country from implementing the measure.[554]

553 Ramdoo, *Local content, trade and investment: Is there policy space left for linkages development in resource-rich countries?,* 38.

554 Kuntze and Moerenhout, "Are Feed-In Tariff Schemes with Local Content Requirements Consistent with WTO Law?," 168.

The limited scope of the infant industry defence and the requirements that the Members raising this defence must comply with make this provision of no practical relevance for developing countries, especially in LCR cases, Indeed, no dispute has been raised addressing the support for infant industry in connection with Article XVIII of the GATT 1994.[555]

Furthermore, the quantitative restrictions which are allowed for balance of payment purposes are subject to several limitations under Section B of Article XVIII, making it difficult for development Members to comply with all the conditions required by the provision. Parties are subject to a series of "conditionalities and safeguards to ensure that the 'right to deviate' from obligations under the Agreement is strictly limited to cases where no other alternative measure consistent with the Agreement is available."[556]

Section B of Article XVIII was unsuccessfully raised in one LCR case.

In *India-Autos* (2002), India attempted to justify its indigenisation requirement applied in the context of the automobile industry by alleging that Article XVIII:B of the GATT constituted an exception from the GATT and from the obligations set out in Article 2 of the TRIMs Agreement, in so far as it allowed the developing country Members of the WTO to impose import restrictions to safeguard their external financial position and to ensure a level of reserves adequate for the implementation of their programme of economic development.[557]

The Panel refused India's arguments that its indigenisation requirements and trade balancing requirements could be justified by Article XVIII:B of the GATT. According to the Panel, India did not present any evidence as to its balance of payments situation and considered that the burden of proof was on the complainants to establish that its measures were not justified on balance-of-payments grounds.[558]

The Panel was of the view that, according to the general rule on burden of proof, it was India who should prove that the conditions for invoking its defence on Article XVIII:B were met.[559]

In the Panel's opinion, "Article XVIII:B foresees the possibility for developing country Members to apply certain measures to safeguard their external financial position and

555 Rolland, *Development at the WTO*, 166.
556 Ramdoo, 38. 2016.
557 Panel Report, *India – Autos* (2002), para. 4.132.
558 Panel Report, *India – Autos* (2002), para. 7.284.
559 See Panel Report, *India – Autos* (2002), paras. 7.285-7.287.

to ensure a level of reserves adequate for their level of development. Article XVIII:9 lists the substantive conditions which should be met in order to apply such measures. In addition, Article XVIII:B and the Understanding on Balance of Payments provisions require the notification of such measures to the BOPs Committee."[560]

In support of its assertion that its measures were justified under Article XVIII:B, India invoked the notification which it submitted to the BOPs Committee in 1997. However, apart from that assertion, India presented no evidence of any discussion in the BOPs Committee. In the Panel's view, it also did not explain how any of the substantive conditions foreseen by Article XVIII:B were fulfilled. It also presented no evidence whatsoever concerning its actual balance of payments during the period which itself defined as the relevant time of examination for the Panel.[561] Consequently, the Panel found that India failed to make a prima facie case that its measures were justified under Article XVIII:B. [562]

The Panel also noted that the complainants had, in response to India's defence, presented some arguments and figures suggesting that India's balance-of-payments situation was not such as to justify the application of balance-of-payments measures under Article XVIII:B. Nevertheless, India also did not provide evidence to refute those contentions. [563]

India also indicated that it would expect the Panel to consult with the IMF in determining India's balance-of-payments situation as of the dates of each claimant's request for establishment of the Panel. The Panel did not rule on whether consultation with the IMF was compulsory or not before the final factual resolution by a Panel of a balance-of-payments matter, where there was conflicting evidence presented. In the Panel's view, whatever the proper view as to this question, such a consultation could not be used as a total substitute for asserting and providing a prima facie case as to a defence under Article XVIII:B, and in the absence of any indication of how the measures would fall within the terms. [564]

Also in *India – Quantitative Restrictions* (1999), the Panel found that quantitative restrictions imposed by India on imports of agricultural, textile and industrial products were not justified under Article XVIII:B.[565] It recalled that "under Article XVIII:9, 'the import restrictions instituted, maintained or intensified shall not exceed those necessary: (a) to forestall the threat of, or to stop, a serious decline in monetary reserves, or (b) in the

560 Panel Report, *India – Autos* (2002), para. 7.289.
561 Panel Report, *India – Autos* (2002), para. 7.291.
562 Panel Report, *India – Autos* (2002), para. 7.292.
563 Panel Report, *India – Autos* (2002), para. 7.293.
564 Panel Report, *India – Autos* (2002), para. 7.294.
565 See Panel Report, *India – Quantitative Restrictions* (1999), para. 5.236.

case of a contracting party with inadequate monetary reserves, to achieve a reasonable rate of increase in its reserves' due regard being paid to any special factors that may be affecting the reserves of the Member or its need for reserves". [566]

These decisions show that WTO Members have to demonstrate a BOP issue under the strict terms of Section B of Article XVIII.9. In this sense, the exemption of LCRs on BOP grounds may be limited as the WTO Members may need to demonstrate that LCRs are implemented as a result of BOP difficulties, which in general is not the case. In addition, the discriminatory aspect of LCRs are not exempted under Article XVIII.B or only to the extent that such aspects are directly linked to the nature of the customs duties or the quantitative restrictions for BOP purposes. In the only LCR case involving BOP issues (*India – Autos,* 2000), the defendant did not provide evidence of its BOP situation. Therefore, the Panel did not have opportunity to further assess whether this provision could be used as a defence for LCRs in their discriminatory dimension.

To sum up, invoking Article XVIII as defence for LCRs is of minimal practical use. First, only developing countries supporting low standards of living or in early stages of development may raise this defence. The infant industry arguments are limited to those situations where Members want to modify their tariff schedule and therefore is not a specific defence for LCRs. In addition, WTO Members invoking it must provide compensatory adjustments for other Members. Additionally, the BOP defence may not be very useful for LCR cases as most of the LCRs applied nowadays are not implemented as a result of BOP crisis, but rather, as a measure to promote local industry development. In addition, there are doubts whether the discriminatory dimension of LCRs would be justified under the BOP defence.

II.3 LEGALITY OF LCRS IN VIEW OF THE TRIMS AGREEMENT

II.3.1 Main provisions

The TRIMs Agreement applies to "investment measures related to trade in goods"[567] that are "inconsistent with the provisions of Article III or Article XI of GATT 1994", as established in Articles 1 and 2.1 of the agreement.

566 See Panel Report, *India – Quantitative Restrictions* (1999), para. 5.158.
567 The TRIMs Agreement covers goods only. Services are covered by the GATS.

The TRIMs Agreement provides for an "Illustrative List" that bans a series of performance requirements on investments for goods, including (i) LCRs, (ii) trade balancing measures and (iii) foreign exchange balancing requirements, as shown below:

> Annex: Illustrative List
>
> 1. TRIMs that are inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III of GATT 1994 include those which are mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage, and which require:
> (a) the purchase or use by an enterprise of products of domestic origin or from any domestic source, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production; or
> (b) that an enterprise's purchases or use of imported products be limited to an amount related to the volume or value of local products that it exports.
>
> 2. TRIMs that are inconsistent with the obligation of general elimination of quantitative restrictions provided for in paragraph 1 of Article XI of GATT 1994 include those which are mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage, and which restrict:
> (a) the importation by an enterprise of products used in or related to its local production, generally or to an amount related to the volume or value of local production that it exports;
> (b) the importation by an enterprise of products used in or related to its local production by restricting its access to foreign exchange to an amount related to the foreign exchange inflows attributable to the enterprise; or
> (c) the exportation or sale for export by an enterprise of products, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production.

The definition of what constitutes a trade-related investment measure does not exist in the TRIMs Agreement. The Panel in *Indonesia – Autos* (1998) assessed the question of "investment measures" based upon evidence that the measure pursued the promotion

and development of specific industries with explicit reference to investment-related implications.[568] The Panel observed that the measures in that case "have investment objectives and investment features and … refer to investment programmes", and that they "are aimed at encouraging the development of a local manufacturing capability" for the goods and sectors in question. The Panel deemed that "[i]nherent to this objective is that these measures necessarily have a significant impact on investment in these sectors".[569]

More importantly, the TRIMs Agreement "does not create any new rules or disciplines, but refers to existing provisions under the GATT."[570] In this sense, the Panel in *Brazil – Taxation* (2019) mentioned that the scope of Article III of the GATT 1994 and Article 2.1 of the TRIMs Agreement overlap broadly; the only difference is that to be inconsistent with Article 2.1 of the TRIMs Agreement, the measure must be investment-related.[571]

In this sense, many of the LCR cases where the Panel concluded that there was a violation to either Article III or Article XI of the GATT 1994, it decided to exercise judicial economy as to the analysis of violation to the TRIMs Agreement,[572]

The provisions of such agreement specifically restrict the WTO Members ability to apply certain LCRs. In *Indonesia – Autos* (1998), the Panel made it clear that "local content requirement … is a principal focus of the TRIM Agreement."[573] The Panel, in *Brazil – Taxation* (2019), in turn, by making reference to other cases, stated that "if a Panel finds that a particular measure is a TRIM, and that such a measure contains a so-called local content requirement, then that local content requirement is necessarily inconsistent with both

568 Panel Report, *Indonesia – Autos* (1998), para. 14.72.
569 Panel Report, *Indonesia – Autos* (1998), para. 14.80.
570 Ramdoo, *Local content, trade and investment: Is there policy space left for linkages development in resource-rich countries?,* 18.
571 Panel Report, *Brazil – Taxation* (2019), para. 7.40. In addition, the Panel in *Canada – Renewable Energy/ Canada – Feed-in Tariff Program* (2013) stated that "where it is established that a measure falls within the scope of the obligations in Article III:4 of the GATT 1994, that measure may be found to be inconsistent with those obligations, and thereby also Article 2.1 of the TRIMs Agreement, if it shares the characteristics of the TRIMs described in Paragraph 1(a) of the Illustrative List."[Panel Reports, *Canada – Renewable Energy/Canada – Feed-in Tariff Program* (2013), para. 7.155]. Additionally, in the same case, the Appellate Body ruled that "[i]n the present case, fulfilment of the elements in paragraph 1(a) of the Illustrative List of TRIMs results in a finding of inconsistency with Article III:4 of the GATT 1994" [Appellate Body Reports, *Canada – Renewable Energy / Feed-in Tariff Program* (2013), para. 5.103]. Furthermore, the Panel in *India – Solar Cells* (2016) asserted that "TRIMs falling under paragraph 1(a) of the TRIMs Illustrative List are necessarily inconsistent with Article III:4 of the GATT 1994, thus obviating the need for separate and additional examination of the legal elements of Article III:4 of the GATT 1994" [Panel Report, *India – Solar Cells* (2016), para. 7.54].
572 See the panel reports in *Canada – Autos* (2000), *India – Autos* (2002), *Canada – Wheat Exports and Grain Imports* (2004), *Turkey – Rice* (2007) and *China – Auto Parts* (2009).
573 Panel Reports, *Brazil – Taxation* (2019), para. 14.73

Article III:4 of the GATT 1994."[574] Indeed, in LCR cases, these measures are easily found to be a violation to Article 2.1 of the TRIM Agreement.

In *Indonesia – Autos* (1998), the Panel analysed the consistency with the TRIMs Agreement of LCRs made effective through the custom duty and tax benefits of the Indonesian car programmes. The Panel found that the Indonesian measures had investment objectives and features as they were aimed at encouraging the development of local manufacturing capability for finished motor vehicles and parts and components in Indonesia and would necessarily have a significant impact on investment in these sectors.[575] In addition, in the Panel's view, because they were local content measures, they were necessarily trade-related. [576] Additionally, according to the Panel, "lower duty rates are clearly 'advantages' in the meaning of the chapeau of the Illustrative List to the TRIMs Agreement"[577]. Consequently, the Panel found that the Indonesian measures fell within the scope of the Item 1 of the Illustrative List of TRIMs.

In *Canada – Renewable Energy/Canada – Feed-in Tariff Program* (2013), the Panel conducted an integrated analysis of Article III of the GATT and the TRIMs Agreement. By analysing the relevant LCR under the illustrative list of the TRIMs Agreement and concluding that it met the requirements of the relevant provision, it also concluded that the measure violated Article III of the GATT 1994.

The Panel ruled that in order to determine an inconsistency with Paragraph 1(a) of the Illustrative List of the TRIMs Agreement, it must ascertain: (i) whether the "Minimum Required Domestic Content Level" that was applied under the FIT Programme requires electricity generators using solar PV and wind power technology to purchase or use renewable energy generation equipment and components that were of Canadian origin or from a Canadian source; and (ii) whether compliance with the "Minimum Required Domestic Content Level" was necessary in order to obtain an "advantage".[578]

Having analysed the operation of the "Minimum Required Domestic Content Level", the Panel concluded that it required FIT and microFIT electricity generators using solar PV technology and FIT generators using wind power technology to purchase or use a

574 Panel Reports, *Brazil – Taxation* (2019), para. 7.41. See also Panel Reports, *Indonesia – Autos* (1998), para. 14.61 ("The TRIMs Agreement and Article III:4 prohibit local content requirements that are TRIMs and therefore can be said to cover the same subject matter."); *India – Solar Cells* (2002), para. 7.54 ("TRIMs falling under paragraph 1(a) of the TRIMs Illustrative List are necessarily inconsistent with Article III:4 of the GATT 1994").

575 Panel Reports, *Brazil – Taxation* (2019), para. 14.80.

576 Panel Reports, *Brazil – Taxation* (2019), para. 14.82.

577 Panel Reports, *Brazil – Taxation* (2019), para. para. 14.89.

578 Panel Reports, *Canada – Renewable Energy / Feed-In Tariff Program* (2013), para. 7.157.

certain percentage of renewable energy generation equipment and components that are sourced in Ontario, and therefore "from a domestic source" within the meaning of Paragraph 1(a) of the Illustrative List. [579]

The Panel also concluded that compliance with the "Minimum Required Domestic Content Level" was a necessary condition and prerequisite for electricity generators to participate in the FIT Programme, which guaranteed a fixed price for every kWh of electricity delivered into the Ontario electricity system for a 20-year period. Thus, in the Panel's view, mere participation in the FIT Programme could be viewed as obtaining an "advantage" within the meaning of the chapeau of Paragraph 1(a) of the Illustrative List. [580]

In the light of these findings, the Panel concluded that the FIT Programme, and the FIT and micro-FIT Contracts, were inconsistent with Article 2.1 of the TRIMs Agreement and Article III:4 of the GATT 1994. [581]

In *India – Solar Cells* (2016), the Panel assessed measures that made the purchase of domestic products (solar cells and modules) a requirement to obtain an advantage (opportunities to bid for and enter into contracts to supply electricity under the [National Solar Mission]).[582] It examined: (a) whether the measures were "TRIMs" within the meaning of Article 1 of the TRIM Agreement; (b) whether the LCR measures "require the purchase or use by an enterprise of products of domestic origin" within the meaning of paragraph 1(a) of the Illustrative List; and (c) whether the LCR measures were TRIMs that "are mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage" within the meaning of the chapeau of the Illustrative List.

It found that the measures were TRIMs that "require" the "use" by "an enterprise" of "products of domestic origin", and "are specified in terms of particular products", namely in terms of solar cells and modules with the possibility of additional specification of the technology used. [583] Moreover, it found that this case was not unlike that examined by the Panel in *Canada – Renewable Energy/Canada – Feed-in Tariff Program* (2013) in which contracts with qualifying generators provided for specific performance and certification

579 Panel Reports, *Canada – Renewable Energy / Feed-In Tariff Program* (2013), para. 7.163.
580 Panel Reports, *Canada – Renewable Energy / Feed-In Tariff Program* (2013), para. 7.165.
581 Panel Reports, *Canada – Renewable Energy / Feed-In Tariff Program* (2013), para. 7.167.
582 Panel Report, *India – Solar Cells* (2016), para. 7.55.
583 Panel Report, *India – Solar Cells* (2016), para. 7.67.

requirements in exchange for long-term guaranteed prices "to ensure economically viable operations".[584]

Ultimately, the Panel ruled that the relevant LCR measures fulfilled the requirements of paragraph 1(a) of the TRIMs Agreement Illustrative List. Accordingly, they were considered "inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III of GATT 1994" and thereby also inconsistent with Article 2.1 of the TRIMs Agreement. [585]

In *Brazil – Taxation* (2019), the complaining party submitted that certain Brazilian ICT programmes were inconsistent with the TRIMs Agreement. It asserted several arguments to defend that the programmes were trade-related investment measures, including:

i. they contain an obligation for all companies seeking accreditation to invest a minimum percentage of their gross revenue in R&D in the relevant sector in Brazil.
ii. the requirement established in the BPPs that certain processing operations or production steps take place in Brazil in order to benefit from the tax reductions and exemptions incentivises investment and local production.
iii. Brazil admits that in the establishment of a BPP it is guided by the amount of investments to be carried out in Brazil by the company in order to produce the product in question.
iv. the programmes are instruments for companies to relocate to Brazil, attract foreign investment and promote productive investments.
v. the BPPs establish LCRs expressed in terms of minimum percentages of locally-produced parts or components (sometimes produced in accordance with their own BPPs) that the accredited company must purchase or manufacture itself in Brazil in order to be used in the manufacturing processes in order to obtain the tax reductions and exemptions.
vi. the programmes provide for domestic content requirements that are "related to trade in goods" since they affect ICT products marketed in Brazil.

Brazil agreed with the complaining parties that the ICT programmes were investment measures. However, it submitted that they did not relate to trade in goods because they dealt with research, development and production.

The Panel was of the view that the ICT programmes affected, and indeed were aimed at promoting, investment. The programmes had an impact on trade, by affecting the

584 Panel Report, *India – Solar Cells* (2016), para. 7.72.
585 Panel Report, *India – Solar Cells* (2016), para. 7.73.

sale and purchase of imported products, including the inputs used in the production of incentivised finished and intermediate products. In this regard, the Panel noted that, if a measure contains LCRs, it would necessarily be a "trade-related" measure, because such requirements, by definition, always favour the use of domestic products over imported products, and therefore affect trade.[586] The Panel therefore concluded that the ICT programmes were trade-related investment measures within the meaning of the TRIMs Agreement.

Because certain aspects of these ICT programmes had previously been found inconsistent with Article III:2 and III:4 of the GATT 1994, the Panel also considered them inconsistent with Article 2.1 of the TRIMs Agreement.[587] The Panel further noted that the LCRs identified in the case "require the purchase or use by an enterprise of products of domestic origin or from any domestic source", as referred to in paragraph 1(a) of the Illustrative List annexed to the TRIMs Agreement. In light of the foregoing, the Panel concluded that the ICT programmes constituted trade-related investment measures, and that the aspects of these programmes found to be inconsistent with Article III:2 and III:4 of the GATT 1994 were also inconsistent with Article 2.1 of the TRIMs Agreement.[588]

The Panel also analysed whether the INOVAR-AUTO programme was inconsistent with Article 2.1 of the TRIMs Agreement. For similar reasons as those stated above in connection with the ICT programmes, the Panel found that it constituted a trade-related investment measure and that the aspects of the programme found to be inconsistent with Article III:2 and III:4 of the GATT 1994 were also inconsistent with Article 2.1 of the TRIM Agreement.[589]

The cases shown above corroborate the conclusion that certain LCRs will be easily found inconsistent with the TRIMs Agreement. As the TRIMs Agreement is intrinsically related to GATT 1994, making reference to the obligations set forth in Article III or Article XI of GATT 1994, all trade-related investment measures violating such provisions will also violate the TRIMs Agreement. LCRs will normally be found to be investment measures as the Panel has already noted in *Indonesia – Autos* (1998) that measures pursuing the promotion and development of specific industries may fall within the concept of TRIMs. The TRIMs Agreement also has an illustrative list prohibiting certain types of LCRs.

586 Panel Reports, *Brazil – Taxation* (2019), para. 7.360.
587 Panel Reports, *Brazil – Taxation* (2019), para. 7.363.
588 Panel Reports, *Brazil – Taxation* (2019), para. 7.363.
589 Panel Reports, *Brazil – Taxation* (2019), para. 7.801-7.806.

II.3.2 Possible defences for LCRs under the TRIMs Agreement

As explicitly provided in Article 3 of the TRIMs Agreement, "all exceptions under GATT 1994 shall apply, as appropriate, to the provisions of this Agreement." Therefore, all the conclusions contained in subsection II.2.3 relating the possibility of raising GATT defences for justifying LCRs are applicable herein.

II.4 Legality of LCRs in view of the SCM Agreement

II.4.1 Overview

LCRs in the form of subsidies are also restricted under the SCM Agreement. Article 3.1(b) of this agreement expressly prohibits the so-called "import-substitution subsidies" or "local content subsidies", i.e., "subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods". Other expressly prohibited subsidies are "export subsidies", that is, those "subsidies contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance" under Article 3.1(a) of the SCM Agreement, with an exception made for least-developed countries (LDCs) and low-income countries with a gross national product (GNP) per capita of less than US$1,000.[590] These prohibited subsidies are considered to be "inherently trade distorting, and hence must be 'withdrawn without delay' once their existence is established." [591]

Other forms of subsidies are not explicitly prohibited but are deemed 'actionable' and may be subject to disciplines in case they have 'adverse effects' on international trade. The harmful trade effects of actionable subsidies "are not presumed by domestic subsidies and must be demonstrated by anyone challenging the existence of such actionable subsidies."[592] Adverse effects may occur in the form of: (i) injury to the domestic industry, (ii) nullification or impairment of benefits, and (iii) serious prejudice to the interests of other Members.

590 Annex 7 of the SCM Agreement: The developing country Members not subject to the provisions of paragraph 1(a) of Article 3 under the terms of paragraph 2(a) of Article 27 are: (a) Least-developed countries designated as such by the United Nations which are Members of the WTO. (b) Each of the following developing countries which are Members of the WTO shall be subject to the provisions which are applicable to other developing country Members according to paragraph 2(b) of Article 27 when GNP per capita has reached $1,000 per annum68: Bolivia, Cameroon, Congo, Côte d'Ivoire, Dominican Republic, Egypt, Ghana, Guatemala, Guyana, India, Indonesia, Kenya, Morocco, Nicaragua, Nigeria, Pakistan, Philippines, Senegal, Sri Lanka and Zimbabwe.

591 Asmelash, "Energy Subsidies and WTO Dispute Settlement: Why Only Renewable Energy Subsidies Are Challenged," 273-74.

592 Gary N. Horlick and Peggy A. Clarke, "WTO Subsidies Discipline During and after the Crisis," *Journal of International Economic Law* 13, no. 3 (2010): 866. See also Appellate Body Report, *US – Tax Incentives* (2017), para. 5.6.

Not all measures fall within the concept of subsidy under the SCM Agreement. Article 1 of the SCM Agreement has an exhaustive list of government interventions that could qualify as a 'subsidy' under the SCM Agreement if they confer a benefit:[593]

> Article 1: Definition of a Subsidy
>
> 1.1 For the purpose of this Agreement, a subsidy shall be deemed to exist if:
> (a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where:
> (i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);
> (ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits);
> (iii) a government provides goods or services other than general infrastructure, or purchases goods;
> (iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments; or
> (a)(2) there is any form of income or price support in the sense of Article XVI of GATT 1994;
> and
> (b) a benefit is thereby conferred.

This closed list implies that Article 1 of the SCM Agreement does not include subsidies applicable to the service sectors. Service subsidies have increased especially after the financial crisis in 2007-2009.[594] Article XV of GATS makes reference to the discipline of subsidies to services sector; however, this provision does not establish "specific rules (apart from the requirement imposed on subsidising Members to give sympathetic consideration to requests for consultations by Members, which consider to have been adversely affected by the subsidy)" and "simply suggest future negotiations to develop multilateral disciplines on subsidies to trade in services."[595] In any case, subsidies to

593 Dominic Coppens, *WTO Disciplines on Subsidies and Countervailing Measures: Balancing Policy Space and Legal Constraints*, Cambridge International Trade and Economic Law, (Cambridge: Cambridge University Press, 2014), 448.
594 Horlick and Clarke, "WTO Subsidies Discipline During and after the Crisis," 872.
595 Asmelash, "Energy Subsidies and WTO Dispute Settlement: Why Only Renewable Energy Subsidies Are Challenged," 269.

domestic sevices or service suppliers would be inconsistente with Article XVII of the GATS to the extent that a Member has made national treatment commitments for the relevant services sector.

Other measures explicitly excluded from the discipline of the SCM Agreement which may also be relevant for LCR purposes are general infrastructure subsidies, according to Article 1.1(a)(1)(iii) of the SCM Agreement. They are excluded to the extent that they are not considered a "financial contribution" under Article 1.1(a)1 of the SCM Agreement and therefore are not considered subsidies for the purposes of this agreement. In addition, subsidies that are not specific are also excluded from the discipline of the SCM Agreement, according to Article 1.2.

Therefore, although the SCM Agreement severely restricts the ability of Members to make use of local content subsidies as defined in Article 3.1(b), Members still have some space left when implementing LCRs connected with service subsidies (provided that they have not made specific commitments under the GATS in the relevant services sectors) or in the area of general infrastructure.

II.4.2 Import-substitution subsidies in WTO jurisprudence

Several cases in WTO dispute settlement system challenged local content subsidies, including, *US – FSC* (2000), *Canada – Autos* (2000), *US – Upland Cotton* (2005), *China – Auto Parts* (2009), *Canada – Renewable Energy/Canada – Feed-in Tariff Program* (2013), *US – Tax Incentives* (2017) and *Brazil – Taxation* (2019).

In *Canada – Autos* (2000), the Panel made an important distinction regarding the legal standard applicable to, on one side, (i) Article III of GATT, which has a broader scope and involves an analysis of the potential effects of measures on the conditions of competition between domestic goods and the like imported one, and, on the other side, (ii) Article 3.1(b) of the SCM Agreement, which strictly assesses the 'contingency' upon the use of domestic over imported goods.

Also, in the same case, the Appellate Body considered that Article 3.1(b) extended to *de facto* local content subsidies, although the text of this subparagraph does not make explicit reference to contingency in fact. This finding was later confirmed by the Appellate Body in *US – Tax Incentives* (2017).

In *US – Upland Cotton* (2005), the Panel and the Appellate Body analysed the relationship between Article 3.1(b) of the SCM Agreement and the domestic support provisions of the Agreement on Agriculture. They concluded that Members could provide domestic

support that is consistent with their reduction commitments under the Agreement on Agriculture. However, in providing such domestic support, WTO Members should be mindful of their other WTO obligations, including the prohibition in Article 3.1(b) of the SCM Agreement on the provision of subsidies that are contingent on the use of domestic over imported goods. [596]

In *Canada – Renewable Energy/Canada – Feed-in Tariff Program* (2013), the Panel's and the Appellate Body's decisions show that it may be very difficult in the context of renewable energy subsidies involving new and separate markets to determine the existence of a "benefit" under Article 1 of the SCM Agreement. In these cases, where subsidies are tied to LCR, parties may more easily contest such requirements under Article III of GATT and Article 2.1. of the TRIM Agreement. Considering the "high regard with which the WTO holds the principle of 'non-discrimination', such discriminatory subsidy programmes can be challenged successfully even without invoking the legal provisions of the SCM Agreement."[597]

In *US – Tax Incentives* (2017), the Appellate Body sedimented a strict conditionality test for determining whether the import-substitution subsidy is prohibited under Article 3.1.(b) of the SCM Agreement. In this sense, it ruled that "(…) the relevant question in determining the existence of contingency under Article 3.1(b) is not whether the eligibility requirements under a subsidy may result in the use of more domestic and fewer imported goods, but whether the measure, by its terms or by necessary implication therefrom, sets out a condition requiring the use of domestic over imported goods."[598]

This conclusion was of particular relevance to the extent that it gave some shelter to subsidies applicable to domestic products. Many governmental subsidies are aimed at fostering domestic production capabilities. The Appellate Body in *US - Tax Incentives* did not consider them per se prohibited under Article 3.1(b) even if they ultimately stimulate, or result in, the use of domestic over imported goods. This potential natural effect of domestic production subsidies does not necessarily make them fall under the strict conditionality test required under Article 3.1(b) of the SCM Agreement.

This test was also used by the Appellate Body in *Brazil – Taxation* (2019) to reverse the Panel's finding that certain production step requirements were inconsistent with Article 3.1(b) of the SCM Agreement. For different reasons, the Panel exercised judicial economy

596 Appellate Body Report, *US – Upland Cotton* (2005), para. 550; Panel Report, *US – Upland Cotton* (2005), para. 7.1071.

597 Asmelash, "Energy Subsidies and WTO Dispute Settlement: Why Only Renewable Energy Subsidies Are Challenged," 279.

598 Appellate Body Report, *US – Tax Incentives* (2017), para. 5.40.

in the analysis of Article 3.1(b) of the SCM Agreement in *US – FSC* (2000), *China – Auto Parts* (2009) and *US – Renewable Energy* (2019).[599]

An important critique to the Appellate Body's ruling on *US - Tax Incentives* has been made by Spadano. The author argues that the Appellate Body made a notable effort to maintain a certain degree of coherence with its earlier findings in *Canada – Autos*, maintaining that Article 3.1(b) covers contingency both in law and in fact. It also affirms that, on the basis of case law, that the *same* factors that are relevant to a *de facto* contingency analysis apply under both Articles 3.1(a) and 3.1(b).[600] However, for the author, it seems contradictory that the Appellate Body did not apply the *geared to induce* test that it developed in its own case law, because it was based on a footnote that explains what *in fact* means under Article 3.1(a). And the words *in fact* (and its accompanying footnote) do not appear explicitly in Article 3.1(b).[601]

For Sapadano, there was no clear *legal* explanation for selectively dismissing the *geared to induce* test while maintaining everything else that Appellate Body's prior case law had to say about *de facto* contingency, including the very existence subsidies that are *per se* prohibited for being *de facto*, but not *de jure*, contingent upon the use of domestic over imported goods within the meaning of Article 3.1(b) of the SCM Agreement. In the author's views:

599 In *US – FSC* (2000), the panel exercised judicial economy as to the analysis of Article 3.1(b) of the SCM Agreement because it had already considered that the measure was an export subsidy under article 3.1(a) of the same agreement [Panel Report, *US-FSC* (2000), para. 7.132]. In *China – Autos*, in view of its finding that China acted inconsistently with Articles III:2 and III:4 of GATT 1994, the Panel considered that it made the findings that were necessary for the resolution of the dispute. In the Panel's view, bringing the measures into conformity with China's obligations pursuant to its findings under Articles III:2 and III:4 of GATT 1994 also would remove any inconsistency of those measures with Articles 3.1(b) and 3.2 of the SCM Agreement [Panel Reports, *China – Auto Parts*, 2009, para. 7.635]. The same rationale was used by the Panel in *US – Renewable Energy* [Panel Report, *US – Renewable Energy,* 2019, para. 7.356-7.368].

600 Appellate Body Report, US – Tax Incentives, para. 5.7.

601 Spadano, "Local content requirements: perspectives under WTO law and other international norms," 235. The Appellate Body explained that it "has found that de facto contingency under Article 3.1(a) of the SCM Agreement, and in particular whether a subsidy is "in fact tied to anticipated exportation", can be determined by assessing whether "the granting of the subsidy [is] geared to induce the promotion of future export performance by the recipient" and "provides an incentive to skew anticipated sales towards exports", in a way that "is not simply reflective of the conditions of supply and demand in the domestic and export markets undistorted by the granting of the subsidy". This test is based on the wording of Article 3.1(a) and footnote 4 thereto and, specifically, the terms "actual or anticipated" and "export performance". Furthermore, similar trade distortions will also occur as a result of subsidies relating to domestic production, which are prohibited under Article 3.1(b) only when they are contingent upon the use of domestic over imported goods. Hence, a test based on an examination of whether a given measure is "geared to induce" the use of domestic products over imports does not answer the question of whether the measure requires the recipient to use domestic over imported goods as a condition for receiving the subsidy" (Appellate Body Report, *US – Tax Incentives*, para. 5.17).

> Perhaps the Appellate Body was uncomfortable with the apparent conclusion that any "domestic production" subsidy that succeeded in inducing substantial local manufacturing activities could end up prohibited by Article 3.1(b) of the SCM Agreement, and thus subject to the harsh remedy of withdrawal of the subsidy without delay. So the Appellate Body decided, somewhat tautologically, that (i) the resulting trade distortions did not matter, (ii) it only mattered whether the subsidies were "contingent upon the use of domestic over imported goods", and (iii) what matters should be assessed on the basis of everything (express and implied terms, design and structure of the measure, modalities of operation, factual circumstances surrounding the subsidy) but the geared to induce test.[602]

As further explained by the author:

> (…) whether *de facto* contingency occurs cannot be assessed on the basis of the consequences or results of the subsidy, nor on the purchases of domestic inputs that such subsidy might induce in practice. One must look only at the requirements to access the subsidy (whether the subsidy requires using domestic instead of imported goods), not the results of such requirements (even if the result is that domestic goods will be used instead of imported ones). In view of the above standard articulated by the Appellate Body, it is hard to understand what *de facto* local content contingency means under Article 3.1(b) of the SCM Agreement. In particular, it seems very difficult, not to say impossible, to visualise any subsidy that, at the same time, will not be contingent in law but will be contingent in fact on the use of domestic over imported goods.
>
> One almost wonders whether the intention of the Appellate Body was actually to remove the practical possibility of submitting de facto claims under Article 3.1(b) of the SCM Agreement, without saying so. After all, such a confession would mean modifying the Appellate Body's reasoning in the *Canada – Autos* case, and Appellate Body "precedents" sometimes appear to be set in stone. Arguably, it would have been preferable to simply revisit that finding and rule that Article 3.1(b) does not actually cover de facto contingency. The effort to maintain the precedent on the possibility of de facto local content contingency, but not the geared to induce test that is fundamental to assess whether a challenged measure

602 Spadano, "Local content requirements: perspectives under WTO law and other international norms," 235.

> is de facto contingent resulted in at least two very problematic outcomes: (i) it became virtually impossible to prove the existence of subsidies de facto contingent upon the use of domestic over imported goods, which renders the concept inutile in practice; and (ii) even worse, there is now more uncertainty with respect to the standard of review, under Article 3.1(b) of the SCM Agreement, of subsidies that seek to incentivise local manufacturing activities.

In any case, as explained, the Appellate Body's reasoning now prevents that domestic production subsidies that only stimulates the production or use of domestic inputs be classified as prohibited subsidies under Article 3.1(b) of the SCM Agreement. Despite relevant critiques to the coherence of the legal argument adopted by the Appellate Body, the Appellate Body's approach has an important consequence, as it shows the Appellate Body's concern in maintaining the Members' policy space regarding domestic production subsidies. In any case, however, production subsidies associated to LCRs can also be questioned under Article III of the GATT 1994 and as actionable subsidies under Part III of the SCM Agreement.

(i) Canada – Autos

In *Canada – Autos* (2000), the Panel analysed in view of Article 3.1(b) of the SCM Agreement certain requirements that car manufacturers had to comply in order to be eligible for tax exemptions. These requirements considered the amount of Canadian value added (CVA) in the manufacturer's local production of motor vehicles. The calculation of CVA was based, among others, on cost of parts produced in Canada and of materials of Canadian origin that were incorporated in the motor vehicles; labour costs incurred in Canada; and certain expenses incurred in Canada.[603]

The complainant argued that Article 3.1(b) prohibits any condition that gives preference to domestic over imported goods, irrespective of whether in practice domestic goods are actually used by the beneficiary. The Panel, however, disagreed and made an important differentiation between the standard of analysis required in Article 3.1(b) of the SCM Agreement, as opposed to Article III:4 of the GATT 1994

According to the Panel, although Article 3.1(b) of the SCM Agreement in some sense has its roots in Article III:4 of GATT and is related to non-discrimination, they do not have the same scope and should be interpreted differently. According to the Panel, Article III:4 of GATT speaks of "treatment no less favourable" and of requirements "affecting" internal

603 Appellate Body Report, *Canada – Autos* (2000), para. 9.

sale, whereas Article 3.1(b) of the SCM Agreement speaks of subsidies "contingent upon the use of domestic over imported goods".[604]

In the case at hand, the Panel observed that, depending upon the factual circumstances, a manufacturer could be willing and able to satisfy a CVA requirement without using any domestic goods whatsoever. Under these circumstances, it would be difficult for the Panel to conclude that access to the import duty exemption is contingent, i.e. conditional or dependent, in law, on the use of domestic over imported goods within the meaning of the SCM Agreement.[605]

On appeal, the Appellate Body also stated that, as regard the legal standard of analysis of the provision, "the precise issue under Article 3.1(b) is whether the use of domestic over imported goods is a 'condition' for satisfying the CVA requirements, and, therefore, for receiving the import duty exemption."[606] However, in examining whether the import duty exemption is contingent "in law" upon the use of domestic over imported goods, the Appellate Body considered that the Panel did not conduct an analysis of how the CVA requirements actually worked.[607] In the Appellate Body's view, "the Panel simply speculated (…). The Panel did not, however, scrutinise the actual CVA requirements for (…) manufacturers to see whether they could indeed be satisfied without using domestic goods."[608] As a result, the Panel simply did not have a sufficient basis for its finding on the issue of "in law" contingency.

Another important issue in *Canada – Autos* (2000) was the discussion of whether Article 3.1(b) extended to subsidies contingent "in fact" upon the use of domestic over imported goods. The language of sub-paragraph "b", as opposed to subparagraph ("a) which speaks of contingency "in law or in fact", does not refer to this expression. As a result, there were doubts whether Article 3.1(b) also extended to subsidies contingent "in fact" upon the use of domestic over imported goods

The Panel, in making a comparison between (i) the wording of Article 3.1(a), which made reference of the words "in law or in fact", and the wording of Article 3.1 (b), which omitted

604 Panel Report, *Canada – Autos* (2000), para. 10.215.
605 Panel Report, *Canada – Autos* (2000), para. 10.216.
606 Appellate Body, *Canada – Autos* (2000), para. 126.
607 Appellate Body Report, *Canada – Autos* (2000), para. 128.
608 Appellate Body Report, *Canada – Autos* (2000), para. 128.

them, concluded that Art. 3.1(b) extended only to contingency in law.[609] In the Appellate Body's view, however, nothing in the language of Article 3.1(b) specifically includes or excludes subsidies contingent "in fact", from the scope of coverage of this provision. The text of the provision, therefore, is inconclusive on this point in the Appellate Body's perspective.[610]

As a result, according to the Appellate Body, Article III:4 of GATT should be used as relevant context for interpretation of Article 3.1(b) of the SCM Agreement, as both apply to measures that require the use of domestic goods over imports. Since Article III:4 of the GATT 1994 covers both de jure and de facto inconsistency, it would not be reasonable to suppose that a similar provision in the SCM Agreement applied only to situations involving de jure inconsistency.[611]

In addition, according to the Appellate Body, "a finding that Article 3.1(b) extends only to contingency 'in law' upon the use of domestic over imported goods would be contrary to the object and purpose of the SCM Agreement because it would make circumvention of obligations by Members too easy" [612] This understanding was later confirmed by the Appellate Body in *US – Tax Incentives* (2017).[613]

Consequently, the Appellate Body reversed the Panel's conclusion that "Article 3.1(b) extends only to contingency in law." Nevertheless, due to the Panel`s incomplete analysis of the operation of the CVA requirements, the Appellate Body could not complete the analysis of whether CVA requirements were contingent "in fact" upon the use of domestic goods over imported ones.

As noted by Horlick and Clarke, "according to one of the drafters, the initial omission of de facto [in Article 3.1(b) of the SCM Agreement] was indeed a mistake, but the decision

609 "We note the disagreement of the parties as to whether Article 3.1(b) extends to the situation where a subsidy is contingent in fact upon the use of domestic over imported goods. In this context, we recall that Article 3.1 is, as clearly indicated by its chapeau, the provision that sets out the subsidies prohibited under the SCM Agreement. Paragraphs (a) and (b) are both part of Article 3.1 and manifestly similar. It is hard to imagine how the inclusion of the words "in law or in fact" in paragraph (a) and the absence of such words in paragraph (b) could be but a reflection of the intention of the drafters. We further recall that the Appellate Body has held in *Japan – Alcoholic Beverages II* (1996) that "omission must have some meaning". That two provisions so alike and juxtaposed together should differ from each other in such specific respect signals, in our view, that the omission of the words "in law or in fact" from Article 3.1(b) was deliberate and that Article 3.1(b) extends only to contingency in law" [Panel Report, *Canada – Autos*, para. 10.221].

610 Appellate Body, *Canada – Autos,* para. 139.

611 Appellate Body, *Canada – Autos,* para. 140.

612 Appellate Body, *Canada – Autos*, para. 142.

613 Appellate Body, *US – Tax Incentives* (2017), para. 5.12

not to correct it prior to signing was deliberate."[614] Even so, the Appellate Body decided to read contingency in fact into the language of subparagraph "b".

The main conclusions in *Canada – Autos* (2000), therefore, are two. Firstly, the analysis of LCRs under Article III of the GATT 1994 is different from that under Article 3.1(b) of the SCM Agreement. While a LCR may more easily violate Article III of the GATT 1994 because such provision is concerned with the mere potential discriminatory effect of a measure on trade, the burden of proving a violation of a LCR under Article 3.1(b) of the SCM Agreement may be heavier. In this case, the complainant may show that the use of domestic over imported goods is a 'condition' for the economic agent to receive a benefit (e.g. a tax incentive). Secondly, Article 3.1(b) of the SCM Agreement extends to subsidies contingent "in law" and "in fact" upon the use of domestic over imported goods.

(ii) US – Upland Cotton

In *US – Upland Cotton* (2005), the Panel assessed US agricultural "domestic support" measures, export credit guarantees, and other measures alleged to be export and domestic content subsidies applicable to upland cotton. More specifically, the so called 'Step 2 Payments to Domestic Users' was under scrutiny. Under this programme, marketing certificates or cash payments (collectively referred to as "user marketing (Step 2) payments") were issued to eligible domestic users and exporters of eligible upland cotton when certain market conditions exist such that United States cotton pricing benchmarks are exceeded. "Eligible upland cotton" was defined as "domestically produced baled upland cotton which bale is opened by an eligible domestic user ... or exported by an eligible exporter". An "eligible domestic user" of upland cotton, in turn, was defined as a person regularly engaged in the business of opening bales of eligible upland cotton for the purpose of manufacturing such cotton into cotton products in the United States (domestic user), who had entered into a specific agreement to participate in the upland cotton user marketing certificate program.

The complainant required the Panel to make a finding that the payment of Step 2 "domestic" payments was in violation of Articles 3.1(b) and 3.2 of the SCM Agreement; and Article III:4 of the GATT 1994.

The United States did not dispute that Step 2 payments were "subsidies" and that to receive a Step 2 payment a domestic user should "open a bale of domestically produced

614 Horlick and Clarke, "WTO Subsidies Discipline During and after the Crisis," 864.

baled upland cotton".[615] The United States, however, asserted that Step 2 payments to domestic users of upland cotton were included, and they complied with, the United States' domestic support reduction commitments pursuant to Article 6.3 of the Agreement on Agriculture.[616] As, in the US view, Step 2 payments to domestic users were permitted under the Agreement on Agriculture, the United States argued that these payments could not be contrary to Article 3 of the SCM Agreement, especially in view of the introductory language of Article 3.1 of the SCM Agreement stipulating that that provision applies "[e]xcept as provided in the Agreement on Agriculture".

Relationship between Article 3.1(b) of the SCM Agreement and the domestic support provisions of the Agreement on Agriculture

The key issue analysed by the Panel and by the Appellate Body was whether the Agreement on Agriculture contained "specific provisions dealing specifically with the same matter" as Article 3.1(b) of the SCM Agreement, that is, subsidies contingent upon the use of domestic over imported goods and, if so, whether it would prevail over the discipline of the SCM Agreement.[617]

The United States submitted that the introductory language to Article 3 of the SCM Agreement("[e]xcept as provided in the Agreement on Agriculture") rendered that provision subject to the terms of the Agreement on Agriculture.

The Panel, in interpreting Article 21.1 of the Agreement on Agriculture,[618] stated that this provision expressly acknowledged the application of the GATT 1994 and the SCM Agreement to agricultural products, while indicating that the Agreement on Agriculture would take precedence in the event, and to the extent, of any conflict.[619]

Although not deciding on a rigid definition of "conflict", the Panel, upheld by the Appellate Body, found that the domestic support provisions of the Agreement on Agriculture would prevail in the event that (i) an explicit carve-out or exemption from the disciplines in Article 3.1(b) of the SCM Agreement existed in the text of the Agreement on Agriculture; (ii) it would be impossible for a Member to comply with its domestic support

615 Panel Report, *US – Upland Cotton* (2005), para. 7.1022.

616 Agreement on Agriculture, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 410. Article 6.3: "A Member shall be considered to be in compliance with its domestic support reduction commitments in any year in which its domestic support in favour of agricultural producers expressed in terms of Current Total AMS does not exceed the corresponding annual or final bound commitment level specified in Part IV of the Member's Schedule."

617 Appellate Body Report, *US – Upland Cotton* (2005), para. 533

618 Article 21.1 of the Agreement on Agriculture: "The provisions of GATT 1994 and of the other Multilateral Trade Agreements in Annex 1A to the WTO Agreement shall apply subject to the provisions of this Agreement".

619 Panel Report, *US – Upland Cotton* (2005), para. 7.1036.

obligations under the Agreement on Agriculture and the Article 3.1(b) prohibition simultaneously; and (iii) there was an explicit authorisation in the text of the Agreement on Agriculture that would authorise a measure that, in the absence of such an express authorisation, would be prohibited by Article 3.1(b) of the SCM Agreement. [620]

Both Panel and Appellate Body were of the view that none of the situations above mentioned was raised in this dispute from the relevant provisions in the Agreement on Agriculture and therefore there was no conflict between them.[621]

Additionally, considering that the Agreement on Agriculture and the SCM Agreement are both 'integral parts' of the same treaty, the WTO Agreement, that are 'binding on all Members', and considering the principle of harmonious interpretation, the Panel and the Appellate Body considered that these agreements should be read together and in a consistent manner which gives full and effective meaning to all of their terms[622]. In this sense, WTO Members could still provide domestic support that is consistent with their reduction commitments under the Agreement on Agriculture. In providing such domestic support, however, WTO Members should be mindful of their other WTO obligations, including the prohibition in Article 3.1(b) of the SCM Agreement on the provision of subsidies that are contingent on the use of domestic over imported goods. [623]

Domestic support provisions in the Agreement on Agriculture

The United States also drew attention to the domestic support provisions in the Agreement on Agriculture, particularly to paragraph 7 of Annex 3 and Article 6.3.

Pursuant to Article 6 of the Agreement on Agriculture, WTO Members have committed themselves to reduce the domestic support that they provide to their agricultural sector. For this purpose, domestic support is calculated using what is known as the Aggregate Measurement of Support (AMS). Annex 3 sets out instructions on how to calculate WTO Members' AMS. Paragraph 7 sets forth that "the AMS shall be calculated as close as practicable to the point of first sale of the basic agricultural product concerned. Measures directed at agricultural processors shall be included to the extent that such measures benefit the producers of the basic agricultural products.

Both Panel and the Appellate Body found that neither of the two sentences in paragraph 7 of Annex 3 referred to import substitution subsidies. In addition, nothing suggested

620 Panel Report, *US – Upland Cotton* (2005), para. 7.1038.
621 Panel Report, *US – Upland Cotton* (2005), para. 7.1039.
622 Appellate Body Report, *US – Upland Cotton* (2005), para. 549.
623 Appellate Body Report, *US – Upland Cotton* (2005), para. 550; Panel Report, *US – Upland Cotton* (2005), para. 7.1071.

that import substitution subsidies were exempt from the prohibition in Article 3.1(b) of the SCM Agreement. The Appellate Body agreed with the Panel that there was a clear distinction between a provision that requires a Member to include a certain type of payment (or part thereof) in its AMS calculation and one that would authorise subsidies that are contingent on the use of domestic over imported goods.[624]

Like the Panel, the Appellate Body did not believe that the scope of paragraph 7 was limited to measures that had an import substitution component in them. There could be other measures covered by paragraph 7 of Annex 3 that did not necessarily have such a component. Thus, paragraph 7 of Annex 3 referred more broadly to measures directed at agricultural processors that benefited producers of a basic agricultural product. WTO Members could still provide subsidies directed at agricultural processors that benefitted producers of a basic agricultural commodity in accordance with the Agreement on Agriculture, as long as such subsidies did not include an import substitution component. [625]

Like paragraph 7 of Annex 3, the Panel and the Appellate Body found that Article 6.3 did not explicitly refer to import substitution subsidies, but to domestic support. [626]

The Appellate Body explicitly stated that in its review of the provisions of the Agreement on Agriculture relied on by the United States, it did not find a provision that dealt specifically with subsidies that had an import substitution component. In the Appellate Body's view, because Article 3.1(b) treats subsidies contingent on the use of domestic over imported products as prohibited subsidies, it would be expected that the drafters would have included an equally explicit and clear provision in the Agreement on Agriculture if they had indeed intended to authorise such prohibited subsidies provided in connection with agricultural goods[627]

The Panel also was not of the view that the application of the Article 3.1(b) prohibition in respect of both industrial and agricultural products was contrary to the object and purpose of the Agreement on Agriculture or the SCM Agreement. It recalled that the fundamental prohibition in Article 3.1(b) is a cornerstone of the subsidy disciplines imposed by the SCM Agreement and relates to the basic national treatment provision in Article III:4 of the GATT 1994, which is a cornerstone of the GATT/WTO multilateral trading system.[628] In the Panel's perspective, the drafters of the Agriculture Agreement did not indicate in its preamble that there is an intention to undermine the fundamental

624 Appellate Body Report, *US – Upland Cotton* (2005), para. 541.
625 Appellate Body Report, *US – Upland Cotton* (2005), para. 542.
626 Appellate Body Report, *US – Upland Cotton* (2005), para. 544; Panel Report, para 7.1069.
627 Appellate Body Report, *US – Upland Cotton* (2005), para. 547.
628 Panel Report, *US – Upland Cotton* (2005), para. 7.1073.

disciplines applicable to import substitution subsidies. Had they desired to do so, they would have so indicated.[629]

The Panel ultimately found that the text of the measure under analysis explicitly required the use of domestically produced upland cotton as a pre-condition for receipt of the payments.[630] For this reason, it ruled that user marketing (Step 2) payments to domestic users constituted a subsidy contingent upon the use of domestic over imported goods within the meaning of Article 3.1(b) of the SCM Agreement.

In summary, the main point in *US – Upland Cotton* (2005) for the purposes of this study is that the Agreement on Agriculture does not provide a shelter for local content subsidies applicable to the agricultural sector. Such type of LCR may still be prohibited under the SCM Agreement. According to established jurisprudence, the Agreement on Agriculture does not have a carve-out or exemption from the disciplines in Article 3.1(b) of the SCM Agreement. Furthermore, both agreements should be read harmoniously. Prohibition of import-substitution/local content subsidies is a cornerstone of the subsidy disciplines and should be applicable to both industrial and agricultural products.

(iii) Canada – Renewable Energy

In *Canada – Renewable Energy/Canada – Feed-in Tariff Program* (2013), important points were raised in relation to local content subsidies, in particular environmental and energy subsidies. Japan and the EU argued that, by imposing a LCR on electricity generators using solar PV or wind power technology, the Canadian FIT programme was incompatible with the prohibition of local content subsidies under Article 3 of the SCM Agreement.

A contentious issue was whether the measure conferred a benefit under Article 1 of the SCM Agreement. This provision requires a two-step analysis: whether the alleged subsidy (i) reflects a 'financial contribution' or 'any form of income or price support' and (ii) confers a benefit.

Both the Panel and the Appellate Body concluded that Ontario's FIT was a 'purchase of goods' and, as such, there was a financial contribution by the government. However, the problem laid down on the determination of the benefit. The key question was "whether electricity producers from certain renewable energy sources receive FIT rates 'on more

629 Panel Report, *US – Upland Cotton* (2005), para. 7.1074.
630 Panel Report, *US – Upland Cotton* (2005), para. 7.1085.

favourable terms' than the 'prevailing market conditions for the goods or service in question in the country of provision or purchase.'"[631]

The issue was so controversial that the Panel could not determine, on the basis of the various benchmarks put forward by the complaining parties, that Ontario's FIT conferred a benefit. Although with a different reasoning, this conclusion was corroborated by the Appellate Body.[632]

This case provided both the Panel and the Appellate Body an opportunity to clarify the definition of subsidy in Article 1 of the SCM Agreement.[633]

According to the majority of the Panel, Ontario's energy supply mix (renewable energy plus other forms of traditional energy) would not be achieved in the absence of government intervention. In other words, it would not be provided by the market. For this reason, the various benchmarks presented by the complaints for the purposes of the benefit analysis were considered inappropriate by the Panel.

For Rubini, the Panel majority's reasoning makes a confusion between the existence of a subsidy and its policy justifications. The author suggests that the fact that the market itself will not produce the type of supply-energy mix existing in Ontario indicate that public action is necessary in the form of subsidisation. This does not mean that the market itself cannot be used as a benchmark for determining a subsidy.[634] This was also the view of the dissenting panellist:

> "In my view (…) the fact that a competitive market might not exist in the absence of government intervention or that it may not achieve all of the objectives that a government would like it to achieve, does not mean it cannot be used for the purpose of conducting a benefit analysis. Indeed, it is because competitive markets do not often work the way that governments would like them to that governments will decide to influence market outcomes by, for example, becoming a market participant,

631 Kuntze and Moerenhout, "Are Feed-In Tariff Schemes with Local Content Requirements Consistent with WTO Law?," 12.

632 Luca Rubini, "The Good, the Bad, and the Ugly. Lessons on Methodology in Legal Analysis from the Recent WTO Litigation on Renewable Energy Subsidies," *Journal of World Trade* 48, no. 5 (2014): 902. See also Asmelash, "Energy Subsidies and WTO Dispute Settlement: Why Only Renewable Energy Subsidies Are Challenged."

633 Rubini, "The Good, the Bad, and the Ugly. Lessons on Methodology in Legal Analysis from the Recent WTO Litigation on Renewable Energy Subsidies," 896.

634 Rubini, "The Good, the Bad, and the Ugly. Lessons on Methodology in Legal Analysis from the Recent WTO Litigation on Renewable Energy Subsidies," 905.

> regulating market participants or providing them with incentives (or creating disincentives) to behave in a particular way. A government might also choose to intervene in competitive market outcomes by granting subsidies, as defined in Article 1.1 of the SCM Agreement." [635]

The Appellate Body, in turn, made two innovations while carrying out its benefit analysis. The first one was the finding that the first analytical step of the benefit analysis lies in the definition of relevant market. The second and most important innovation was the creation of a carve-out for "government-created markets". [636] According to the Appellate Body:

> "a distinction should be drawn between...government interventions that create markets that would otherwise not exist and...other types of government interventions in support of certain players in markets that already exist, or to correct market distortions therein....While the creation of markets...does not in and of itself give rise to subsidies within the meaning of the SCM Agreement, government interventions in existing markets may amount to subsidies."[637]

The Appellate Body in effect created a shelter for some significant measures of public support to clean energy.[638] However, "there is no clarity with respect to the precise boundaries of the carve-out. Moreover, the Appellate Body does not provide strict conditions or procedural guarantees to ensure that this flexibility is not abused."[639] In other words, because the SCM Agreement does not have a general exception clause (e.g. GATT XX), the Appellate Body, by interpretation, created one. This sheds light on the problem of the lack of a policy exception clause in the SCM Agreement.

Since the Panel and the Appellate Body were unable to complete the 'benefit' analysis, it remained "open whether FIT schemes with LCR may constitute a 'subsidy' in terms of Article 1.1 of the SCM Agreement".[640] In any case, considering that LCRs are consistently found to violate the national treatment principle under Article III of the GATT 1994, it

635 Panel Reports, *Canada – Renewable Energy/Canada – Feed-in Tariff Program* (2013), para 9.1 and 9.5.
636 Rubini, "The Good, the Bad, and the Ugly. Lessons on Methodology in Legal Analysis from the Recent WTO Litigation on Renewable Energy Subsidies," 910.
637 Appellate Body Reports, *Canada – Renewable Energy/Canada – Feed-in Tariff Program*, para. 5.188
638 Rubini, "The Good, the Bad, and the Ugly. Lessons on Methodology in Legal Analysis from the Recent WTO Litigation on Renewable Energy Subsidies," 914.
639 Rubini, "The Good, the Bad, and the Ugly. Lessons on Methodology in Legal Analysis from the Recent WTO Litigation on Renewable Energy Subsidies," 917-18.
640 Kuntze and Moerenhout, "Are Feed-In Tariff Schemes with Local Content Requirements Consistent with WTO Law?," 13.

may be less important to determine whether they will also be found inconsistent with Article 3.1(b) of the SCM Agreement, because its GATT-inconsistency will be sufficient for a recommendation to bring the measure into conformity, also condemning the use of LCRs in the context of subsidies applicable to goods.

However, it is important to highlight that, in terms of the remedy for breach of the Article III of the GATT 1994 as opposed to the remedy for violation of Article 3.1(b) of the SCM Agreement, it would be more effective for the complanaint to have a finding from the Panel or the Appelate Body that the respondent violated Article 3.1(b) of the SCM Agreement. The multilateral remedy for prohibited subsidies involves withdrawal of the subsidy without delay, according to Article 4.7 of the SCM Agreement. As explained by Bossche and Zdouc, "on several occasions, panels and the Appellate Body have emphasised that prohibited subsidies must therefore be withdrawn *without delay*, and the time period within which the subsidy must be withdrawn is to be specified by the panel."[641] In contrast, the remedy for violation of Article III of the GATT 1994 involves "bringing the measure into conformity with the relevant agreement, according to Article 19 of the DSU. Respondent has more flexibility in choosing the means how to bring the measure into conformity. It may involve an adaptation of the measure and not its withdrawal. In addition, the parties may reach an agreement on the "reasonable period of time for implementation". The timeframe is not established by the Panel. Nevertheless, a finding of violation of Article 3.1(b) of the SCM Agreement may involve more complexities and the complanaint may prefer to focus on the measure's violation of Article III of the GATT 1994.

In this sense, the Panel in *China – Autos* considered that its finding that China acted inconsistently with Articles III:2 and III:4 of GATT 1994 were sufficient for the resolution of the dispute. In the Panel's view, bringing the measures into conformity with China's obligations pursuant to its findings under Articles III:2 and III:4 of GATT 1994 also would remove any inconsistency of those measures with Articles 3.1(b) and 3.2 of the SCM Agreement.[642]

Also, the withdrawal of the claims under the SCM Agreement from the second consultations request in *India – Solar Cells* (2016) seems to have been informed by the ruling in *Canada—Renewable Energy/Canada – Feed-in Tariff Program* (2013). The Appellate Body's ruling in the particular case "appear to have convinced the USA that making claims under

641 Bossche and Zdouc, *The Law and Policy of the World Trade Organization - Text, Cases and Materials*, 777.
642 Panel Report, *China – Autos*, para. 7.635

the GATT and the TRIMs Agreement would be enough to prevent India from pursuing with the allegedly discriminatory aspect of its subsidy programme."[643]

The carve-out made by the Appellate Body for government-created markets was important in the sense that it indicated that government subsidisation in certain new green markets may be exempted from the disciplines of the SCM Agreement. [644] However, the lack of clear parameters as to what constitute a government-created market makes this carve-out unpredictable. In addition, given the imprecision on the definition of what is a subsidy, in particular, what constitutes a benefit under Article 1.1(b), local content subsidies in renewable energy markets may be more easily found WTO-inconsistent under Article III of GATT 1994.

(iv) US – Tax Incentives

In *US – Tax Incentives* (2017), the Panel was established to consider a complaint by the European Union (EU) with respect to measures taken by the United States concerning certain tax incentives for large civil aircraft. In particular, the EU identified two "siting" provisions in relevant Washington legislation governing the availability of the challenged tax incentives.

According to the First Siting Provision, aerospace tax incentives would take effect "upon the siting of a significant commercial airplane manufacturing program" in Washington. The Second Siting Provision concerned only the continued availability of a reduction in the business and occupation (B&O) tax rate that applied to business activities concerning the manufacture and sale of commercial airplanes (B&O aerospace tax rate). It provided that the reduced tax rate would no longer apply if there was a determination by the Washington Department of Revenue, "that any final assembly or wing assembly of any version or variant of a commercial airplane that is the basis of a siting of a significant commercial airplane manufacturing program" under the First Siting Provision has been sited outside of Washington.

The Panel found that each of the aerospace tax measure constitutes a subsidy within the meaning of Article 1 of the SCM Agreement.[645] It also found that the EU had not demonstrated that any of the aerospace tax measures were *de jure* contingent upon the use of domestic over imported goods with respect to the First or Second Siting Provi-

643 Asmelash, "Energy Subsidies and WTO Dispute Settlement: Why Only Renewable Energy Subsidies Are Challenged," 278.

644 Aaron; Cosbey and Petros Mavroidis, *A Turquoise Mess: Green Subsidies, Blue Industrial Policy and Renewable Energy: The Case for Redrafting the Subsidies Agreement of the WTO*, Robert Schuman Centre for Advanced Studies Research Paper No. 2014/17 (Italy: European University Institute, 2014), 12.

645 Panel Report, *US – Tax Incentives* (2017), paras. 7.165 and 8.1.a.

sions, whether considered jointly or separately.[646] In this regard, the Panel ruled that, by their terms, the First and Second Siting Provisions related to the location of certain assembly operations within Washington and were silent as to the use of domestic or imported goods. Therefore, the Panel concluded that, based on the necessary implications of the provisions' terms, no *de jure* requirement existed for Boeing to use domestic over imported goods.

However, the Panel considered that the B&O aerospace tax rate for the manufacturing or sale of commercial airplanes under Boeing's aircraft program was a subsidy *de facto* contingent upon the use of domestic over imported goods within the meaning of Article 3.1(b) of the SCM Agreement.[647]

Noting that "the conditionality in the Second Siting Provision is phrased in the negative", the Panel understood the Second Siting Provision to set forth the factual circumstances that would, if they arose, cause Boeing's 777X aircraft program to lose access to the subsidy.[648] The Panel underscored that the exercise of discretion granted to the Washington Department of Revenue "would be inconsistent with Article 3.1(b) of the SCM Agreement if, in practice, it resulted in the termination of the B&O aerospace tax rate for … the 777X programme on the basis of a determination that Boeing, by virtue of using imported 777X wings, had 'sited' 777X wing assembly outside Washington State."[649]

The Panel concluded that "the Second Siting Provision is not only aimed at ensuring that [Boeing] itself assemble the 777X wings or conduct the final assembly of the 777X"[650]; rather, "[i]t also concerns the 'use' of certain goods [i.e. wings], and specifically the origin of those goods that enter into the production process for the 777X as a condition for the continued availability of a subsidy."[651]

According to the Panel, whether or not the Second Siting Provision would be triggered would be determined by the origin of the wings. The Panel concluded that "the only decision by Boeing to source wings which it would then 'use' in producing the 777X that would not trigger the Second Siting Provision would be to source such wings within Washington State, which by definition would be domestic wings."[652] Consequently, the Panel concluded that the siting provisions, and in particular the prospective modalities

646 Panel Report, *US – Tax Incentives* (2017), paras. 7.297, 7.311, 7.317, and 8.1.b.
647 Panel Report, *US – Tax Incentives* (2017), paras. 7.369 and 8.1.c.
648 Panel Report, *US – Tax Incentives* (2017), para. 7.346.
649 Panel Report, *US – Tax Incentives* (2017), para. 7.360.
650 Panel Report, *US – Tax Incentives* (2017), para. 7.364
651 Panel Report, *US – Tax Incentives* (2017), para. 7.366.
652 Panel Report, *US – Tax Incentives* (2017), para. 7.364.

of operation of the Department of Revenue's discretion under the Second Siting Provision, made the B&O aerospace tax rate for the manufacturing or sale of commercial airplanes under the 777X programme de facto contingent upon the use of domestic over imported goods within the meaning of Article 3.1(b) of the SCM Agreement.[653]

The Appellate Body took the opportunity to clarify the interpretation of Article 3.1(b) of the SCM Agreement.

First, the Appellate Body confirmed its ruling in *Canada – Autos* (2000) that Article 3.1(b) of the SCM Agreement covers contingency both in law and in fact.[654] It also clarified the standard of analysis of the contingency.

Based on the interpretation of the previous Appellate Body decisions on Article 3.1(a), the Appellate Body concluded that whether a subsidy, under Article 3.1(b), is *de jure* contingent upon the use of domestic over imported goods is to be based on the words of the relevant legislation, as well as their necessary implication (i.e., it would result inevitably from the words actually used in the legislation, or that any other interpretation would be unreasonable). In addition, *de facto* contingency should be based on an assessment of the subsidy itself, in the light of the relevant factual circumstances, rather than by reference to the granting authority's subjective motivation for the measure and should be established from the total configuration of the facts constituting and surrounding the granting of the subsidy, including the design, structure, and modalities of operation of the measure granting the subsidy, none of which on its own is likely to be decisive in any given case.[655]

The Appellate Body understood "the analysis of *de jure* and *de facto* contingency under Article 3.1(b) as a continuum, starting with the terms of the measure and their necessary implications, and continuing with factors including the measure's design and structure, its modalities of operation, and other relevant circumstances." [656] In its view, a Panel should conduct "a holistic assessment of all relevant elements and evidence on the record, and need not compartmentalise de jure and de facto analyses, in order to reach an overall conclusion as to whether a subsidy is contingent upon the use of domestic over imported goods." [657]

653 Panel Report, *US – Tax Incentives* (2017), para. 7.369.
654 Appellate Body Report, *US – Tax Incentives* (2017), para. 5.12.
655 Appellate Body Report, *US – Tax Incentives* (2017), para. 5.12.
656 Appellate Body Report, *US – Tax Incentives* (2017), para. 5.13.
657 Appellate Body Report, *US – Tax Incentives* (2017), para. 5.13.

The Appellate Body also recalled that "by its terms, Article 3.1(b) does not prohibit the subsidisation of domestic 'production' per se but rather the granting of subsidies contingent upon the 'use', by the subsidy recipient, of domestic over imported goods."[658] In particular, the Appellate Body underscored that:

> Subsidies that relate to domestic production are therefore not, for that reason alone, prohibited under Article 3 of the SCM Agreement. We note in this respect that such subsidies can ordinarily be expected to increase the supply of the subsidized domestic goods in the relevant market, thereby increasing the use of these goods downstream and adversely affecting imports, without necessarily requiring the use of domestic over imported goods as a condition for granting the subsidy.[659]

In this sense, the Appellate Body established a strict conditionality test for determining whether the import-substitution subsidy is prohibited under Article 3.1(b) of the SCM Agreement.

> We begin by observing that, as the European Union argues, the requirement to produce wings and fuselages in Washington would in all likelihood result in the use of at least some domestically produced wings and fuselages in the final assembly of the 777X. In this regard, we recall that the relevant question in determining the existence of contingency under Article 3.1(b) is not whether the eligibility requirements under a subsidy may result in the use of more domestic and fewer imported goods, but whether the measure, by its terms or by necessary implication therefrom, sets out a condition requiring the use of domestic over imported goods. Thus, in our view, whether any reading of the First Siting Provision "would allow the subsidy recipient to avail itself of the subsidy without the use of domestic over imported wings and fuselages, at least for some aircraft for some time" does not directly address the issue of contingency under Article 3.1(b). Even if, under all scenarios discussed by the Panel, Boeing would likely use some amount of domestically produced wings and fuselages, this observation is not in itself sufficient to establish the existence of a condition, reflected in the measure's terms or arising by necessary implication therefrom, requiring the use of domestic over imported goods."[660]

658 Appellate Body Report, *US – Tax Incentives* (2017), para. 5.15.
659 Appellate Body Report, *US – Tax Incentives* (2017), para. 5.15. See also para. 5.49.
660 Appellate Body Report, *US – Tax Incentives* (2017), para. 5.40.

When such conditionality is not established, the subsidy could also be analysed as actionable:

> In conclusion, we note that, to the extent that no conditionality on the use of domestic over imported goods can be determined, but the effect of the subsidy is to displace or impede, or otherwise cause adverse effects to imports, those effects are disciplined under Part III of the SCM Agreement. In other words, the relevant question in determining the existence of contingency under Article 3.1(b) is not whether the eligibility requirements under a subsidy may *result in* the use of more domestic and fewer imported goods. Rather, the question is whether a condition requiring the use of domestic over imported goods can be discerned from the terms of the measure itself, or inferred from its design, structure, modalities of operation, and the relevant factual circumstances constituting and surrounding the granting of the subsidy that provide context for understanding the operation of these factors.[661]

These findings were of particular relevance to the extent that it gave some shelter to subsidies applicable to domestic production. Many governmental subsidies are aimed at fostering domestic production capabilities. The Appellate Body in *US - Tax Incentives,* building upon the contingency test of Article 3.1(b) established *Canada – Autos* (2000), did not consider them *per se* prohibited under Article 3.1(b) even if they ultimately stimulate, or result in, the use of domestic over imported goods. This potential natural effect of domestic production subsidies does not necessarily make them meet the strict conditionality test required under Article 3.1(b) of the SCM Agreement. The relevant question, in the Appellate Body's view, is whether a condition requiring the use of domestic over imported goods can be discerned from the terms of the measure itself, or inferred from the measure's design, structure, and modalities of operation. This contingency test makes it more difficult to relate certain LCRs and subsidies on local production to the prohibited subsidy of Article 3.1(b) of the SCM Agreement. Nevertheless, as seen above, they may still be found inconsistent with Article III of the GATT 1994.

(v) Brazil - Taxation

In *Brazil – Taxation* (2019), the complainant argued that certain Brazilian ICT programmes were contingent upon the use of domestic over imported, because they were only granted to ICT goods produced in accordance with the basic production process (BPP) or similar production-step requirements, which contain requirements that the compo-

661 Appellate Body Report, *US – Tax Incentives* (2017), para. 5.18.

nents and subassemblies incorporated in the product are produced locally, sometimes by the accredited company, sometimes by other domestic companies.[662]

Brazil, in turn, claimed that the measures at issue were not related to products, but to production, and that the production-step requirements under the programmes did not require directly or indirectly the use of domestic over imported goods. [663]

Third parties supported Brazil's arguments by stating that Article 3.1(b) of the SCM Agreement does not prohibit subsidies where the receipt of the subsidy is conditioned on the recipient of the subsidy performing certain production steps that may result in the creation of intermediate products. In the view of these third parties, neither the GATT 1994 nor the SCM Agreement "limit a subsidizing Member's ability to define the level of production required for subsidy eligibility purposes" and that a "Member's ability to condition the provision of a subsidy on a production requirement would be significantly curtailed if a Member could not require the production of an intermediate good. A production requirement would then have to be limited to simple assembly operations. [664]

The analysis of the Panel in this matter reflects its previous considerations on the allegedly overlapping scope of Article III of the GATT 1994 and Article 3.1(b) of the SCM Agreement. The Panel stated that "there are reasons to believe that Article 3.1(b) codifies in the SCM Agreement the principle of non-discrimination already contained in Article III of the GATT 1994."[665] Although it acknowledged that the scope of the SCM Agreement was narrower than the GATT's in so far the former is applicable to "subsidies" and not to "laws, regulations and requirements",[666] the Panel did not properly differentiate the standards of interpretation of both provisions. In this sense, it stated that a finding that the alleged requirement to use domestic goods exists would "lead ipso facto to the further finding of inconsistency with Article III:4 of the GATT 1994"[667], and would also constitute a finding of contingency in the sense of Article 3.1(b) of the SCM Agreement.[668]

Consequently, it concluded that the BPP and other production requirements "constitute explicit requirements to use domestic goods – the components and subassemblies

662 Panel Reports, *Brazil – Taxation* (2019), para. 7.381.
663 Panel Reports, *Brazil – Taxation* (2019), para. 7.382.
664 Panel Reports, *Brazil – Taxation* (2019), para. 7.383.
665 Panel Reports, *Brazil – Taxation* (2019), para. 7.42
666 Panel Reports, *Brazil – Taxation* (2019), para. 7.47.
667 Panel Reports, *Brazil – Taxation* (2019), para. 7.258.
668 Panel Reports, *Brazil – Taxation* (2019), para. 7.259.

covered by the nested BPPs – in the sense covered by Article III:4 of the GATT 1994 and Article 3.1(b) of the SCM Agreement." [669]

The complainants also argued that the alleged subsidies granted under the INOVAR-AUTO programme were prohibited under Article 3.1(b) of the SCM Agreement, because: (a) as one of the requirements to be accredited under the INOVAR-AUTO programme, companies should perform a number of specific manufacturing and engineering infrastructure activities in Brazil; (b) the highest amount of presumed credits could only be obtained by purchasing domestic strategic inputs and tools; and (c) if an accredited company chose to comply with the R&D and technology investment requirements through the setting up or refurbishing of testing laboratories, it should rely on national equipment and spare parts.

The Panel stated that the production step requirements under the INOVAR-AUTO programme operate in an analogous manner as under the ICT programmes. Therefore, for similar reasons, they violated Article 3.1(b) of the SCM Agreement.[670]

The Panel also found that the calculation of the deductible part for the rules on accrual of presumed IPI tax credits resulting from expenditure in strategic inputs and tools requires the use of domestic over imported goods, and thus, entails a contingency upon the use of domestic over imported goods.[671] In particular, the Panel noted that Brazil itself conceded that aspects of its rules on calculation of the presumed IPI tax credits should incentivise the purchase of domestic products over like imported products, and that Brazil even provides a policy justification as to why such incentives are in place.[672]

Finally, the Panel ruled that the accreditation requirement to make expenditure and invest in R&D in Brazil, in respect of laboratory equipment used in performing R&D in Brazil, results in a requirement to use domestic over imported goods, and thus, entails a contingency upon the use of domestic over imported goods.[673] In this regard, the Panel underscored that the option to purchase "national" equipment and spare parts in order to satisfy the accreditation requirements for the INOVAR-AUTO programme, functioned as a requirement to purchase Brazilian equipment and spare parts.[674]

669 Panel Reports, *Brazil – Taxation* (2019), para. 7.299-7.302.
670 Panel Reports, *Brazil – Taxation* (2019), paras. 7.747-7.748 and 7.847.
671 Panel Reports, *Brazil – Taxation* (2019), para. 7.824.
672 Panel Reports, *Brazil – Taxation* (2019), para. 7.764.
673 Panel Reports, *Brazil – Taxation* (2019), para. 7.825.
674 Panel Reports, *Brazil – Taxation* (2019), para. 7.769.

On appeal, Brazil claimed that the Panel erred in finding that the BPPs and other production-step requirements under the ICT programmes and the INOVAR-AUTO were prohibited under Article 3.1(b) of the SCM Agreement. In Brazil's view, the Panel erroneously equated a condition that certain production activities take place domestically with a contingency on the use of domestic over imported goods.[675]

With respect to the ICT programmes, the Appellate Body upheld the Panel's findings that the main BPPs that incorporate nested BPPs are inconsistent with Article 3.1(b) of the SCM Agreement. However, it reversed the Panel's findings that the main BPPs without nested BPPs under the Informatics programme are contingent upon the use of domestic over imported goods under Article 3.1(b) of the SCM Agreement. With respect to the INOVAR-AUTO programme, having reversed the Panel's findings with respect to the main BPPs that do not incorporate nested BPPs under the ICT programmes, the Appellate Body also reversed the Panel's findings of inconsistency with Article 3.1(b) regarding the requirement to perform a minimum number of manufacturing steps under the INOVAR-AUTO programme.

In order to reach this conclusion, the Appellate Body, followed the strict conditionality test established in *US – Tax Incentives* (2017). It disagreed with the Panel that the mere possibility of outsourcing under BPPs of production steps to be performed by a third party in Brazil, in and of itself, gives rise to a requirement to use domestic over imported goods under Article 3.1(b) of the SCM Agreement.[676]

The Appellate Body noted the structure of the BPPs suggested that the subsidy recipients will likely "use" in a subsequent production step the domestic components and subassemblies that were manufactured in a previous production step. However, in the Appellate Body's view, "while such use of domestic goods may be a likely consequence of the eligibility requirements for the tax incentives under the Informatics programme, this does not, in and of itself, indicate the existence of a condition requiring the use of domestic over imported products."[677]

It recalled that "Article 3.1(b) does not prohibit per se conditioning eligibility for tax incentives on conducting certain production, processing, or assembly steps domestically. Inherent effects of production subsidies are not sufficient for a finding of contingency upon import substitution."[678]

675 Appellate Body Reports, *Brazil – Taxation* (2019), para. 5.249.
676 Appellate Body Reports, *Brazil – Taxation* (2019), para. 5.278.
677 Appellate Body Reports, *Brazil – Taxation* (2019), para. 5.281.
678 Appellate Body Reports, *Brazil – Taxation* (2019), para. 5.282-83.

This decision suggested that the strict conditionality test under Article 3.1(b) of the SCM Agreement shall be crystallised under WTO jurisprudence, making more difficult for parties to allege that production subsidies resulting in the use of domestic components and subassemblies are *per se* prohibited under such provision.

To sum up, although the WTO jurisprudence has extended the scope of the prohibition under Article 3.1(b) of the SCM Agreement to include both *de jure* and *de facto* import-substitution subsidies and has confirmed that such provision applies to both agricultural and industrial products, the strict conditionality test adopted by the Appellate Body where a condition requiring the use of domestic over imported goods shall be discerned from the terms of the measure itself, or inferred from the measure's design, structure, and modalities of operation makes it more difficult to classify certain LCRs under the prohibited local content subsidies under Article 3.1(b) of the SCM Agreement. Many forms of subsidies on local production may not be classified as prohibited subsidies, even though they can still be considerable actionable.

Also, local content subsidies in the context of new green markets may fall under the carve-out made by the Appellate Body when they are granted in connection with government-created markets. In this sense, they may be exempted from the discipline of the SCM Agreement. The problem, however, is that there is no clear definition on what constitutes "government-created markets".

In any case, the difficulties relating to the configuration of a local content subsidy under the SCM Agreement does not exclude the fact that they might be easily found WTO-inconsistent under Article III of the GATT 1994. Given interpretation and factual difficulties in making claims under the SCM Agreement, complainants in cases involving local content subsidies may prefer to claim WTO violations only under GATT 1994's national treatment principle and may be successful in demonstrating LCRs GATT-inconsistency in view of the national treatment principle.[679]

II.4.3 Possible defences for LCRs under the SCM Agreement[680]

Differently from the GATT 1994 and the GATS, the SCM Agreement does not have a "general exceptions" provision. There has been no explicit ruling on whether the GATT

679 See *India – Solar Cells* (2016), where the complainant decided to make claims only under GATT 1994 although claims under the SCM Agreement were also possible.

680 The SCM Agreement sets forth a special category of subsidies called "non-actionable subsidies", as established in Article 8 of this agreement. It now includes only non-specific subsidies to which the disciplines of the SCM Agreement do not apply. Until 31 Dec 1999, this category included certain specific subsidies mentioned in Article 8.2 such as subsidies for education and research, regional subsidies and environmental subsidies. Nowadays, however, these subsidies, if specific, are actionable, pursuant to Article 31 of the SCM Agreement.

general exceptions apply to the SCM Agreement, as both agreements relate to trade in goods. [681] In any case, on the basis of the reasoning of case law on the scope of application of GATT general exceptions, it would be difficult to see panels and the Appellate Body ruling on the availability of Article XX as a defence for inconsistencies with obligations of the SCM Agreement.

In none of the LCR cases, the defendants have raised GATT exceptions to justify violations to the SCM Agreement. In any case, Kuntze and Moerenhout have explained that the finding of the Appellate Body in *China—Raw Materials* (2012) suggests that the GATT exceptions may not be applicable to the SCM Agreement.[682]

In that case, the Appellate Body found that Paragraph 11.3 of China's Accession Protocol, which was at issue, did not contain any reference to other provisions of the GATT1994, including Article XX'. The Appellate Body stressed that it attaches "significance to the fact that Paragraph 11.3 of China's Accession Protocol expressly refers to Article VIII of the GATT 1994, but does not contain any reference to other provisions of the GATT 1994, including Article XX."[683] In this sense, the Appellate Body concluded with the Panel's view that it was reasonable under these circumstances to assume that, were GATT Article XX intended to apply to Paragraph 11.3 of China's Accession Protocol, language would have been inserted to suggest this relationship. Consequently, the Appellate Body found that "a proper interpretation of Paragraph 11.3 of China's Accession Protocol does not make available to China the exceptions under Article XX of the GATT 1994." [684]

As the SCM Agreement does not contain such language to suggest a relationship to Article XX GATT, it could be assumed that WTO adjudicating bodies would not be open to apply Article XX GATT to justify violations to the SCM Agreement. If that is true, this would severely limit WTO Members' ability to justify local content subsidies which fall within Article 3.1(b) of the SCM Agreement.

681 . For a discussion on this topic, see: Tran, "Using GATT, Art XX to Justify Climate Change Measures in Claims Under the WTO Agreements "; Kuntze and Moerenhout, *Local Content Requirements and the Renewable Energy Industry - A Good Match?*

682 Kuntze and Moerenhout, "Are Feed-In Tariff Schemes with Local Content Requirements Consistent with WTO Law?," 167.

683 Appellate Body Report, *China – Raw Materials* (2012), para. 303.

684 Appellate Body Report, *China – Raw Materials* (2012), para. 307.

II.5 LEGALITY OF LCRS IN VIEW OF THE GATS

II.5.1 Main provisions

The GATS provides the widest range of policy space for the use of LCRs, in particular for those Members who have not made specific commitments related to market access and national treatment in specific sectors. [685]

However, if commitments have been made, LCRs affecting foreign investment and employment of local and foreign staff can be restricted under the GATS.[686]

As regards the regulation of LCRs having an impact on services, the main provisions of the GATS refer to the market access and national treatment clauses.

Article XVI:2(a) to (f) of the GATS establishes an exhaustive list of prohibited market access barriers,[687] involving (a) quantitative restrictions on (i) the number of services suppliers, (ii) the value of the service transaction, (iii) the number of service operations, (iv) the number of natural persons employed by a service supplier, and (v) the amount of foreign capital invested in service suppliers; and (b) a limitation on the kind of legal entity or joint venture through which the services can be supplied.

> **Article XVI: Market Access**
>
> 1. With respect to market access through the modes of supply identified in Article I, each Member shall accord services and service suppliers of any other Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule.(8)
>
> 2. In sectors where market-access commitments are undertaken, the measures which a Member shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule, are defined as:

685 Johnson, *Space for Local Content Policies and Strategies: A Crucial Time to Revisit an Old Debate,* 17.
686 Ramdoo, *Local content, trade and investment: Is there policy space left for linkages development in resource-rich countries?,* 20.
687 Bossche and Zdouc, *The Law and Policy of the World Trade Organization - Text, Cases and Materials*, 515. The authors make references to the understanding of the panels in *US – Gambling* (2005) and in *China – Publications and Audiovisual Products* (2010).

(a) limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test;
(b) limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test;
(c) limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;
(d) limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test;
(e) measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service; and
(f) limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment.

The obligations set forth in sub-paragraphs (a) to (c) limit a country's ability to favour the domestic industry by restraining foreign service suppliers' ability to access the host country's market. In addition, the requirement in sub-paragraph (d) restricts the ability to apply LCRs to secure employment of local workforce. The conditions of sub-paragraphs (e) and (f) restrict LCRs in the form of joint ventures, equity participation, maximum foreign ownership and obligation of state participation. In particular, sub-paragraph (e) can prevent a WTO Member from requiring foreign firms to partner with local companies, or to establish a subsidiary in the host country and (f) can prevent WTO Members from requiring firms to have a certain percentage of domestic equity.[688]

As explained by Van den Bossche and Zdouc, the quantitative limitations referred in sub-paragraphs (a) to (d) do not relate to: "(1) the quality of the service supplied; or (2) the ability of the supplier to supply a service". In this sense, "a requirement, for example, that services be offered in the national language or a requirement for engineers to have

688 Johnson, *Space for Local Content Policies and Strategies: A Crucial Time to Revisit an Old Debate,* 17.

specific professional qualifications … is not a market access barrier."[689] Additionally, they relate to "maximum limitations. Minimum requirements such as those common to licensing criteria (for example, minimum capital requirements for the establishment of a corporate entity) do not fall within the scope of Article XVI of the GATS". [690]

Therefore, even if a Member did make specific market access commitments, they enjoy some, although limited, discretion in regulating services in a way that may favour domestic industry or national workforce, as the example above relating to the requirement of provision of services in national language or even requiring a professional to be fluent in the national language. In any case, it is important to recall that Article VI:5 combined with Article VI:4 of the GATS establish that in sectors in which a Member has undertaken specific commitments, the Member shall not apply licensing and qualification requirements and technical standards that nullify or impair such specific commitments in a manner which is not transparent nor based on objective criteria or that is more burdensome than necessary to ensure the quality of the service. In this sense, Art VI:5 read with VI:4 would impose some (limited) disciplines if the regulation involving the relevant LCR took the form of a technical standard, qualification requirement or licencing requirement.

As relates to the national treatment obligation, it requires that WTO Members do not impose discriminatory measures that would benefit domestic services or service suppliers over foreign suppliers.

Article XVII: National Treatment

1. In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.

2. A Member may meet the requirement of paragraph 1 by according to services and service suppliers of any other Member, either formally identical treatment or formally different treatment to that it accords to its own like services and service suppliers.

689 Bossche and Zdouc, *The Law and Policy of the World Trade Organization - Text, Cases and Materials*, 516.
690 Bossche and Zdouc, *The Law and Policy of the World Trade Organization - Text, Cases and Materials*, 516.

> 3. Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member.

As in GATT, the main factor of analysis is whether the requirement modifies, in law or in fact, the conditions of competition in favour of the domestic service industry. [691] As LCRs in connection to services, by their very nature, involve different treatment to foreign services or service suppliers, a Member that made specific national treatment commitments under GATS in specific sector would be prevented from imposing most types of LCRs affecting services. As stated by Johnson:

> The GATS national treatment article (Article XVII) requires WTO Members to treat foreign investors no less favourably than domestic investors. It restricts governments' abilities to impose on foreign-owned service firms measures that are not similarly imposed on domestic-owned entities, and to provide domestic-owned entities fiscal, financial, or other incentives that are not similarly provided to foreign-owned firms. These provisions can therefore prevent governments from using various supportive measures to increase the competitiveness of domestic service firms and their ability to integrate and upgrade in domestic and global value chains. [692]

LCRs affecting services and service suppliers were discussed in *Canada – Autos* (2000), *China – Publications and Audiovisual Products* (2010) and *China – Electronic Payment Services* (2012).

In *Canada – Autos* (2000), the complainants claimed that the Canadian value added (CVA) requirements were inconsistent with Article XVII (national treatment) of the GATS, in that they required manufacturers of motor vehicles to achieve a minimum of Canadian value added in order to benefit from the import duty exemption, therefore according more favourable treatment to services supplied in Canada than to services of other Members supplied through modes 1 ("cross-border supply") and 2 ("consumption abroad"). The complainants indicated that the CVA requirements created an incentive for manufacturer beneficiaries to procure services from suppliers established in Canada to the detriment of services supplied through modes 1 and 2.

691 Ramdoo, *Local content, trade and investment: Is there policy space left for linkages development in resource-rich countries?,* 22.

692 Johnson, *Space for Local Content Policies and Strategies: A Crucial Time to Revisit an Old Debate,* 17.

Canada, in turn, alleged that a series of circumstances excluded that these measures could violate any of its specific commitments: (i) Canada had inserted relevant limitations to its commitments in the relevant sectors; (ii) the supply of many of the relevant services through modes 1 and 2 was not technically feasible; (iii) where it was technically feasible, the supply of the relevant services through modes 1 and 2 suffered from a competitive disadvantage, due to the inherent foreign character of these services and not to the CVA requirements; and (iv) most manufacturer beneficiaries achieved the required proportion of Canadian value added through their employment of Canadian labour so that the effect of the CVA requirements on their procurement of services was minimal.

The Panel first analysed the general issue of whether the measures, which the complainants claimed to be in violation of Articles II and XVII of the GATS, constituted "measures affecting trade in services" within the meaning of Article I of the GATS. In this regard, it noted that "Article I of the GATS does not *a priori* exclude any measure from the scope of application of the Agreement. The determination of whether a measure affects trade in services cannot be done in abstract terms in isolation from examining whether the effect of such a measure is consistent with the Member's obligations and commitments under the GATS."[693] As a result, the Panel was of the view that the issue of whether CVA requirements affected trade in services could not be analysed separately from its (in) consistency with GATS.[694]

The Panel also found that Canada had undertaken specific commitments in those sectors which the complainants claimed to be affected by the CVA requirements. However, the limitations that had been listed did not cover the CVA requirements.[695]

The Panel clarified that lack of technical feasibility only excluded the supply of some (and not all) repair and maintenance services on machinery and equipment through modes 1 and 2 from Canada's national treatment obligation. It also found that any eventual inherent disadvantages due to the foreign character of services supplied through modes 1 and 2 did not exempt Canada from its national treatment obligation with respect to the CVA requirements. According to the Panel, footnote 10 to Article XVII[696] only exempts Members from having to compensate for disadvantages due to foreign character in the application of the national treatment provision; it does not provide cover for actions

693 Panel Report, *Canada – Autos* (2000), para. 10.234.
694 Panel Report, *Canada – Autos* (2000), para. 10.235.
695 Panel Report, *Canada – Autos* (2000), para. 10.297.
696 "Specific commitments assumed under this Article shall not be construed to require any Member to compensate for any inherent competitive disadvantages which result from the foreign character of the relevant services or service suppliers.

which might modify the conditions of competition against services and service suppliers which are already disadvantaged due to their foreign character.[697]

In the Panel's view, the CVA requirements potentially affected the conditions of competition between services supplied in Canada and services of other Members supplied from outside Canada through modes 1 and 2, even where a manufacturer met its CVA requirements on the basis of labour costs alone. For the Panel, CVA requirements constituted an incentive to purchase services supplied in Canada and such incentive would be effective unless the requirements for a given period of time had already been met through labour costs. Moreover, even where for a given period of time, it was clear that CVA requirements were going to be met on the basis of labour costs alone, thus rendering redundant any possible incentive to purchase services supplied in Canada, there was no evidence that the CVA requirements would also be met in the future on the basis of labour costs alone and that, consequently, there would be no discriminatory effect on trade in services.[698]

Consequently, in the Panel's perspective, CVA requirements provided an incentive for the beneficiaries of the import duty exemption to use services supplied within the Canadian territory over "like" services supplied in or from the territory of other Members through modes 1 and 2, thus modifying the conditions of competition in favour of services supplied within Canada.

In *China – Publications and Audiovisual Products* (2010), the Panel made findings on various United States' claims that provisions of China's measures regulating reading materials were inconsistent with China's national treatment obligations under the GATS and the GATT 1994. The Panel found that certain provisions of China's measures regulating foreign investment violated China's national treatment commitments under Article XVII of the GATS because they prohibited foreign-invested enterprises, but not like domestic enterprises, from engaging in certain types of distribution of reading materials in China. It also found that provisions of various regulations violated Article XVII of the GATS because they either prohibited foreign-invested enterprises from engaging in the wholesale distribution of imported reading materials or impose registered capital and operating term requirements that discriminate against foreign-invested wholesale suppliers.[699]

697 Panel Report, *Canada – Autos* (2000), para 10.300.
698 Panel Report, *Canada – Autos* (2000), para. 10.304.
699 Panel Report, *China – Publications and Audiovisual Products* (2010), para. 7.1428-7.1434.

In *China – Electronic Payment Services* (2012), the Panel analysed a measure involving a series of requirements imposed by China and alleged by the United States to constitute impermissible market access restrictions or national treatment limitations on foreign suppliers of the electronic payment services (EPS).[700]

In particular, China adopted measures that favoured the Chinese EPS company, China UnionPay Co., Ltd. ("CUP"), to the detriment of global providers such as Visa, MasterCard, and American Express as well as other potential domestic entrants. In effect, CUP was granted exclusive supplier status in the Chinese market for Remimbi-denominated EPS.[701]

The United States asserted that China made relevant commitments in its Schedule not to maintain any limitations on the number of EPS suppliers of other WTO Members in respect of the services at issue. As a result of these commitments, the United States considered the measures were inconsistent with China's obligations under Articles XVI:1 and XVI:2(a) of the GATS. In respect of Article XVI:2(a), the United States claimed that each of the requirements established and maintained CUP as both a "monopoly" supplier and an "exclusive service supplier" within the meaning of Article XVI:2(a) of the GATS for all RMB bank card transactions.

The Panel rejected this argument on the basis of lack of evidence that China maintained CUP as an across-the-board monopoly supplier for the processing of all domestic RMB payment card transactions, in breach of its obligations under Art. XVI.[702]

The Panel further noted that the United States did not establish that the economic effect of any of the requirements was to prevent foreign EPS suppliers from entering and establishing themselves in China. Finally, it noted it had no direct evidence to assess whether the instruments at issue made it economically unviable for other EPS suppliers to establish themselves and operate in China. Consequently, it was unable to conclude that the imposition of issuer, acquirer and terminal equipment requirements imposed a limitation on the number of EPS suppliers in China in the form of a monopoly or exclusive service supplier, as stated in Article XVI:2(a).[703]

700 EPS are services through which transactions involving payment cards (credit, debit, charge) are processed and funds are transferred.
701 Bernard Hoekman and Niall Meagher, "China – Electronic Payment Services: discrimination, economic development and the GATS," *World Trade Review* 13, no. 2 (2014): 409.
702 Panel Report, *China – Electronic Payment Services* (2012), para. 7.579-7.580.
703 Panel Report, *China – Electronic Payment Services* (2012), para. 7.605.

The Panel found, however, that China acted inconsistently with GATS Art.XVI:2(a) in view of its mode 3 market access commitment by granting CUP a monopoly for the clearing of certain RMB payment card transactions, because only CUP could clear RMB denominated transactions involving RMB payment cards issued in China and used in Hong Kong or Macao, or RMB cards issued in Hong Kong or Macao used in China.[704]

As regards Article XVII (national treatment obligation) of the GATS, the Panel found that some of the relevant requirements, namely the requirements that all bank cards issued in China must bear the Yin Lian/UnionPay logo (i.e., the logo of CUP's network) and be interoperable with that network, that all terminal equipment in China must be capable of accepting Yin Lian/UnionPay logo cards, and that acquirers of transactions for payment card companies post the Yin Lian/UnionPay logo and be capable of accepting payment cards bearing that logo, were each inconsistent with China's national treatment obligations under Art. XVII. This is because, contrary to China's mode 1 and mode 3 national treatment commitments, these requirements modified the conditions of competition between EPS suppliers of other Members and China's own like services and service supplier CUP to the detriment of those other EPS suppliers.[705]

The cases mentioned above demonstrated that WTO Members should carefully consider the market access and national treatment commitments that they make under GATS or should inscribe relevant limitations for LCRs where they have made such commitments if they wish to preserve their ability to impose LCR affecting services and service suppliers.

II.5.2 Possible defences for LCRs under GATS

The GATS allows governments to choose whether to schedule specific commitments on a sector/mode basis and to inscribe limitations to commitments made. Consequently, they provide Members with policy space to implement industrial policy measures, including LCRs.

When commitments are made, the GATS has a general exceptions provision (Article XIV), which focuses on policy space for regulation to protect human health, safety, privacy, etc., in addition to a security exceptions clause (Article XIV bis).

The GATS sets out general exceptions and security exceptions from obligations under that Agreement in the same manner as does the GATT 1994.[706] Article XIV of the GATS

704 Panel Report, *China – Electronic Payment Services* (2012), para. 7.624.
705 Panel Report, *China – Electronic Payment Services* (2012), para. 7.712-7.734.
706 Appellate Body Report, *Argentina – Financial Services* (2016), para. 6.113 and Appellate Body Report, *US – Gambling* (2005), para. 291.

and Article XX of the GATT 1994 recognise the right of WTO Members to pursue regulatory objectives identified in the paragraphs of these provisions even if, in doing so, they violate obligations set out in other provisions of the respective Agreements.[707] Some of these regulatory objectives are the same under both provisions, such as protection of public morals, protection of human, animal or plant life or health, and securing compliance with WTO-consistent laws and regulations. [708]

Article XIV of the GATS also contains exceptions not found in the GATT 1994, covering measures "necessary ... to maintain public order", "aimed at ensuring the equitable or effective imposition or collection of direct taxes", and resulting from "an agreement on the avoidance of double taxation".[709]

The Appellate Body in *US - Gambling* (2005) noted that similar language is used in Article XX of the GATT 1994 as well Article XIV of the GATS, notably the term "necessary" and the requirements set out in their respective chapeaux. For these reasons, the Appellate Body found previous decisions under Article XX of the GATT 1994 relevant for the analysis under Article XIV of the GATS.[710]

In none of the LCR cases where there was an alleged violation to GATS, the general exceptions were raised as a defence. In any case, given the similarities of Article XX of the GATT 1994 and Article XIV of GATS and the similarities in the analysis of both provisions recognised by the Appellate Body, the conclusions contained in subsection II.2.3.2 relating the possibility of raising GATT defences for justifying LCRs are applicable herein. The same applies for the security exceptions, considering the equivalence of Article XIV bis of the GATT and Article XXI of the GATT.

Hence, it is possible to argue that defences under the GATS's general and security exceptions may have a limited effect as justifications for GATS-inconsistent LCRs in the same way as the GATT general and security exceptions have.

707 Appellate Body Report, *Argentina – Financial Services* (2016), para. 6.113.
708 Appellate Body Report, *Argentina – Financial Services* (2016), para. 6.113.
709 Additionally, Annexes to the GATS contain mechanisms that could allow for certain deviations from a Member's obligations, such as paragraph 2(a) of the Annex on Financial Services. Appellate Body Report, *Argentina – Financial Services* (2016), para. 6.113.
710 Appellate Body Report, *US – Gambling* (2005), para. 291.

II.6 LEGALITY OF LCRS IN VIEW OF THE GPA

II.6.1 Main provisions

Differently from the other agreements mentioned above, the GPA is a plurilateral agreement (as opposed to a multilateral agreement), meaning that it will only bind those Members which expressly decide to be party.

In general terms, the GPA has the purposes of regulating government procurement of goods and/or services, or any combination thereof by any contractual means which is carried out by a national or subnational procurement entity. Similar to the GATS, the GPA relies on a positive list approach and therefore only binds the entities that were explicitly included into its scope of application by their host states.[711]

Even if the procurement involves goods and/or services and entities covered by the Member's commitments, certain types of government procurement are excluded from the GPA framework (e.g. procurement of goods with a view to commercial sale or resale; acquisition or rental of land).

Traditionally, government procurement has been a mechanism for attainment of non-economic goals. It has been used as a tool to, among others: "stimulating national economic activity in particular sectors of the economy; protecting national industry against foreign competition; improving the competitiveness of key industrial sectors; remedying regional disparities within the state", including "tackling long-term unemployment, (…) promoting the use of local labour in economically deprived areas, prohibiting discrimination against minority groups, encouraging equality of opportunity between men and women, and promoting the increased use of the disabled in employment."[712]

Given its role in encouraging the development of local industries, most of the developing country Members have decided not to sign the GPA, as it imposes several constraints on the use of government procurement as a mechanism to promote industrial policies and social goals. The GPA signed in Marrakesh on 15 April 1994 ("GPA 1994") as well as its revised version entered into force on 6 April 2014 ("Revised GPA") prevent that government procurements establishing conditions that encourage local development or improve a Party's balance-of-payments accounts (the so called "offsets"). These conditions expressly include LCRs.

711 Kuntze and Moerenhout, *Local Content Requirements and the Renewable Energy Industry - A Good Match?*, 38.

712 Christopher McCrudden, "International economic law and the pursuit of human rights: A framework for discussion of the legality of'selective purchasing'laws under the WTO Government procurement agreement," *Journal of International Economic Law* 2, no. 1 (1999): 7-8.

Therefore, the countries that accede to the GPA and listed entities that implement and administer LCRs in the Appendix to the GPA may have restricted their ability to use this offset in governmental procurements.[713]

In any case, as mentioned in subsection II.3.1.2 above, the type of restrictive interpretation given by the Appellate Body to Article III:8(b) of the GATT 1994 makes several measures in the context of government procurement not exempted from the application of the GATT national treatment principle. As a result, even Members which did not sign the GPA are subject to having their LCR related to public procurements prohibited under GATT.

The only complaint in the WTO which involved the analysis of LCRs vis-à-vis the GPA was *Korea – Procurement* (2000).

This dispute related to the Inchon International Airport (IIA) project, which was built in the Seoul Metropolitan area. As a condition for participation of foreign suppliers in this project and in related tendering procedures, Korea imposed qualification conditions requiring them to build or purchase manufacturing facilities in Korea and also imposed domestic partnering requirements that forced foreign firms to partner with, or act as subcontractors to, local Korean firms. [714]

The LCR dimension of the case, however, was not analysed as the Panel ultimately found, based on the terms of Korea's concessions in its GPA Schedule and the supplementary negotiating history of the Schedule, that the entities allegedly responsible for IIA procurement were not entities covered by Korea's GPA schedule, and thus concluded that the IIA project was not covered by Korea's commitments under the GPA.[715]

II.6.2 Possible defences for LCRs under the GPA

Article III of the Revised GPA and Article XXIII of the 1994 GPA establish certain security exceptions and general exceptions related to public morals, order or safety; protection of human, animal or plant life or health; protection of intellectual property; and relating to goods or services of persons with disabilities, philanthropic institutions or prison labour, which, under certain conditions may justify the violation of provisions of the Agreement. These exceptions were not raised in the single LCR case involving the GPA.

713 Kuntze and Moerenhout, *Local Content Requirements and the Renewable Energy Industry - A Good Match?*, 33.
714 Panel Report, *Korea – Procurement* (2000), para. 7.1.
715 Panel Report, *Korea – Procurement* (2000), para. 7.73.

In any case, given similarities with GATT exceptions, it is also difficult to conclude that they can actually contribute for justifying LCRs under the GPA Agreement.

II.7 LEGALITY OF LCRS IN VIEW OF THE TRIPS AGREEMENT

II.7.1 Main provisions

LCRs in the context of the TRIPS Agreement generally refer to local working requirements of patents, that is, requirements that mandate the patentee to produce the patented technology or process within the country granting the patent.[716] It may also refer, in this same line, to technology transfer requirements to domestic companies.

It is suggested that the local working of patents could "bring about significant benefits to the country granting the patent, including but not limited to increased employment opportunities, transfer of technology and development of skills and expertise of human resources. Thus (…) working a patent locally will be useful for the dissemination of knowledge on the technology surrounding the patent, which would provide the know-how for the patent granting country to develop further and experiment on better uses of the technology involved."[717] In this sense, local working requirements can contribute to public policy goals relating to industrial and technological capacity building, employment creation and economic independence.

Indeed, many countries have local working requirements in their domestic legislations coupled with the remedy of compulsory licensing[718] for failure to work locally. In the sixties, except for the US and the Soviet Union, every industrialised nation in the world had local working requirements. In the nineties, the situation had not changed much and the vast majority of countries, industrialised or not, had local working requirements, with a few loosening the requirement by treating importation as satisfactory (e.g. Australia, Hungary, South Korea and Mexico).[719] In line with our conclusion that LCRs have not been withdrawn by WTO Members as a result of the execution of the WTO

716 Althaf Marsoof, "Local Working of Patents: The Perspective of Developing Countries," in *Multi-dimensional Approaches Towards New Technology*, ed. Ashish; Bharadwaj, Vishwas H.; Devaiah, and Indranath Gupta (Singapore: Springer, 2018), 316.

717 Marsoof, "Local Working of Patents: The Perspective of Developing Countries," 316.

718 Under compulsory licensing, governmental authorities license companies or individuals other than the patent owner to use the rights of the patent — to make, use, sell or import a product under patent (i.e. a patented product or a product made by a patented process) — without the permission of the patent owner. The TRIPS Agreement allows compulsory licensing provided that certain procedures and conditions established in Article 31 are fulfilled.

719 Champ and Attaran, "Patent rights and local working under WTO TRIPS agreement: An analysis of the US-Brazil patent dispute," 366, fn 7.

Agreement, it is interesting to note that "the advent of the TRIPS Agreement has not led many countries to amend their local working provisions."[720] Therefore, many preserve local working requirements in their domestic IP laws.

It is important to recall that so far Panels and the Appellate Body have not analysed the legality of local working requirements of patents in light of the TRIPS Agreement. Although in three disputes, parties attempted to challenge the legality of local working requirements under Article 27 of the TRIPS Agreement, ultimately, they settled the dispute[721] or requested for the establishment of the panel on other grounds,[722] which highlights the sensitivity of the issue.

Article 27.1 establishes the principle against discrimination under the TRIPS Agreement by requiring that patents rights shall be enjoyable *without discrimination as to the place of the invention, the field of technology and whether products are imported or locally produced*. Therefore, refusing the grant of patent protection or limiting the scope of protection available to a product solely produced abroad and imported is a form of discrimination prohibited under Article 27.1 of the TRIPS Agreement. It may also conflict with WTO Members' national treatment obligation set forth in Article 3.1 of the TRIPS Agreement, according to which "each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property (…).

In *Brazil - Measures Affecting Patent Protection* (2000), the US alleged that Brazil's patent law violated Articles 27 and 28 of the TRIPS Agreement, and Article III of the GATT 1994, because it authorises compulsory licensing on the ground of the patentee's failure to work locally. As argued by the US, "Brazil's 'local working' requirement stipulates that a patent shall be subject to compulsory licensing if the subject matter of the patent is not 'worked' in the territory of Brazil. Brazil then explicitly defines 'failure to be worked' as 'failure to manufacture or incomplete manufacture of the product', or 'failure to make full use of the patented process'."[723] However, in the US perspective, the TRIPS Agreement "prohibits discrimination regarding the availability of patents and the enjoyment of patent rights on the basis of whether products are imported or locally produced. This

720 Champ and Attaran, "Patent rights and local working under WTO TRIPS agreement: An analysis of the US-Brazil patent dispute," 366, fn 7.

721 *Brazil — Measures Affecting Patent Protection* (DS199) (2000) and *United States — US Patents Code* (DS224) (2001).

722 *Turkey — Certain Measures concerning the Production, Importation and Marketing of Pharmaceutical Products* (DS583) (2019).

723 *Brazil — Measures Affecting Patent Protection* (DS199). Request for Consultations by the United States. 8 June 2000. Available at: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/G/L/385.pdf. Accessed on June 16, 2020.

obligation prohibits Members of the World Trade Organization (WTO) from requiring 'local working,' i.e., local production, of the patented invention as a condition for enjoying exclusive patent rights."[724]

The case was never analysed by the Panel or the Appellate Body as the parties reached a mutually agreed solution.[725] Politically, it would look very bad to the US to insist on the dispute as Brazil had set up an important governmental program offering AIDS patients free antiretroviral drugs which involved the local manufacture of those products not under patent and negotiations with the rights-holders where patent existing, with the grant compulsory licensing when necessary. The US did not want to be viewed as a country impairing the fight against AIDS/HIV.

In *United States — US Patents Code* (2001), Brazil requested consultations with the US concerning certain provisions of its patent legislation that stipulates that no small business firm or non-profit organization which receives title to any subject invention shall grant to any person the exclusive right to use or sell any subject invention in the US unless such person agrees that any products embodying the subject invention or produced through the use of the invention will be manufactured substantially in the US. Brazil also referred to a requirement that each funding agreement with a small business firm or non-profit organization should contain appropriate provisions to effectuate the above-mentioned requirement; and the statutory restrictions limiting the right to use or sell any federally owned invention in the US only to a licensee that agrees that any products embodying the invention or produced through the use of the invention will be manufactured substantially in the US. Brazil requested the US to justify the consistency of such requirements with its obligations under the TRIPS Agreement, especially Articles 27 and 28, the TRIMs Agreement, Article 2 in particular, and Articles III and XI of GATT 1994.[726] As this case was initiated by Brazil in response to the *Brazil - Measures Affecting Patent Protection* dispute, given that the latter was ultimately settled, Brazil did not proceed with the case against the US.

Finally, in *Turkey — Certain Measures concerning the Production, Importation and Marketing of Pharmaceutical Products* (2019), the European Union submitted that the Turkish

724 *Brazil — Measures Affecting Patent Protection* (DS199). Request for the Establishment of the Panel. 9 January 2001. Available at: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/DS/199-3.pdf. Accessed on June 16, 2020.

725 *Brazil — Measures Affecting Patent Protection* (DS199). Notification of Mutually Agreed Solution. 19 July 2001. Available at: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/IP/D/23A1.pdf. Accessed on June 16, 2020.

726 *United States — US Patents Code* (DS224). Request for Consultations. 7 February 2001. Available at: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/G/TRIMS/D18.pdf. Accessed on June 16, 2020.

authorities have adopted plans to achieve progressively the localisation in Turkey of the production of a substantial part of the pharmaceutical products consumed in Turkey. In order to achieve that objective, Turkey requires foreign producers to commit to localise in Turkey their production of certain pharmaceutical products in exchange for certain advantages. As part of the localisation requirement, foreign producers may be required to transfer technology, including patent rights, to a producer established in Turkey (the "technology transfer requirement"). In the EU's view, Turkey may be in violation of Article 3.1 of the TRIPS Agreement, because the technology transfer requirement does not apply to domestic producers of pharmaceutical products, and therefore it accords to the producers of other Members treatment less favourable than that accorded to domestic producers with regard to the protection of intellectual property. In addition, according to the EU, there is a possible violation to Article 27.1 of the TRIPS Agreement, as the technology transfer requirement may cover patent rights and does not apply to domestic producers of pharmaceutical products, and thus patents are not available and patent rights are not enjoyable without discrimination as to whether products are imported or locally produced. Article 28.2 of the TRIPs Agreement may also be infringed according to the EU, because the technology transfer requirement restricts or infringes on the right of patent owners to assign, or transfer by succession, the patent and to conclude licensing contracts.[727]

It is interesting to note that these arguments based on alleged violations to the TRIPS Agreement are not reflected in the EU request for the establishment of the Panel, which has decided to challenge Turkey's localisation requirements in light of Article III:4 of the GATT 1994, Article 2.1. of the TRIMs Agreement and Article 3.1(b) of the SCM Agreement. At the time of the conclusion of this thesis, the Panel had been composed but no decision had been issued.

The fact that local working requirements had been questioned in the beginning of 2000 in the Brazil-US disputes and then only in 2019 in the Turkey-EU dispute, with the EU abandoning the questioning of the measure under the TRIPS Agreement highlights the sensitivity of the issue. As seen, many countries still maintain local working requirements in their domestic patent laws and are not willing to leave this matter to be decided by WTO adjudicating bodies. WTO Members seem to be willing to maintain discretion in the adoption of local working requirements and technology transfer requirements as they may be important instruments to address public policy objectives. Differently from other LCRs which have been questioned under other WTO agreements (e.g. GATT 1994,

727 *Turkey — Certain Measures concerning the Production, Importation and Marketing of Pharmaceutical Products* (DS583). Request for Consultations by the European Union. 10 April 2019. Available at: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/583-1.pdf. Accessed on: June 16, 2020.

SCM Agreement, TRIMs Agreement, among others), WTO Members are not willing to take the risk of leaving the interpretation of the legality of local working requirements to the WTO adjudicating bodies.

II.7.2 Possible defences for LCRs under the TRIPS Agreement

Despite the potential prohibition on local working requirements brought by the non-discrimination rule set forth in Article 27.1 and potentially Article 3.1 of the TRIPS Agreement, there are important arguments to defend that these measures are justified by certain provisions set forth in the TRIPS Agreement, in particular, Article 31, and Article 5A of the Paris Convention, which is incorporated into the TRIPS Agreement by Article 2.1.

Article 31 of the TRIPS Agreement establishes a series of conditions and procedures for the grant of compulsory license. According to Watal et al, "a compulsory licence can be said to be a licence given by a government authority to a person other than the patent owner that authorizes the production, importation, sale or use of the patent-protected product without the consent of the patent owner."[728]

The discipline of compulsory licensing is part of the TRIPS Agreement's rationale for creating a balance between competing goals such as rewarding IP creators, promoting technological innovation and protecting public interest. Article 31 of the Agreement allows compulsory licensing and government use of a patent without the authorization of its owner under a number of conditions aimed at protecting public legitimate interests,[729] as follows:

> Where the law of a Member allows for other use https://www.wto.org/english/docs_e/legal_e/27-trips_04c_e.htm - fnt-7 of the subject matter of a patent without the authorization of the right holder, including use by the government or third parties authorized by the government, the following provisions shall be respected:
>
> (a) authorization of such use shall be considered on its individual merits;
>
> (b) such use may only be permitted if, prior to such use, the proposed user has made efforts to obtain authorization from the right holder on reasonable commercial terms and conditions and that such ef-

728 Jayashree Watal, Hannu Wager, and Antony Taubman, *A Handbook on the WTO TRIPS Agreement* (Cambridge University Press, 2012), 109.

729 WTO. Information Note – The TRIPS Agreement and COVID-19. 15 October 2020, p. 9. Available at https://www.wto.org/english/tratop_e/covid19_e/trips_report_e.pdf

forts have not been successful within a reasonable period of time. This requirement may be waived by a Member in the case of a national emergency or other circumstances of extreme urgency or in cases of public non-commercial use. In situations of national emergency or other circumstances of extreme urgency, the right holder shall, nevertheless, be notified as soon as reasonably practicable. In the case of public non-commercial use, where the government or contractor, without making a patent search, knows or has demonstrable grounds to know that a valid patent is or will be used by or for the government, the right holder shall be informed promptly;

(c) the scope and duration of such use shall be limited to the purpose for which it was authorized, and in the case of semi-conductor technology shall only be for public non-commercial use or to remedy a practice determined after judicial or administrative process to be anti-competitive;

(d) such use shall be non-exclusive;

(e) such use shall be non-assignable, except with that part of the enterprise or goodwill which enjoys such use;

(f) any such use shall be authorized predominantly for the supply of the domestic market of the Member authorizing such use;

(g) authorization for such use shall be liable, subject to adequate protection of the legitimate interests of the persons so authorized, to be terminated if and when the circumstances which led to it cease to exist and are unlikely to recur. The competent authority shall have the authority to review, upon motivated request, the continued existence of these circumstances;

(h) the right holder shall be paid adequate remuneration in the circumstances of each case, taking into account the economic value of the authorization;

(i) the legal validity of any decision relating to the authorization of such use shall be subject to judicial review or other independent review by a distinct higher authority in that Member;

(j) any decision relating to the remuneration provided in respect of such use shall be subject to judicial review or other independent review by a distinct higher authority in that Member;

(k) Members are not obliged to apply the conditions set forth in subparagraphs (b) and (f) where such use is permitted to remedy a practice determined after judicial or administrative process to be anti-competitive. The need to correct anti-competitive practices

may be taken into account in determining the amount of remuneration in such cases. Competent authorities shall have the authority to refuse termination of authorization if and when the conditions which led to such authorization are likely to recur;

(l) where such use is authorized to permit the exploitation of a patent ("the second patent") which cannot be exploited without infringing another patent ("the first patent"), the following additional conditions shall apply:

(i) the invention claimed in the second patent shall involve an important technical advance of considerable economic significance in relation to the invention claimed in the first patent;

(ii) the owner of the first patent shall be entitled to a cross-licence on reasonable terms to use the invention claimed in the second patent; and

(iii) the use authorized in respect of the first patent shall be non-assignable except with the assignment of the second patent.

While setting out certain conditions, the TRIPS Agreement does not specifically list the reasons that might be used to justify compulsory licensing and thus leaves Members the freedom to define the grounds for issuing a compulsory. Article 31 makes reference to "(1) national emergencies, (2) other circumstances of extreme urgency and (3) anti-competitive practices – but only as grounds when some of the normal requirements for compulsory licensing do not apply, such as the need to try for a voluntary licence first."[730] According to the Declaration on the TRIPS Agreement and Public Health[731], "each member has the right to determine what constitutes a national emergency or other circumstances of extreme urgency, it being understood that public health crises, including those relating to HIV/AIDS, tuberculosis, malaria and other epidemics, can represent a national emergency or other circumstances of extreme urgency."

As recognised by Marsoof, "the fact that compulsory licensing under Article 31 can only be granted on 'individual merits' means that there is no room for domestic legislation that calls for the issuance of a compulsory license solely because a patent was not worked locally, without there being other factors that warrant such outcome."[732] Ultimately, governments cannot automatically compulsorily license a 'class' of patents, without considering the application on its individual merits.However, if a WTO Member

730 Jayashree Watal, Hannu Wager, and Antony Taubman, *A Handbook on the WTO TRIPS Agreement* (Cambridge University Press, 2012), 109.

731 World Trade Organisation. Declaration on the TRIPS Agreement and Public Health of 20 November 2001, WTO Doc. WT/MIN(01)/DEC/2.

732 Marsoof, "Local Working of Patents: The Perspective of Developing Countries," 323.

decides to grant compulsory license for failure to locally work a patent on a case-by-case basis and after considering the individual merits of each case, such a measure may be successful under Article 31 of the TRIPS Agreement provided that the other requirements established therein are complied with.[733]

It is also important to note that Article 31 of the TRIPS Agreement should be read together with Article 5A of the Paris Convention that allows for compulsory license on the ground of failure to work or insufficient working under certain circumstances.[734] Looking back at the *travaux préparatoires* of the TRIPS Agreement, in article 34 of the Brussels Draft,[735] negotiators agreed that compulsory licenses for failure to work were subject to essentially the same conditions as under Article 5A(4) of the Paris Convention.[736]

Additionally, it is worth mentioning that the preamble of the TRIPS Agreement recognises the underlying public policy objectives of national systems for the protection of intellectual property, including developmental and technological objectives. This purposive reading of Articles 27.1 and 31 of the TRIPS Agreement reinforces the WTO-consistency of compulsory licenses in case of failure to locally work of a patent, as local working requirements are important instruments for achieving developmental and technological objectives envisaged by the TRIPS Agreement.

In this context, the Declaration on the TRIPS Agreement and Public Health sets forth that the TRIPS Agreement has flexibilities which include the notions that "each provision of the TRIPS Agreement shall be read in the light of the object and purpose of the Agreement as expressed, in particular, in its objectives and principles" and "each member has the right to grant compulsory licences and the freedom to determine the grounds upon which such licences are granted," reinforcing the idea that the TRIPS Agreement does not limit the grounds on which compulsory license may be granted. The Declaration also stressed the need of the TRIPS Agreement to be part of the wider national and international efforts to address public health problems.

733 Marsoof, "Local Working of Patents: The Perspective of Developing Countries," 323.

734 According to Article 5A of the Paris Convention, each country of the Union shall have the right to take legislative measures providing for the grant of compulsory licenses to prevent the abuses which might result from the exercise of the exclusive rights conferred by the patent, for example, failure to work. A compulsory license may not be applied for on the ground of failure to work or insufficient working before the expiration of a period of four years from the date of filing of the patent application or three years from the date of the grant of the patent, whichever period expires last; it shall be refused if the patentee justifies his inaction by legitimate reasons. Such a compulsory license shall be non-exclusive and shall not be transferable, even in the form of the grant of a sub-license, except with that part of the enterprise or goodwill which exploits such license.

735 GATT-Uruguay Round. Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, GATT Doc. MTN.TNC/W/35/Rev.1 (Dec. 3, 1990) [the Brussels Draft].

736 Champ and Attaran, "Patent rights and local working under WTO TRIPS agreement: An analysis of the US-Brazil patent dispute," 384.

Therefore, Article 27.1 and 31 of the TRIPS Agreement should be interpreted in light of the objectives of this agreement. Considering that it aims to contribute to the promotion of technological innovation and to the transfer and dissemination of technology (Article 7) and the protection of public health and nutrition and the promotion of public interest in sectors of vital importance to WTO Members' socioeconomic and technological development (Article 8), it is reasonable to interpret the provisions of the TRIPS Agreement in a way that allows the grant of compulsory license in case of failure to work a patent domestically provided that the other conditions set forth in Article 31 are satisfied.

It is important to stress, however, that no opinion has been issued on this subject by the WTO adjudicating bodies.

Recently, the discussion on compulsory licensing has gained utmost relevance in the context of the Covid-19 pandemic. As stated in a WTO information note on the TRIPS Agreement and Covid-19:

> To be prepared to respond to the pandemic, some members have eased procedures to grant compulsory or government use licences. One member has issued a government use licence for a potential treatment. In some other members, the parliament has requested the government to issue compulsory licences to ensure access to medicines, vaccines, or diagnostics for COVID-19. Compulsory licensing may serve as a useful policy tool to increase access to eventual treatments or vaccines for COVID-19, in particular in situations in which from a member's perspective access to affordable health technologies in sufficient quantities cannot be otherwise secured.[737]

Compulsory licensing is seen as an alternative that could boost production of vaccines and other pharmaceuticals to fight COVID-19 in the short-run, especially in a context where production is concentrated in high-income countries and there is high inequality in the distribution of vaccines. World Health Organisation has been stressing the relevance of local production and related technology transfer in the context of access to medicines and other health. A resolution on "Strengthening local production of medicines and other health technologies to improve access" was passed on the 74th World Health Assembly,[738]calling Members for a holistic, collaborative approach in addressing

737 WTO. Information Note – The TRIPS Agreement and COVID-19. 15 October 2020, p. 9. Available at https://www.wto.org/english/tratop_e/covid19_e/trips_report_e.pdf.

738 Resolution on Strengthening local production of medicines and other health technologies to improve access. SEVENTY-FOURTH WORLD HEALTH ASSEMBLY, A74/A/CONF./1, 25 May 2021, available at: https://apps.who.int/gb/ebwha/pdf_files/WHA74/A74_ACONF1-en.pdf.

the current and future challenges in promoting sustainable local production to improve access to quality, safe, effective and affordable medicines and other health technologies. The resolutions make reference to WTO instruments which affirm that the TRIPS Agreement can and should be interpreted and implemented in a manner supportive of the right of Member States to protect public health and, in particular, to promote access to medicines for all, and recognises that intellectual property protection is important for the development of new medicines and also recognises the concerns about its effects on prices.

II.8 CONCLUSION: WHAT SPACE IS LEFT FOR LCRS UNDER WTO LAW?

As shown in the subsections above, the WTO Members' policy space to implement LCRs is reduced and the defences available under WTO law are extremely limited. Indeed, in all the 18 WTO cases (except one) involving LCRs where rulings have been disclosed, there were findings of violation of WTO agreements.

In this sense, 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. Also, the interpretation of WTO provisions swings towards the free trade ideal. In none of the LCR cases where defendants attempted to justify their measures based on WTO exceptions and derogations, they were successful.

As regards trade in goods, the possibilities for Members to implement local content policies are drastically restricted under WTO law. The broad scope of GATT national treatment principle – which only requires that a measure *potentially* affect the relevant market to the detriment of imported goods – means that WTO Members are generally prevented from imposing LCRs affecting goods. Indeed, the origin-based distinction between imported and domestic products, which is a characteristic of LCRs, is enough to amount to a violation of Article III of the GATT.

The defences available for Members to justify their LCRs are of reduced practical use. First, subsidies to national producers involving a requirement to use domestic over imported goods are not covered by the exception in Article III:8(b) of the GATT 1994, according to established case law.

Second, GATT general exceptions are, as currently interpreted, not useful to justify LCRs. As regards aragraphs (a), (b) and (d) of Article XX of GATT 1994, LCRs do not gener-

ally satisfy the step of the analysis established by Panels and the Appellate Body which requires proof of unavailability of less trade-restrictive measures. In addition, LCRs will hardly be justified under paragraph (g) and (j) of Article XX of the GATT 1994 considering the interpretation parameters established by WTO jurisprudence. LCRs are not imposed "in conjunction with restrictions on domestic production or consumption". As a result, they may not satisfy the requirements of Article XX(g) of the GATT 1994. In addition, given that panels and the Appellate Body ruled that the definition of general or local short supply under Article XX(j) of the GATT 1994 must take into account the supply from all sources, including foreign sources (and not only domestic capacity), disputing parties may not be able to use Article XX(j) to justify LCRs when only domestic capacity is insufficient to meet the local demand, and the product is available from international sources (except in case of disruptions in supply chain). Furthermore, GATT security exceptions may only be applicable in very limited cases (e.g. in data localisation barriers aiming at the prevention of cybersecurity risks of highly classified information).

The available exemptions to the GATT discipline are also not very useful for defending LCRs. The public procurement derogation to the national treatment obligation set forth in Article III:8(a) of the GATT 1994 will only be applicable in limited instances, i.e., where the product procured is in competitive relationship with the product being discriminated.[739] Also, invoking the economic development exceptions in Article XVIII relating to the infant industry and BOP arguments as defences for LCRs is of minimal practical use. Such defences are generally available only to developing countries supporting low standards of living or in early stages of development. In addition, they pose some requirements on the developing Members that make their use too burdensome or illogical.

Local content subsidies are prohibited under Article 3.1(b) of the SCM Agreement. Even local content subsidies in the agriculture sector are prohibited as WTO adjudicating bodies have confirmed that the Agreement on Agriculture does not provide a shelter for local content subsidies in agriculture. Other types of local content subsidy that do not meet the conditionality test imposed by the Appellate Body in connection with Article 3.1(b) of the SCM Agreement may be challenged as actionable subsidies.

The fact that the SCM Agreement does not contain any cross-reference to GATT general exceptions may also mean that it is difficult for WTO Members to justify their local content subsidies on public policy grounds. In contrast, WTO Members enjoy some discretion under the SCM Agreement (provided that the relevant service sector is not

739 For instance, the government may procure energy but its intention is to discriminate energy equipment and incentivise local production of energy equipment. Since energy is not in a competitive relationship with energy equipment, the discrimination is not exempted from the national treatment obligation.

subject to the discipline of Article XVII of the GATS) to make use of subsidies in services and general infrastructure as these sectors are not part of the scope of the SCM Agreement. Also, the Appellate Body has created an important carve-out, possibly allowing subsidies in "governmentally-created markets"[740] However, the precise scope of this carve-out is unclear.

Even when the local content subsidy does not fall under the requirements established by Panels and the Appellate Body to be considered a *condition requiring the use of domestic over imported goods* under Article 3.1(b) of the SCM Agreement, the WTO may successfully contest the measure under Article III of the GATT 1994, considering the discriminatory nature of LCRs. Ultimately, if LCRs are not found inconsistent with Article 3.1(b) of the SCM Agreement, they will probably violate Article III of the GATT 1994, meaning that LCRs relating to trade in goods may be deemed in one way or the other WTO-inconsistent.

In turn, for countries which did not make specific commitments in their Service Schedules under GATS or have inscribed relevant limitations when commitments have been made, the possibility to implement LCRs affecting service sectors and service suppliers is broader. As GATS functions under a positive list approach, Members will have discretionary power to implement LCRs in sectors in relation to which they have made no market access and national treatment commitments or where they have inscribed relevant limitations. As a result, they will be able, for instance, to require or incentivise the use of domestic service suppliers and domestic labour; require joint ventures or a certain share of domestic equity; and require or incentivise transfers of technology.[741]

The same is valid for countries which are not parties to the GPA. However, in the matter of public procurement, it is important to recall that, given the competitive test required under Article III:8(b) under *Canada – Renewable Energy/Canada – Feed-in Tariff Program* (2013), many government procurements associated with LCRs will not be exempted from the national treatment obligation and therefore will be considered GATT-inconsistent even if the country did not ratify the GPA.

As relates to the TRIPS Agreement, there is uncertainty on whether local working requirements of patents could be outlawed by the non-discrimination principles enshrined in Article 27.1 and 3.1 of the agreement. However, there are grounds to at least justify the grant of compulsory license in case of failure to locally work provided that the

740 Appellate Body Reports, *Canada – Renewable Energy/Canada – Feed-in Tariff Program* (2013), para. 5.188
741 Johnson, *Space for Local Content Policies and Strategies: A Crucial Time to Revisit an Old Debate,* 18.

conditions set forth in Article 31 of the TRIPS Agreement are satisfied. This is reinforced by a purposive reading of the TRIPS Agreement in light of its objectives of promoting technological development and the protection of public health policies.

Finally, SDT provisions are no longer available to allow developing Members to implement LCRs and deviate from main WTO obligations. Existing SDT provisions such as Article XVIII of the GATT 1994 in support of infant industry and balance of payment arguments are of no practical use as defences for LCRs.

As to the SCM Agreement, Article 27 establishes that "Members recognize that subsidies may play an important role in economic development programmes of developing country Members." Despite this important acknowledgment, this provision does not represent a broad exception clause or a scape valve for developing countries to implement subsidies as they wish. This article has been constantly interpreted as a reference for Articles 27.2 and 27.3, but not as having an autonomous existence or function. Article 27.2[742] and 27.3[743] provides for specific SDT for developing countries. Article 27.2 exempts least-developed countries and countries with a per capita annual income of less than US$ 1,000 from the prohibition on export subsidies under Article 3 of the SCM Agreement. Article 27.3 excludes, certain developing countries from the scope of application of the prohibition on local content subsidies for specified periods of time.[744]

However, developing countries no longer benefit from S&D treatment with regard to the prohibition on local content subsidies (Article 3.1(b)) since the transitional period stipulated under Article 27.3 has expired. In any case, this flexibility does not seem of relevance as III:4 GATT and the TRIMs Agreement already outlaw local content subsidies.[745] Other exceptions relating to the provisional application of Article 8, which classified certain types of subsidies (e.g. regional and R&D subsidies) as non-actionable, have also expired.[746]

742 27.2 The prohibition of paragraph 1(a) of Article 3 shall not apply to: (a) developing country Members referred to in Annex VII; (b) other developing country Members for a period of eight years from the date of entry into force of the WTO Agreement, subject to compliance with the provisions in paragraph 4.

743 27.3 The prohibition of paragraph 1(b) of Article 3 shall not apply to developing country Members for a period of five years, and shall not apply to least developed country Members for a period of eight years, from the date of entry into force of the WTO Agreement.

744 Panel Report, *Brazil – Aircraft*, para. 7.53.

745 Dominic Coppens, "How special is the Special and Differential Treatment under the SCM Agreement? A legal and normative analysis of WTO subsidy disciplines on developing countries," *World Trade Review* 12, no. 01 (2013): 89.

746 SCM Agreement, Art. 31. The provisions of paragraph 1 of Article 6 and the provisions of Article 8 and Article 9 shall apply for a period of five years, beginning with the date of entry into force of the WTO Agreement. Not later than 180 days before the end of this period, the Committee shall review the operation of those provisions, with a view to determining whether to extend their application, either as presently drafted or in a modified form, for a further period.

As a reflection of the dominant view among trade economists that LCRs lead countries in entirely wrong direction, distorting trade and development and drawing resources into inefficient sectors, they have been greatly constrained under WTO law and "no SDT permission now exists under WTO for developing countries to use local content requirements, beyond the granting of a phased withdrawal (now complete)."[747]

In only 3 LCR cases, defendants have adduced SDT provisions or raised arguments that required the Panel to interpret a certain WTO provision considering their condition as a developing country.

In none of the cases did the 'development' aspect of the argument make a difference in the outcome of the case.

In *China – Autos Parts* (2009), China alleged that its measures were necessary to secure compliance with its law and regulations. More specifically, it contended that they were necessary to prevent tariff circumvention. In China's view, the collection of taxes and the enforcement of tariff scheduled commitments were important especially for developing countries.

In *India – Autos* (2002), India argued that it maintained the challenged measures for balance-of-payments reasons. In its view, although they could be inconsistent with the general prohibition of quantitative restrictions set out in Article XI of the GATT, they were justified under Article XVIII:B of the GATT, according to which the developing country Members of the WTO could impose import restrictions to safeguard their external financial position and to ensure a level of reserves adequate for the implementation of their programme of economic development.

In *Indonesia – Autos* (1998), Indonesia argued that, for the purposes of the analysis of serious injury in the context of the SCM Agreement, the term "like product" should be narrowly interpreted as regards developing country, because "an affirmative finding of the threat of serious prejudice to a 'like product' would operate to deprive a developing country Member of this generally available right [to provide subsidies]".[748]

The cases listed above stress the limited availability and applicability of SDT provisions for justifying LCRs imposed by developing countries.

747 Gillian Moon, *Capturing the benefits of trade? Local content requirements in WTO law and the human rights-based approach to development* (University of New South Wales Faculty of Law, 2008), 7.

748 Panel Report, *Indonesia — Autos* (1998), para. 8.210.

CHAPTER 3

3

LCRs against the backdrop of development: legal framework for development and the regulation of LCRs

III.1 INTRODUCTION

Having situated LCRs in the WTO framework in the previous chapter, it is now important to place their discussion in the context of the legal framework for development.

Chapter 2 has demonstrated that under the WTO framework, which is highly concerned with trade liberalisation, Members have limited space in implementing LCRs according to established jurisprudence. In all LCR disputes (except one) analysed by panels and the Appellate Body, the contested LCR was found WTO-inconsistent. At the same time, as seen in Chapter 1, WTO Members continue to adopt such measures as part of their national policies and only take steps to discontinue their use when they are challenged in the WTO dispute settlement system.[749] This suggests that LCRs are an important part of WTO Members' industrial policy and they may not be willing to abandon them due to the WTO disciplines.

In particular, LCRs can be important for their developmental process to the extent that governments can maximise the population's participation in the development process by creating jobs domestically, stimulating the transfer of technology, improving industrial capabilities, in addition to generating spill over effects. Therefore, from the point of view of *development*, it is worrisome that WTO law narrows the range of options available for WTO Members.

However, what exactly is development and how can LCRs be associated to the development process of WTO Members?

This chapter will first present the evolution of the concept of development, which was originally limited to economic considerations, but now encompasses a broader notion of an economic, social and cultural process entailing the realisation of all human rights. It will be seen that under this contemporary view of development, the regulation of LCRs can be important not only in promoting *economic* development in the sense of improving economic indicators, but also in contributing to the realisation of human rights, such as the right to improved standards of living, the right to employment, the right to health, the right to a healthy environment, the right to take part in cultural life, the right of indigenous peoples, among others.

749 Also, as regards local working requirements in the patent field, it was shown that many countries have in their domestic legislations this type of requirement, and none of them have abdicated from these measures as a result of the signing of the TRIPS Agreement and its provisions on national treatment. Issues involving local working requirements are rarely taken to the WTO dispute settlement system and in the instances where they were, the parties decided not to proceed with the judicialisation of the case.

Further, in laying the groundwork for a development-oriented analysis of WTO rules affecting LCRs, this chapter will also detail the normative and legal content of certain human rights and principles related to the normative framework for development, which are relevant for the purposes of this thesis. If such norms are to provide meaningful guidance to trade policy, it is necessary to point out more precisely and specifically their normative and legal content as they apply in the field of trade policy in order to increase their utility as guiding principles. [750]

III:2 EVOLUTION OF THE CONCEPT OF DEVELOPMENT

The notion of development has evolved from a notion strongly related to gross domestic product (GDP) growth to a broader approach where the conception of development is "associated with a discourse of rights, entitlements, and a linkage between development and political and social rights, rather than being limited to a technical economic issue."[751]

This section analyses the evolution of the concept of development, from a purely economic perspective which equates development to economic wealth, to the current rights-based and human-centred view, where development is seen as a holistic concept involving the realisation of all human rights. It highlights that under this new conception of development, national policies should be assessed not only in relation to its impact on generation of economic wealth, but also in relation to broader economic and social considerations, including their capacity of contributing to the realisation of human rights.

III:2.1 Economic perspectives on development

Development has been historically associated with wealth. Richest countries have been deemed more developed than poorer ones.[752]

Theories of development economics generally equate the concept of development to GDP growth. This idea of development has its origin in the industrialisation of Western European countries beginning in the eighteenth century. Differences between the advanced economies and those "underdeveloped" were mostly explained in view of their differences in economic (GDP) and technological terms. Under this perspective, the development of a country has been traditionally measured by a country's GDP per

750 Lang, "Re-thinking trade and human rights," 391.
751 Rolland, *Development at the WTO*, 13.
752 Michael J. Trebilcock and Mariana Mota Prado, *Advanced Introduction to Law and Development*, Elgar Advanced Introductions, (Cheltenham, UK; Northampton, MA, USA: Edward Elgar, 2014), 3.

capita. This measurement "reflects a particular concept of development, centred around economic wealth and it is also associated with policies designed to promote economic growth."[753]

Classical theories of development economics also place underdevelopment in a sequential chain through which underdeveloped nations must evolve into mature and advanced economies. Accumulation of wealth by the former economies would naturally lead to further development. These theories do not have distributive concerns as they believe the cake will eventually be shared and benefit all.

In addition, to the extent that the role of development institutions and the law would be to transform the primitive socioeconomic structure of under-developed countries into an advanced industrial economy, these theories inevitably regard industrial countries as experts on development, which hold the key for success, having a one-size-fits-all solution for the underdevelopment problem.

This economic perspective of development has been endorsed in the nineties with the rise of the neoliberal ideology. The neoliberal model assumes that free markets can promote an efficient allocation of resources by creating efficient pricing signals. Macroeconomic stability, liberalisation, privatisation and policies to attract foreign direct investment (FDI) and private entrepreneurs are recipes that can ultimately contribute to development.[754]

Until the 1990s, the decision-making structure of the Bretton Woods institutions, as well as the motivation behind, and implementation of, their decisions were highly influenced by this macroeconomic perspective of development of classical economic development theories and the idea of a development model that could be applied universally. The WTO has also inherited, to a large extent, a perspective of development close to a macroeconomic-centred approach.[755]

Currently, however, the concepts of development viewed from a purely macroeconomic perspective are recognised as too limited.[756] GDP alone is not enough to indicate the level of development of a country. This parameter does not capture a country's level of poverty, inequality and other social problems. Due to these limitations, such narrow conception of development based purely on economic factors have been strongly criti-

753 Trebilcock and Prado, *Advanced Introduction to Law and Development*, 4.
754 Trebilcock and Prado, *Advanced Introduction to Law and Development*, 4.
755 Rolland, *Development at the WTO*, 23.
756 Rolland, *Development at the WTO*, 24.

cised. Currently, the definition of development has gained broader contours and is not limited to economic and technological considerations, although of course these factors remain important.

III:2.2 Rights-based perspective of development

III:2.2.1 The progressive construction of a rights-based concept of development

A different notion of development from that defended by liberal economic theories started to be elaborated amid the decolonization process started in the 1950s. The process of decolonisation is one of the main transformations of the twentieth century, giving rise to the process of challenging an international order characterised by flagrant inequalities. From this moment on, developing countries started to act collectively to defend a fairer international system that took into account their needs and interests and to elaborate on what has been termed as a development ideology.

In this context and in response to classical liberal theories of development economics, economists at the United Nations Commission for Latin America and the Caribbean (UNCLAC), inspired by Raúl Prebisch's thoughts, elaborated a dependency theory according to which underdevelopment in developing countries was not a matter of catching up with the development level of industrialised nations. In fact, underdevelopment was a product of unequal positioning of countries within the European-led economic system.

According to the dependency theory, developing countries were a key piece of developed countries' industrialisation process and a conduit for their wealth. Developed and developing countries played different roles in a single socioeconomic system and developing countries have traditionally been used as consumer markets for the expansion of the industries of developed countries. Accordingly, developed countries did not have the recipe for development of under-developed countries. To the contrary, the former contributed to the latter's underdevelopment through colonialist and neo-colonialist processes. According to the dependency theory, development could therefore only be achieved by a transformation of the entire global economic system. The call for a New International Economic Order (NIEO) in the 1970s was a natural extension of such perspectives on development and the long process of political struggle of the developing countries (also former colonies) for the defence of their interests at the international level.

The NIEO was promulgated as a UN declaration in 1974 (NIEO Declaration)[757] and aimed for a complete reform on global governance to "correct inequalities and redress existing injustices", making it possible to eliminate the widening gap between developed and developing countries. The goal therefore was to bring social justice[758] to the international economic system.[759]

Under the NIEO, it was envisaged an international order "based on equity, sovereign equality, interdependence, common interest and cooperation among all States, irrespective of their economic and social systems which shall (…) ensure steadily accelerating economic and social development and peace and justice for present and future generations".[760] The idea was that "the prosperity of the developed countries and the growth and development of the developing countries, and that the prosperity of the international community as a whole depends upon the prosperity of its constituent parts. International co-operation for development is the shared goal and common duty of all countries."[761]

The NIEO aimed to improve the developing world's terms of trade, increase development assistance, and reduce tariffs in the developed world - so that trade would be more beneficial for developing countries. The NIEO charter also established that each state had the freedom to choose its own political, social, and cultural system.[762] Under this NIEO vision and the idea that developing countries should reduce their dependence of developed countries, structuralists defended internal structural reforms within developing countries, including the use of import substitution policies whereby a country's imports should be replaced by locally produced goods wherever possible in order to promote domestic industries and to reduce balance of payment deficits. Structuralists naturally rejected the idea of a universal formula for development that could be applied to developing countries.

757 United Nations. General Assembly, 3201 (S-VI). *Declaration on the Establishment of a New International Economic Order*, 1 May 1974, A/RES/3201(S-VI).

758 The definitions of social justice are far reaching and ambiguous and translation into concrete practice is fraught with challenges. Nevertheless, "notions of social justice generally embrace values such as the equal worth of all citizens, their equal right to meet their basic needs, the need to spread opportunity and life chances as widely as possible, and finally, the requirement that we reduce and, where possible, eliminate unjustified inequalities." Janet L.; Finn and Maxine Jacobson, "Social Justice," in *Encyclopedia of Social Work* (Oxford University Press, 2013).

759 Prévost, *Balancing Trade and Health in the SPS Agreement: The Development Dimension*, 42.

760 Preamble of the NIEO Declaration.

761 Item 3 of the NIEO Declaration.

762 Moses and Letnes, *Managing Resource Abundance and Wealth: The Norwegian Experience*, 3.

In the nineties, the neoliberal ideas ultimately superseded the NIEO attempt to make deeper changes in the global order, which, nevertheless, did not suppress the important contribution of the developing countries in promoting a new ideology of development.

It is important to stress, however, that the incorporation of the notion of development in the context of human rights as a *right to development* and the idea of a rights-based concept of development, is the result of a long process of elaboration of the ideology of development and codification of its principles in international instruments.

The formulation of the right to development derives from legal doctrines and especially from the efforts conducted within the UN on development issues. The precursor of the notion of development as a rights-based concept was the Senegalese scholar and judge M'Baye, which elaborated the idea of a right to development.[763] The doctrinal elaboration of the right to development as part of the third generation rights also contributed to its integration to the paradigm of human rights.[764]

In addition, the UN has been an important focal point for developing countries to discuss and present their claims as they form the majority in the General Assembly, making it a suitable place to challenge the established order. In this sense, it has been a natural forum for the formalisation of the right to development and its consecration as a human right.

The first correlation between development and human rights appears in the Proclamation of Teheran at the International Conference on Human Rights organised by the UN

763 K. M'Baye, "Le Droit au Développement comme un Droit de L'Homme," *Revue Des Droits de L'Homme* 5 (1972).

764 In 1990, Vasak wrote: "Or, n'y a-t-il pas, ne devrait-il pas y avoir, des droits de l'homme secrétés par l'évidence fraternité des hommes et par leur indispensable solidarité, droits qui uniraient les hommes dans un monde fini dont le temps a commencé depuis longtemps déjà ? Tel est le sens de ces nouveaux droits de l'homme de la troisième génération. Ils sont nouveaux, car les aspirations qu'ils expriment sont nouvelles sous l'angle des droits de l'homme visant à faire pénétrer la dimension humaine dans des domaines dont elle était jusqu'ici trop souvent absente, étant abandonnés à l'Etat, aux Etats: le développement, la paix, l'environnement, le patrimoine commun de l'humanité, l'assistance humanitaire en cas de détresse humaine. […] à la fois opposables à l'Etat et exigibles de lui ; mais surtout (et c'est là leur caractéristique essentielle) ils ne peuvent être réalisés que par la conjonction des efforts de tous les acteurs du jeu social : l'individu, l'Etat, les entités publiques et privées, la communauté internationale." Karel Vasak, "Les différents catégories des droits de l'homme," in *Les dimensions universelles des droits de l'homme*, ed. A.; Tinguy F; Vasak K. Lapeyre (Bruxelles: UNESCO-Bruylant, 1990), 302-03.

in 1968.[765] Subsequent resolutions also introduced the issue of development within human rights. In 1977, the Commission on Human Rights for the first time stated that the right to development is an alienable human right and called for a study to better define this right and its implications.[766] The UN General Assembly later proclaimed the right to development in several instruments, advocating an integration of social, political, civil, and cultural rights and development.[767]

In particular, the concept of the right to development was adopted by the UN General Assembly in 1986 in the UN Declaration on the Right to Development (UNDRD). It represents the crystallisation of development as a human right. The UNDRD places the human person at the centre of the development process, advancing the view that the objective of development is to create the necessary conditions for ensuring a dignified life for all. This is in contrast to a purely economic perspective of development.

The Declaration definitely contributed to align the concept of development to human rights, [768] representing the right to development as one entailing the progressive realisation of civil, political, economic, social and cultural rights, which are interdependent.

Ultimately, "human rights and development both aim to promote well-being and freedom, based on the inherent dignity and equality of all people. The concern of human development is the realisation by all of basic freedoms, such as having the choice to meet bodily requirements or to escape preventable disease. It also includes enabling opportunities, such as those given by schooling, equality guarantees and a functioning justice system. The human rights framework shares these concerns. Human rights and human development share a preoccupation with necessary outcomes for improving people's lives, but also with better processes."[769]

765 Proclamation of Teheran, Final Act of the International Conference on Human Rights, Teheran, 22 April to 13 May 1968, U.N. Doc. A/CONF. 32/41 at 3 (1968). The document establishes that: "12. The widening gap between the economically developed and developing countries impedes the realization of human rights in the international community. The failure of the Development Decade to reach its modest objectives makes it all the more imperative for every nation, according to its capacities, to make the maximum possible effort to close this gap; 13. Since human rights and fundamental freedoms are indivisible, the full realization of civil and political rights without the enjoyment of economic, social and cultural rights is impossible. The achievement of lasting progress in the implementation of human rights is dependent upon sound and effective national and international policies of economic and social development."

766 Commission on Human Rights, "Report of the UN Secretary- General on the International Dimensions of the Right to Development as a Human Right," Res 4 (XXXIII), UN Doc E/ CN.4/1334 (1979)

767 UN General Assembly Resolution 34/46, A/RES/34/46 (23 November 1979); UN General Assembly Resolution 35/174, A/RES/35/174 (15 December 1980), UN General Assembly Resolution 36/133, A/RES/36/133 (14 December 1981), UN General Assembly Resolution 37/199, A/RES/37/199 (18 December 1982); UN General Assembly Resolution 37/200, A/RES/37/200 (18 December 1982).

768 Prévost, *Balancing Trade and Health in the SPS Agreement: The Development Dimension*, 22.

769 Office of the High Commissioner for Human Rights, Frequently Asked Questions on a Human Rights-Based Approach to Development Cooperation, HR/PUB/06/8, 7 (Geneva: United Nations 2006).

However, while the Declaration represented an important step towards the affirmation and recognition of the right to development, it was not the end of the story. The scope of the right to development and the means to make it effective is a work in progress. Several studies and reports[770] have been elaborated and several instruments and resolutions have been enacted especially in the context of the UN as efforts to build upon this right to development to bring the content of the right to development to the kind of clarity that would enable Member States, UN agencies and other international institutions and actors to integrate the standard effectively into their arrangements and practices.[771]

The UNDRD and its principles were the basis for the conceptualisation of the UN human rights-based approach to development. As such, a human rights-based approach focuses on "ensuring participation, accountability, non-discrimination, equity and consistency with international human rights standards, including the right to development, in all development processes. A human rights-based approach to development is a tool to promote human rights-compliant development, particularly in development programming. This approach applies a conceptual framework based on international human rights standards with the right to development at its core and is directed towards the promotion and protection of all human rights, including the right to development, in development programmes."[772] Under this approach, development is not a process solely related to economic indicators, but has special concern with being consistent with human rights standards.

Finally, Amartya Sen's concept of Development as Freedom (1999) was essential to challenge the mainstream concept of measuring development by economic terms. His work had an immense impact on the establishment of a new paradigm for development in the early 2000s. The concept was "redefined in terms that include human rights as a con-

770 For a chronology of the main developments relating to the right of development after the UNDRD, see the "Landmarks in the recognition of development as a human right" in the website of the Office of the High Commissioner on Human Rights at: https://www.ohchr.org/EN/Issues/Development/Pages/Landmarksintherecognitiondevelopmentasahumanright.aspx Accessed on June 9th, 2020. See also High-level task force on the implementation of the right to development, Report of the high-level task force on the implementation of the right to development on its sixth session. Right to development criteria and operational sub-criteria., A/HRC/15/WG.2/TF/2/Add.2 (Geneva: United Nations, 2010); Office of the High Commissioner for Human Rights, *Realizing the right to development: essays in commemoration of 25 years of the United Nations declaration on the right to development* (Geneva: United Nations, 2013).

771 Among the steps taken are the appointment by the Commission on Human Rights, precursor to the Human Rights Council, of an Independent Expert on the right to development and the creation of the Working Group on the Right to Development and the high-level task force on the implementation of the right to development, made up of independent experts, to assist the Working Group in clarifying and making operational the norms contained in the UNDRD. Susan Randolph and Maria Green, "Theory into practice: A new framework and proposed assessment criteria," in *Realizing the Right to Development: Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development* (Geneva: United Nations, 2013).

772 Office of the High Commissioner for Human Rights, Frequently Asked Questions on the Right to Development. Fact Sheet No. 37, 10-11 (New York and Geneva: United Nations, 2016).

stitutive part: all worthwhile processes of social change are simultaneously rights-based and economically grounded and should be conceived of in those terms."[773] According to Amartya Sen, economic growth is instrumental to development and not its ultimate goal. Development should be concentrated on promoting individual freedom, i.e., the ability of people to choose to live lives that they have a reason to value.[774]

According to Sen, "development consists of the removal of various types of unfreedoms that leave people with little choice and little opportunity of exercising their reasoned agency"[775] Limitations to people's freedoms or to their exercise of capabilities include "poverty as well as tyranny, poor economic opportunities as well as systematic social deprivation, neglect of public facilities as well as intolerance or over activity of repressive states."[776] Sen also focuses on crucial instrumental freedoms, including economic opportunities, political freedoms, social facilities, transparency guarantees and protective security, defending their interconnectedness. He also contends that choices about growth strategies should be democratic.

III:2.2.2 The importance of building parameters and indicators to assess development

Together with the elaboration of a rights-based approach to development, there was a preoccupation with developing tools to concretely assess the realisation of the right to development. In this sense, an important concern of UN organs has been with the effective realisation and implementation of the right to development. Accordingly, a series of parameters and indicators have been discussed to evaluate State performance.

As a result, together with this broader and rights-based dimension of development, the idea of assessing the social and human rights impact of policy decisions becomes relevant. Such assessments "provide important methodological tools to promote evidence-based policy formulation by including distributional and social effects in the *ex ante* analysis of policy reforms and agreements. It is potentially useful in bringing about policy coherence at both the national and international levels, and in promoting adherence to human rights standards, as required by the right to development."[777]

773 Peter Uvin, " From the right to development to the rights-based approach: how human rights entered development.," in *Deconstructing Development Discourse*, ed. Cornwall and Eade (Oxford: Practical Action Publishing Ltd., 2010), 168.

774 Amartya Sen, *Development As Freedom* (Oxford: Oxford University Press, 1999), x.

775 Sen, *Development As Freedom*, xii.

776 Sen, *Development As Freedom*, 1.

777 High-level task force on the implementation of the right to development, Consolidation of findings of the high-level task force on the implementation of the right to development, A/HRC/15/WG.2/TF/2/Add.1, 5 (Geneva: United Nations, 2010).

Currently, therefore, the impact assessment of policy decisions on the realisation of the right to development has gained prominence. What matters is not only their impact on wealth generation but also on social issues, such as employment generation, reduction of inequalities, improvement of health and educational conditions, etc, and the policy's capacity in generating a favourable environment to the realisation of human rights. Even in the context of trade, commentators have criticised the WTO trade policy review by stating that it only examines Members' policies and practices in relation to their promotion of free trade. As a result, they make an appeal for expanding the scope of such mechanism by including other goals such as full employment and sustainable development.[778]

Of particular relevance is the work of the High-level Task force on the Implementation of the Right to Development (HLTF), which has created a series of attributes, criteria, sub-criteria and indicators to evaluate the extent to which States are individually and collectively taking steps to establish, promote and sustain an enabling environment for the realisation of the right to development.[779] Under the criteria, it is possible to find promotion of constant improvement of well-being through long-term employment strategies; maintenance of stable national economic and financial system by reducing risks of external macro-imbalances; adoption of national and international policies supportive of the right to development; promoting and ensuring access to the benefits of science and technology; promoting and ensuring environmental sustainability; human-rights based approach in national development strategies and policy of bilateral or multilateral institutions; provision of fair access to and sharing of the benefits of development.

In addition, the MDGs and the SDGs represented initiatives attempting to make the right to development more concrete. The MDGs represented a renewed commitment to development at the turn of the millennium and an attempt to move forward the agenda on the right to development with quantifiable targets with a timetable for achievement and indicators to monitor implementation. They were set out as a series of time-bound targets in the context of the 2000 UN Millennium Declaration where UN Members have committed to a global partnership to reduce poverty. In particular, MDG8 established a global partnership for development, which strengthens the idea that there is need for international cooperation in order to attain international environment that is conducive for development.

778 Howse and Mutua, "Protecting human rights in a global economy: challenges for the World Trade Organization " 3.

779 High-level task force on the implementation of the right to development, *Short Report of the high-level task force on the implementation of the right to development on its sixth session*. Right to development criteria and operational sub-criteria., 8.

As mentioned, the UNDRD stresses the importance of international cooperation and, consequently, global partnership in the realisation of the right to development. Goal 8 of the MDGs dialogues with this idea that development cannot be achieved only by efforts of the State action but also requires international cooperation. [780]

Despite the efforts to make the right to development more concrete under the MDGs, the establishment of a partnership for development still faces real challenges as it requires a common set of objectives and shared values, institutionalised mechanisms for mutual accountability and review, observance to the rule of law and reliance on UN principles with human rights as the basis for development plans and partnerships.[781]

As the MDGs came to a conclusion in 2015, a post-2015 agenda was launched in the same year called the 2030 Agenda for Sustainable Development. It seeks to build on the MDGs and complete what they did not achieve. It is also aims at mobilisation of the resources required to implement the Agenda through a "revitalized Global Partnership for Sustainable Development, based on a spirit of strengthened global solidarity, focused in particular on the needs of the poorest and most vulnerable and with the participation of all countries, all stakeholders and all people." The new Agenda calls on countries to begin efforts to achieve 17 Sustainable Development Goals (SDGs) over the next 15 years.

In light of the above, the current notion of development now extends beyond the idea of economic welfare and a bridging of the gap between developed and developing countries by means of an imitative process, in which the less developed countries gradu-

780 "Goal 8 is arguably the most significant development since the International Covenant on Economic, Social and Cultural Rights because it takes the idea of international State obligations beyond a statement of principle to list specific policy areas of required action: trade, aid, debt relief and technology transfer. Moreover, goal 8 is part of an internationally agreed mechanism of review and accountability." Sakiko Fukuda-Parr, "A right to development critique of Millennium Development Goal 8," in *Realizing the Right toDevelopment: Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development* (Geneva: United Nations, 2013). MDG 8's specific targets entail, among others, developing further "an open, rule-based, predictable, non-discriminatory trading and financial system" (target 8.a) and addressing the special needs of least developed countries, landlocked countries and small island developing states (target 8.b and 8.c). As a result, MDG reports concentrate on measuring level of trade-related assistance from developed to developing countries, preferential treatment granted from developed to developing countries, market access to developing countries and agricultural subsidies from developed countries. See United Nations, *The Millennium Development Goals Report* (New York, 2015); United Nations, *The Millennium Development Goals Report* (New York 2008); United Nations, *The Millennium Development Goals Report* (New York, 2012).

781 Fateh Azzam, "The right to development and implementation of the Millennium Development Goals," in *Realizing the Right to Development: Essays in Commemoration of* (Geneva: United Nations, 2013). The realisation of the MDGs has been limited by threats to peace and security, environmental degradation, policy inadequacies and poor governance, and lack of an external environment supportive of the improvement of conditions for developing countries in terms of international trade, debt sustainability and internationally agreed levels of aid.

ally assume the qualities of the developed. The rights-based notion of development is human-centred and concerned with the realisation of human rights and social impact of policy decisions. Consequently, it sheds light to the need of balancing economic and non-economic interests and taking into account the relevant measure's impacts on human rights. Economic wealth is not the sole concern of development, it should be accompanied by a process of progressive realisation of civil, political, economic, social and cultural rights.

III.3 LCRS FROM THE PERSPECTIVE OF DEVELOPMENT

III.3.1 Initial considerations

In view of the broader concept of development as a rights-based concept involving a "multidimensional undertaking to achieve a higher quality of life for all people,"[782] the analysis of LCRs should involve not only economic considerations, but also their social dimension and their potential contribution to the realisation of all human rights. As to this later point, it is relevant to understand how LCRs can contribute to the realisation of different human rights, such as ESC rights, human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, among others.

In addition, as a rights-based perspective of development seeks to integrate principles of participation, accountability, non-discrimination and equity with international human rights standards in all development processes, local content policies should also be assessed in light of these procedural standards. Considering that the effects of local content policies are not felt in the short-term, but on the long-haul, sometimes it may be difficult to actually measure their economic and social impact as they may be newly implemented or not an adequate period of time has passed so that their effects can be seen. In this context, it is important to analyse them from the point of view of procedural standards, for instance, if they have been elaborated with the participation of affected enterprises and the community in a transparent way, if their rules are clear, if the policy foresees mechanisms to monitor the implementation of the rules and their effects, if it has a pre-defined timeframe (i.e. it is not a perpetual or indefinite measure), among others.

In subsection I.2.3, we summarised keys points to maximise the chances that LCRs fulfil their economic and social objectives. These included orientation in the sense that (i) the

782 First paragraph of the Agenda for Development. United Nations. General Assembly. Agenda for Development. Resolution A/RES/51/240 adopted on 15 October 1997.

process of local content policy formulation should be open and transparent, backed by strong and accountable institutions and allowing for cooperation between government and the market; (ii) local content targets should be set realistically and should be modified as conditions change; and (iii) LCRs should be gradually phased out. Therefore, as seen in Chapter 1, these procedural aspects, apart from participation and accountability, may be important to assess the probable success or failure of LCRs in generating positive social and economic impact. Also, considering the efforts made in the construction of indicators and parameters to make the right to development effective, it is important to assess LCRs in light of these parameters, including the MDGs, SGDs, parameters developed by the High-level Task force on the Implementation of the Right to Development (HLTF), among others.

Below, LCRs are presented from an economic, social and human rights perspective.

III.3.2 Economic perspective of LCRs

From an economic perspective, it has been argued that LCRs can act as mechanisms for creating linkages between foreign investment and domestic industries and national citizens, stimulating the transfer of technology, the establishment of a domestic industrial base and the rise of employment levels. Local companies and local workforce can benefit from training, infrastructure build-out, among others.

In developing countries, most of the industries linked to international production networks have high import contents in technology-intensive parts and components while their domestic value added often consists of wages paid to unskilled or semi-skilled workers. Raising domestic content of such production is important to the extent it promotes the development of domestic industries for technology-intensive parts and components, which constitute an important step in industrial upgrading. It also contributes to levelling up the capabilities of the labour force. As a result, restrictions over LCRs potentially limit transfer of technology and import substitution in industries linked to international production networks, preventing the establishment of a national industrial base in more technology-intensive and value-added segments and the upgrading of workforce.[783]

In this context, LCRs, if properly designed, are in line with SDG 8 ("Promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all") that envisages the promotion of development-oriented policies that

783 Yilmaz Akyüz, *Multilateral disciplines and the question of policy space*, TWN Trade & Development Series 38 (Malaysia: Third World network (TWN), 2009).

support productive activities, decent job creation, domestic technology development, creativity and innovation. They may also be consistent with the objectives of SDG 9 ("Build resilient infrastructure, promote inclusive and sustainable industrialisation and foster innovation"), which includes the support to domestic technology development, research and innovation in developing countries, including by ensuring a conducive policy environment for, inter alia, industrial diversification and value addition to commodities.

Also, LCRs can contribute to policies targeting the equilibrium in the balance of payments and foreign exchange reserves, as imports are supposed to reduce throughout time as local industry develops. As a result, there will be a lower level of foreign currency drainage associated with the importation of goods and services for strategic industries. This concern with balance of payments is particularly true in the case of technologically-intensive resource extraction (e.g. offshore oil).[784] In indicating a criteria for measuring development, the High-level Task force on the Implementation of the Right to Development (HLTF) expressly mentions the stability of the economic and financial system and the adoption of measures targeting the reduction of risks of macro-imbalances affecting debt sustainability and foreign Exchange reserves.[785]

III.3.3 Social perspective of LCRs

From a social perspective, LCRs can, by stimulating job creation, create opportunities for people to increase their living standards, by being able to adequately sustain themselves and support their families. Especially in a world of global value chains (GVC) characterised by countries' specialisation in a segment of a production process rather than in the whole process of the final product, LCRs could be an instrument to guarantee that employment opportunities remain within the host country.

Such social impact is also prominent when LCRs are targeted at promoting social inclusion, by creating employment opportunities for vulnerable groups or those historically disadvantaged. Additionally, social impact could be seen where LCRs encourages training and development of local human resource, which can also help improving the situation of unskilled labour. The capabilities acquired by the local work force accompany them throughout their lives and can turn into future professional opportunities in the same or other field, also translating into improvement of living standards.

784 UNCTAD, *Local Content Requirements and The Green Economy*, UNCTAD/DITC/TED/2013/7, (Geneva: United Nations, 2014), 5.

785 High-level task force on the implementation of the right to development, Short Report of the high-level task force on the implementation of the right to development on its sixth session. Right to development criteria and operational sub-criteria., 9.

Also, from a social perspective, LCRs could be important to the extent that it encourages the transfer of technology and entices knowledge production, research, capacity building or awareness that could generate positive impacts in several areas of social relevance. For instance, transfer of technology in environment and water fields could improve the host country ability to deal with water supply and sanitation management. When transfer of technology is connected to public health incentives, it could increase access of population to affordable medicines, vaccines or diagnostic kits. Transfer of technology linked to the agriculture field can increase crop productivity and food security, addressing concerns over food shortage and malnutrition of the population. Additionally, construction/infrastructure incentives could improve infrastructure such as road safety and highway construction, increasing mobility and safety standards. In order to enable a more intensive process of technology transfer, local working requirements of patents are of special relevance as discussed in section II.7.

Technology transfer is of particular importance for developing countries. Indeed, the TRIPS Agreement mandates developed country Members to provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least developed country (LDC) Members in order to enable them to create a sound and viable technological base (Article 66.2). However, as this is a type of "best efforts" provisions, governments from developing countries can effectively stimulate such transfer through LCRs, in particular, local working requirements. Transfer of technology, under LCRs, in this sense, also addresses the social justice dimension of development to the extent that it could reduce marginalisation of least developed and vulnerable countries. In this context, it is consistent with the SGD 10 ("reduce inequality within and among countries"), which incentivises policies that progressively achieve greater equality,[786] and SGD 17 ("strengthen the means of implementation and revitalise the Global Partnership for Sustainable Development"), which has the purposes, among others, to enhance knowledge sharing on mutually agreed terms and promoting the development, transfer, and dissemination of environmentally sound technologies to developing countries on favourable terms.

Development from a social perspective is also concerned with environment sustainability and sustainable use of natural resources. In this regard, LCRs can also be used in connection to the renewable sector in order to stimulate the local development of clean energy. Proponents of LCRs in the renewable energy sector argue that LCRs provide incentives for local firms to produce and eventually innovate and to lower their production costs over time. They contend that, "by increasing the number of players in the

786 United Nations, *Sustainable Development Goals - Goal 10: Reduce inequality within and among countries.*

international market, in the medium term, greater competition will spur innovation in the renewable energy sector and consequently lower green technology costs. Competition and innovation should reduce the time it takes for renewable energy to compete with fossil fuels and nuclear energy. In addition, proponents claim that, by promoting the transfer of technology, LCRs foster sustainable practices worldwide."[787] Therefore, limiting LCRs could create barriers to the achievement of environment sustainability.

III.3.4 Human rights perspective of LCRs

Furthermore, from a human rights perspective, LCRs, as shown, could contribute to the realisation of human rights. It is important to establish the link between LCRs and relevant human rights, as described above.

III.3.4.1 LCRs and the right to work

Of particular relevance is understanding how LCRs could contribute to the right to work. Article 6 of the ICESCR recognises a broad right to work, which is essential for the realisation of other human rights, as it constitutes an inherent part of human dignity and allows for the survival and development of the individual and his/her family within the community.[788] The article also furthers the idea that, in order to realise this right, the State Party shall elaborate *technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.*

In this context, the principal obligation of States´ parties is to ensure the progressive realisation of the exercise of the right to work by adopting appropriate legislative, administrative, budgetary, judicial and other measures aiming at achieving full employment.[789] In other words, the right to work requires formulation and implementation by States´ parties of an employment policy with a view to "stimulating economic growth and development, raising levels of living, meeting manpower requirements and overcoming unemployment and underemployment". [790]

As shown in Chapter 1, one of the goals of LCRs is to respond to national priorities and political pressures for job creation from constituents and to grow and develop skills of

787 Sherry Stephenson, "Addressing local content requirements in a sustainable energy trade agreement," *International Centre for Trade and Sustainable Development, Geneva, Switzerland* (2013): 5.

788 Social and Cultural Rights Committee on Economic, General comment No. 18. Article 6 of the International Covenant on Economic, Social and Cultural Rights, E/C.12/GC/18, 2 (United Nations, 2006).

789 Committee on Economic, Short General comment No. 18. Article 6 of the International Covenant on Economic, Social and Cultural Rights, 6.

790 Committee on Economic, Short General comment No. 18. Article 6 of the International Covenant on Economic, Social and Cultural Rights, 8.

the national labour force. LCRs are therefore used as a means of stimulating job creation and human capital development. Especially for developing countries, building the capacity of local work force may represent an opportunity to increase productivity and industry competitiveness, in addition to enabling citizens to improve their standards of living. It also helps to reduce dependence on foreign aid, as the domestic labour force gains the necessary conditions for their survival and development, becoming free from fear and want and from serious deprivation. Local content policies and strategies for direct employment could also be used to promote workforce participation among groups who do not have access to the same employment opportunities as other groups in a society on account of historical discrimination or social constraints. In this sense, LCRs could be used to promote workforce participation of specific social groups in a country, such as indigenous people.

LCRs could also translate into more incisive measures to promote local employment such as mandated minimum percentages of local people employed in specific job roles or overall, mandated requirements to conduct training of local works, succession or localisation plans,[791] visa restrictions on foreign workers, requirements to promote indigenous people or historically disadvantaged groups, preferences in bidding process on the basis of direct employment strategy, non-binding commitments to employ local people, fiscal incentives that reward local employment and provision of financial resources or support for education and training facilities.[792]

In this content, adopting local content requirements which are situated within the national development context could provide an enabling environment that is favourable to the realisation of the right to work, especially in a context of global value chains and high industry mobility. LCRs may encourage job creation and training for local population which, absent these incentives, would strive to realise their right to work. These policies may help local work forces to restore their conditions for survival, development and improvement of living standards, contributing for the realisation of their human dignity.

By connecting LCRs to a local employment policy, governments could also reduce risks of high unemployment and of increased forms of informal jobs that may not translate into decent work, also fulfiling their obligations under Article 6 of the ICESCR. By link-

791 "Sometimes the requisite skills for particular positions—usually technical, specialist or management positions—are not available in the local population and must be sourced elsewhere. In such cases, "succession" or "localization" plans can describe how mining companies intend to train local people to take over these positions within a given timeframe." Tim Grice, "Local content policies in the mining sector: Stimulating direct local employment," *IGF/IISD* (2018): 20.

792 Grice, "Local content policies in the mining sector: Stimulating direct local employment," 13.

ing LCRs to social inclusion initiatives, such as increasing opportunities for indigenous people, States also address equality concerns of the ICESCR in particular as relates to the right to work, by promoting employment opportunities for groups that have historically been in a disadvantageous position and reducing direct and indirect obstacles to the realisation of the right to work by these groups.

Spill-over effects of LCRs could also generate indirect jobs and further contribute to the realisation of right to work of people not necessarily linked to the targeted sector of the LCR.

While LCRs could have the potential of increasing local employment targets, it is necessary that governments implement a measurement and assessment process in order to collect empirical data on employment outcomes of their LCRs. At present, there is lack of empirical data and little analysis of the effectiveness of different local content policies on generating meaningful local employment.[793] This lack of empirical data and assessment mechanisms creates barriers to defending LCRs from a development-oriented perspective.

III.3.4.2 LCRs and the right to health

Furthermore, LCRs in the pharmaceutical industry[794] could be implemented to not only foster domestic industry, but to ensure that citizens have access to quality medicine at affordable prices, especially in a context where more than two billion people worldwide cannot get the medicines they need. This is particularly important for developing countries and least developed countries so they can help vulnerable populations and reduce dependency on international donations and on a shrinking number of overseas companies that dominate the global market. LCRs in this segment could also help to curb the influx of sub-standard medicines into developing countries.[795] Consequently, LCRs in the

793 Grice, "Local content policies in the mining sector: Stimulating direct local employment," 37.

794 LCRs in the pharmaceutical industry can, for example, take the form of requirements regarding local ownership of companies or partnering with local companies, and also establishment of facilities for local production of medicines. It can also take the form of preferences for local companies in public procurements and of local working requirements.

795 UNIDO, Boosting pharmaceutical production, (Vienna: United Nations, 2019).

pharmaceutical market could contribute to guarantying an enabling environment for the realisation of the right to health, as set forth in Article 12 of the ICESCR.[796]

The COVID-19 pandemic highlighted the need for countries to reduce their dependency on imports of medicine and medicine components and to strengthen domestic industry in the pharmaceutical sector. In this context, Steele et al pointed out that, in the context of the COVID-19 outbreak, "[T]here has been a lead-time increase in the recommended procurement of health products. The sharp shortage of available medicine and increased procurement lead-times during the pandemic, since major exporting countries went into lockdown, highlighted the need for self-reliance in health infrastructure and pharmaceuticals as a national priority (…)."[797]

A WHO concept note that preceded the enactment of the Resolution on strengthening local production of medicines and other health technologies to improve access has shed light to the problems of shortage of medicine and other health technologies as well as the fragility of international health supply chains:

> Shortages of medicines and other health technologies have also been increasing in recent years and affects all countries. Shortages are due to various reasons: a limited number of manufacturers of the finished medical product, active ingredient or necessary component/part; low volume markets; low profitability of the medicines and other health technologies; poor forecasting of the demand; prohibitive regulatory requirements (e.g. too costly); interruptions in manufacturing coupled with weak supply systems. Medical product shortages could result in the inability to deliver needed medicines and other health technologies and the penetration of substandard and falsified medicines and other health technologies into the market especially for countries with weak regulatory oversight.

796 Article 12 of the ICESC:
1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:
(a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
(b) The improvement of all aspects of environmental and industrial hygiene;
(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

797 Pamela Steele et al., *A Case for Local Pharmaceutical Manufacturing in Africa in Light of the COVID-19 Pandemic*, PSA (Oxford, 2020), 5.

> Some countries or regions largely rely on importation of medicines and other health technologies to meet the public heath need, which put their health security at risk should importation be interrupted. For instance, in Africa, more than 80% of the demand for essential medicines are imported.
>
> The COVID-19 pandemic has presented an unprecedented challenge to health systems causing complete disruption of the global supply chain of vital medicines and other health products. Many countries imposed restrictive measures during the COVID-19 pandemic to secure adequate access to certain critical medicines and medical products. These restrictive measures including export restrictions, export authorization, restrictions on movement and lockdowns, especially in countries that are the largest producers, has resulted in significant market gaps in many vulnerable countries. The crisis underscored the risk of overreliance on international health supply chains, imported medicines and other health technologies and donor support.[798]

The right to health is a central element of the international human rights system. It is part of the UDHR, ICESCR, as well as of regional human rights instruments and many national constitutions. By 2009, 135 countries had incorporated aspects of the right to health in their national constitutions. It also constitutes the basis for the overall objective of the World Health Organisation (WHO) – stated in Article 1 – which is "the attainment by all peoples of the highest possible level of health".[799] It is understood as a "right to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realization of the highest attainable standard of health."[800] In fulfiling the right to health, the State has the obligation to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realisation of the right to health, including the provision of essential drugs affordable for all, including disadvantaged groups.[801]

798 World Health Organisation (WHO), *Concept Note. WHO Resolution on Strengthening Local Production of Medicines and Other Health Technologies to Improve Access* (2021), 1-2, https://healthpolicy-watch.news/wp-content/uploads/2021/01/Zero-Draft-resolution-on-Strengthening-Local-Production-of-Medicines-and-Other-Health-Technologies-to-Improve-Access-Dec-042020.pdf.

799 World Intellectual Property Organization (WIPO) and World Trade Organization (WTO) World Health Organization (WHO), *Promoting Access to Medical Technologies and Innovation: Intersections between public health, intellectual property and trade* (Geneve: Book Now Ltd, 2013), 40.

800 Social and Cultural Rights Committee on Economic, General Comment No. 14. The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/2000/4, 3 (Geneva: United Nations, 2000).

801 Committee on Economic, Short General Comment No. 14. The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights), 9 and 13.

Also, the international dimension of the right to health is evidenced by the problem of access to affordable medicines and the lack of research and development (R&D) into neglected diseases. As explained by Sellin and Coomans, "these pose challenges of a global nature that states, particularly developing and least-developed, cannot solve without assistance and cooperation of the international community as a whole. That this is a global problem requiring a global solution, has also been recognised by the international community, for example with the commitment to the Millennium Development Goal which was (…) extended with the adoption of the Sustainable Development Goals."[802]

LCRs in this context would encourage the local production of medicine, vaccines, medical equipment and products, the transfer of related technology and capacity building, working ultimately as a "strategy to improve access to quality-assured affordable medicines and other health technologies, achieve universal health coverage and reduce dependency on imports to strengthen national health security, as well as to catalyze local capacity for innovation, strengthen capacity of the health workforce and stimulate a knowledge-based economy and social development."[803]Pharmaceutical production remains concentrated in the high-income countries. In contrast, most low- and middle-income countries import medicines, diagnostics, vaccines and other medical products and either have no pharmaceutical industry at all or are able to carry out only the relatively late-stage steps of formulation and packaging[804] Nevertheless, a number of these countries aspire to build and strengthen their domestic medical products' industry. Trends show that local production is growing and diversifying in some of these countries.[805]

802 Jennifer Sellin and Fons Coomans, *Extraterritorial Human Rights Obligations and the Transfer of Technology for Local Production and Research & Development for Essential Medicines*, Working Paper 2016/7 (Maastricht Faculty of Law, 2016), 7.

803 World Health Organisation (WHO), *Concept Note. WHO Resolution on Strengthening Local Production of Medicines and Other Health Technologies to Improve Access,* 4.

804 World Health Organisation (WHO), *Pharmaceutical Production and Related Technology Transfer* (France, 2011), 23-24.

805 "First, several countries that currently do not have strong API [active pharmaceutical ingredient] production capacity are interested in developing it, recognizing that this value-added step of the production process may be critical to enable firms to compete at an international level. For example, the Government of Bangladesh has approved the creation of an "API Park" to support its domestic industry, which currently primarily carries out formulation and packaging of imported APIs. Industry sources in Tunisia, South Africa, Argentina and Brazil also mentioned interest in upgrading their API production capacity. Second, some of the larger generics firms are developing into multinationals, with production sites in multiple countries. For example, India-based Ranbaxy has production sites in China, Ireland, India, Malaysia, Nigeria, Viet Nam and the United States. Third, the more advanced generics firms are spending increasing and substantial percentages of revenue on R&D for new formulations, new drug delivery systems and new chemical entities. Finally, northern-based multinationals are acquiring or partnering with southern-based firms." World Health Organisation (WHO), *Pharmaceutical Production and Related Technology Transfer*, 25.

Of particular relevance are initiatives of local production of essential drugs and vaccines. Brazil, for instance, has taken measures in the past for the local production of anti-retrovirals in the context of its HIV program, significantly lowering the prices of such medicine. Access to essential medicines is a vital component of fulfilling the right to health and governments have the obligation to ensure that vulnerable segments of the population have access to them.[806]

In implementing LCRs in the pharmaceutical industry for the purpose of promoting expansion and long-term sustainability of local production and sustainable supply of safe, effective, quality, and affordable essential medicines and vaccines (in line with SDG target 3.8[807]) – with a focus on quality production and inclusive and sustainable industrialisation (in accordance with SDG targets 9.2, 9.3, 9.5)[808], the State is taking measures to ensure the right to health for its population.

III.3.4.3 LCRs and cultural rights

Another ESC right which has a close connection to LCRs is the right to take part in cultural life, as established in Article 15 of the ICESCR and the progressive obligation of the State to take steps necessary for the conservation, the development and the diffusion of science and culture.[809]

Different countries have enacted measures to protect and promote the local broadcasting sector as well as local programming in radio and television. In this context, they have

806 World Health Organization (WHO), *Promoting Access to Medical Technologies and Innovation: Intersections between public health, intellectual property and trade*, 42.

807 Achieve universal health coverage, including financial risk protection, access to quality essential health-care services and access to safe, effective, quality and affordable essential medicines and vaccines for all.

808 Target 9.2: Promote inclusive and sustainable industrialization and, by 2030, significantly raise industry's share of employment and gross domestic product, in line with national circumstances, and double its share in least developed countries; Target 9.3: Increase the access of small-scale industrial and other enterprises, in particular in developing countries, to financial services, including affordable credit, and their integration into value chains and markets; Target 9.5: Enhance scientific research, upgrade the technological capabilities of industrial sectors in all countries, in particular developing countries, including, by 2030, encouraging innovation and substantially increasing the number of research and development workers per 1 million people and public and private research and development spending.

809 The Committee on Social, Economic and Cultural Rights considers that culture, for the purpose of implementing article 15 (1) (a) of the ICESC, encompasses, inter alia, ways of life, language, oral and written literature, music and song, non-verbal communication, religion or belief systems, rites and ceremonies, sport and games, methods of production or technology, natural and man-made environments, food, clothing and shelter and the arts, customs and traditions through which individuals, groups of individuals and communities express their humanity and the meaning they give to their existence, and build their world view representing their encounter with the external forces affecting their lives. Culture shapes and mirrors the values of well-being and the economic, social and political life of individuals, groups of individuals and communities. Social and Cultural Rights Committee on Economic, General comment No. 21. Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights). E/C.12/GC/21, 3-4 (United Nations, 2009).

implemented local control over and ownership of broadcasting companies as well as requirements that a certain amount of local programming be broadcasted, for instance, on an hourly, daily, weekly, and/or annual basis. Likewise, variable quotas for different types of broadcasting and programming have been implemented (television and radio, cable and satellite, free and pay-tv, public and private, films, children's programming, news, talk shows, different kinds of music, etc).

The purpose of these local content measures is related to protection of culture, pluralism and national identity. Governments are concerned that the international audio-visual industry homogenises and dominates programming in the broadcasting sector, reducing or eliminating pluralism and diversity of expression.

Consequently, most countries restrict liberalisation of the audio-visual sector to protect their cultural identity. Audiovisual services are seen as "a carrier of social, political, economic and trade considerations but also as a vehicle for ensuring other values of society, such as pluralism and democracy."[810] Indeed, "very few countries have implemented liberalization of their audio-visual markets, since in most countries this sector is considered 'sensitive', demonstrating the unwillingness to treat culture simply as a trade issue." [811]

In this context, the adoption of LCRs in the broadcasting and programming fields can be seen as a measure that creates a favourable environment for the realisation of the right to take part in cultural life. If such local content policies are removed, there is a risk the local, regional and national cultures and languages are threatened. In particular, it is worth mentioning the role of local media as public watchdog, creating channels for circulation of information and ideas and providing a forum for public debate closer to the community and with engagement with local politics and issues.[812] In addition, local programming can incentivise local artists, contributing to the dissemination of local culture.

Article 15 of the ICESCR states the obligation to adopt "policies for the protection and promotion of cultural diversity, and facilitating access to a rich and diversified range of cultural expressions, including through, inter alia, measures aimed at establishing and supporting public institutions and the cultural infrastructure necessary for the implementation of such policies; and measures aimed at enhancing diversity through public broadcasting in regional and minority languages."[813]

810 UNCTAD, Audiovisual services: improving participation of developing countries, 9 (Geneva 2002).
811 UNCTAD, Short Audiovisual services: improving participation of developing countries, 18.
812 Elda Brogi et al., "Regional and local broadcasting in Europe," *IRIS Special* (2016): 11.
813 Committee on Economic, Short General comment No. 21. Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights). 13.

Consequently, where local content rules are implemented in such a way as to promote local culture, expression and pluralism, they could be justified from a development perspective as they seek to ensure the conditions necessary for individuals to participate in cultural life and to facilitate and promote access to cultural goods.

III.3.4.4 LCRs and environmental rights

Another important correlation can be made between LCRs and environmental rights. In particular, LCRs in the green sector are closely related to the right to a healthy and sustainable environment.[814] Ambient air pollution is caused, among other factors, by electricity generation (from burning fossil fuels or biomass). The emissions arising out of such activity not only pollute the air, but also contributes to climate change, causing notorious catastrophic consequences. In addition, black carbon, which is formed by incomplete combustion of fossil fuels, biofuels and biomass, when deposited on snow and ice (e.g. snowfields and glaciers), accelerates melting, contributing to natural disasters and water insecurity. Under the right to a healthy and sustainable environment, however, States have obligations under human rights law to reduce their emissions of greenhouse gases.[815] Such emissions have implications for a wide range of human rights, including the rights to life, health, water, food, housing and an adequate standard of living.[816]

As explained by the UN Special Rapporteur on human rights and the environment, "a rapid shift away from fossil fuels to renewables such as solar and wind (except in the context of clean cooking, which often involves a shift to [liquified petroleum gas] LPG) could save as many as 150 million lives over the course of the twenty-first century by reducing air pollution."[817]

The use of LCRs to promote green industries also makes sense in light of the modern notion of circular economy, which entails approaches that may lead to lower rates of extraction and use of natural resources and that improve resource efficiency. Benefits of the transition to a circular economy, in turn, includes lessened exposure to (geo-political)

814 More than 100 States recognise some form of a right to a healthy environment in, inter alia, international agreements, their constitutions, legislation or policies. Several international treaties also include a right to a healthy environment. See Human Rights Council, Issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment. Report of the Special Rapporteur, A/HRC/40/55, 2-3 (United Nations, 2019).

815 Human Rights Council, Short Issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment. Report of the Special Rapporteur, 7.

816 Human Rights Council, Short Issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment. Report of the Special Rapporteur, 8.

817 Human Rights Council, Short Issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment. Report of the Special Rapporteur, 18.

supply risk, reduced environmental pressures and new economic opportunities. Circular economy initiatives are strongly facilitated through domestic policies.[818]

The policy rationales for the use of LCRs associated with green industries include promoting the development of infant green industries, shifting the economic structure of a country from rent-seeking industries (e.g. fossil-fuel sectors) into more diverse and high value-added sectors, and ensuring that economic development is more inclusive.

As explained in a report of the Partnership for Action on Green Economy (PAGE), a initiative of the United Nations Environment Programme (UN Environment), the International Labour Organisation (ILO), the United Nations Development Programme (UNDP), the United Nations Industrial Development Organisation (UNIDO) and the United Nations Institute for Training and Research (UNITAR):

> The development of green industries can be promoted by ensuring a relatively steady demand (required by local content requirements), which may allow certain industries to have better and cheaper access to capital and investment as well as to increase the production volume (thus reducing marginal costs of production). A frequent goal of certain types of local content requirements (e.g. requiring investors to domestically produce high value-added products and to locally hire some labour and services) is technological 'leapfrogging', i.e. the ability to learn from innovative practices in other countries without going through the entire trial and error process. This is particularly the case for sectors where the positive spillover effects are high (e.g. green services). LCRs are also used as a tool to shift the economic structure of a country from a brown to a greener economy, as for example in countries that are highly concentrated on fossil fuel extractive industries. In this context, local content requirements can promote higher value-added production (e.g. equipment) and services (e.g. engineering) as well as address potential coordination problems (e.g. when large industries are not engaging enough with the local manufacturing or services sectors). Local content requirements are also used to ensure a higher level of resource distribution and inclusiveness. Indeed, large and concentrated industries may be highly profitable but, if these profits are not shared more widely with other stakeholders (e.g. workers,

818 Shunta Yamaguchi, *International Trade and the Transition to a More Resource Efficient and Circular Economy – Concept Paper* (OECD, 2018), 6, https://doi.org/dx.doi.org/10.1787/847feb24-en.

small businesses, local providers of goods and services, etc.), this gap may lead to increasing inequality.[819]

Therefore, although it is acknowledged that the effectiveness of LCRs is context-specific, they could be important in the process of stimulating the proliferation of local renewable energy industries, contributing to the fulfilment of the right to a healthy and sustainable environment.

III.3.4.5 LCRs and the rights of indigenous people

LCRs could also have a relation with the rights of indigenous peoples as recognised in the UN Declaration on the Rights of Indigenous Peoples, adopted in 2007,[820] and the ILO Indigenous and Tribal Peoples Convention, of 1989 ("ILO Convention 169").[821] The oil and gas industry, the mining sector and Indigenous Peoples have been increasingly coming into contact with each other over the past few decades as the search for new oil and gas and mining resources make these industries exploit lands that Indigenous Peoples traditionally occupy or customarily use.[822]

In this context, the social impact of the activities of the oil and gas and the mining sectors become evident. In these cases, the idea of implementing LCRs seems consistent with the need to compensate local communities for using their lands and resource. In this context, Article 28[823] and Article 32[824] of the UN Declaration on the Rights of In-

819 Partnership for Action on Green Economy (PAGE), *Green Industrial Policy and Trade: A Tool-Box*, UN Environment and UNIDO under the Partnership for Action on Green Economy (PAGE) (2017), 56.

820 United Nations. General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly*, 2 October 2007, A/RES/61/295.

821 International Labour Organization, *Convention concerning Indigenous and Tribal Peoples in Independent Countries* (ILO Convention n. 169). Adoption: Geneva, 76th ILC session (27 Jun 1989).

822 IPIECA, Indigenous Peoples and the oil and gas industry: Context, issues and emerging good practice, 3 (United Kingdom: IPIECA, 2012).

823 Article 28 1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent. 2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take 21 the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

824 Article 32 1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources. 2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. 3. States shall provide effective mechanisms for just and fair redress for any such activities, and 24 appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

digenous Peoples and Article 15[825] of the ILO Convention 169 foresee that, in cases of resource extraction projects taking place on indigenous lands, Indigenous Peoples have the right to participate in the benefits of such projects and to be fairly compensated for any damages which they may sustain as a result of such activities. Under such instruments, Indigenous Peoples also have the right to participate in the use, management and conservation of the natural resources on their lands.[826]

Under this scenario, there is an increasing number of agreements[827] between companies and indigenous groups that are aimed at enabling greater indigenous economic participation and which include commitments to support the development of indigenous-owned enterprises, in particular incorporating small-to-medium enterprises (SMEs) belonging to Indigenous Peoples into the supply chains of the oil & gas or mining industries.[828]

The connection between the right to indigenous peoples and the right to development was elaborated in the *Endorois* case, decided by the African Commission on Human and Peoples Rights (ACHPR). The case concerns the eviction, by the Kenyan government, of hundreds of Endorois families from their traditional lands around the Lake Bogoria area in the Rift Valley, to create a game reserve for tourism. In response, and after pursuing

825 Article 15. The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources. 2. In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.

826 Articles 26 and 29 of the UN Declaration on the Right of Indigenous Peoples and Article 15 of the ILO Convention 169.

827 An example of agreement between a mining company and the indigenous community is the case of Rio Tinto Argyle Diamond Mine in Australia. Argyle's policy for local aboriginal content is driven by its mine participation agreement with indigenous owners, and is supported by a management plan specifically dealing with business development and contracting. The principle underpinning the plan is Argyle's commitment to increasing business opportunities connected with the mine's operations for local businesses in general, and indigenous owner businesses and local aboriginal community businesses in particular. Argyle defines "local" in the agreement as the East Kimberley Region. The company is obliged under the agreement to notify the business development task force (comprising indigenous owners and company representatives) of its intent to let any contract worth over an agreed amount in a year. In addition, any request for tender over this amount requires the tenderer to demonstrate how it will involve indigenous owner businesses in the contract, how it will employ and/or train indigenous owners, and how it will provide benefits to traditional owners. All else being equal, Argyle commits to giving preference to tenderers that bring the greatest opportunities to indigenous owners. Ana Maria Esteves, Bruce Coyne, and Ana Moreno, "Local content initiatives: Enhancing the subnational benefits of the oil, gas and mining sectors," *Natural Resource Governance Institute* (2013): 17.

828 Ana Maria Esteves and Mary-Anne Barclay, "Enhancing the benefits of local content: integrating social and economic impact assessment into procurement strategies," *Impact Assessment and Project Appraisal* 29, no. 3 (2011): 205.

legal options at the national level, the Endorois Welfare Council took the case to the African Commission on Human and Peoples Rights (ACHPR).In this case, the ACHPR was of the view that "the Respondent State bears the burden for creating conditions favourable to a people's development. It is certainly not the responsibility of the Endorois themselves to find alternate places to graze their cattle or partake in religious ceremonies. The Respondent State, instead, is obligated to ensure that the Endorois are not left out of the development process or benefits. The African Commission agrees that the failure to provide adequate compensation and benefits, or provide suitable land for grazing indicates that the Respondent State did not adequately provide for the Endorois in the development process. It finds against the Respondent State that the Endorois community has suffered a violation of Article 22 of the Charter [right to development]." [829]

In adopting LCRs, governments and companies could address important rights from Indigenous Peoples, as established in the human rights instruments mentioned above and the right to development. To this effect, local content policies for indigenous people could involve strategies to increase indigenous business access to contract opportunities include "assigning higher preference weightings to local businesses in competitive bidding processes; sole sourcing arrangements with local suppliers; price matching, that is allowing local suppliers to match the price of other suppliers; breaking large contracts into smaller ones (unbundling) to create opportunities for smaller local suppliers; requiring non-local suppliers to sub-contract locally or to enter joint ventures with local suppliers; providing technical and management training and mentoring; and linking local businesses to other service providers and agencies that promote technological innovation and provide access to finance." [830]

Indigenous peoples' right to maintain, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as expressed In Article 31 of the UN Declaration on the Rights of Indigenous Peoples and Article 4 and 31 of the ILO Convention 169, could also be addressed by local content measures in the broadcasting and programming sectors, by guaranteeing a percentage of content that is produced by Indigenous Peoples or of value for the maintenance and dissemination of their culture and language.

829 African Commission on Human and Peoples' Rights, Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, 4 February 2010 (Appl.no. 276/2003), para. 298.

830 Esteves and Barclay, "Enhancing the benefits of local content: integrating social and economic impact assessment into procurement strategies," 207.

III.3.4.6 LCRs and procedural human rights standards

The UNDRD states in its preamble that "development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals *on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom*."

It has been suggested that "[T]his three-dimensional entitlement encompassed by the right to development – participation, contribution, and enjoyment – underpins the very essence of the right as including both the process as well as the outcome aspects of development. It stresses that the right to development is realised not only based on 'what' is achieved, but also on 'how' it is achieved." [831]How it is achieved involves elements of accountability, transparency and participation.

As LCRs are "long journeys" in the sense that their effects may only be felt 10 years or more after their implementation,[832] analysing such measures from a development-oriented perspective may involve assessing whether they comply with these procedural standards in human rights.

Ensuring accountability involves raising awareness of rights and responsibilities, and developing the capacities of duty-bearers to fulfil their obligations. Accountability can be increased by involving stakeholders in analysis, programme planning, implementation, and reviews; by building relationships between rights-holders and duty-bearers by working together. It also entails using qualitative and quantitative data to reveal whether implemented policies are helping to achieve the desired behaviour change and ensuring that monitoring takes place on an ongoing basis. Monitoring should be participatory, involving all stakeholders as far as feasible, allowing them to assess both progress and any revisions required.[833] Furthermore, enabling participation means "ensuring that national stakeholders have genuine ownership and control over development processes in all phases of the programming cycle: assessment, analysis, planning, implementation, monitoring and evaluation."[834] Transparency, in turn, refers to an environment in which the objectives of policy, its legal, institutional and economic framework, policy decisions

831 United Nations. Human Rights Council. Working Group on the Right to Development. *Draft convention on the right to development, with commentaries.* UN Doc. A/HRC/WG.2/21/2/Add.1, 20 January 2020, p. 8.

832 John Sutton, "In Focus: Local Content Policy," August 7, 2014. Interview available at: https://www.youtube.com/watch?v=dU8LNd2fGLk. Accessed on: May 24, 2020.

833 Office of the High Commissioner for Human Rights, Short Frequently Asked Questions on a Human Rights-Based Approach to Development Cooperation, 25.

834 Office of the High Commissioner for Human Rights, Short Frequently Asked Questions on a Human Rights-Based Approach to Development Cooperation, 26.

and their rationale, data and information (…), and the terms of agencies' accountability, are provided to the public in a comprehensible, accessible, and timely manner."[835]

As regards local content policies, this means making governments accountable for the programs they implement by mechanisms that increase their responsibilities on the choices made in connection with the local content strategy. This involves having a transparent and open process of designing and implementing LCRs with the participation of the affected enterprises and civil society and establishing clear mechanisms of monitoring the efficacy of the local content policy on a permanent basis and disclosing related information to the public in accessible formats. Considering these procedural standards in the design and implementation of local content measures facilitates the differentiation between adequate and inadequate policies.

III.3.4 Concluding remarks

In view of the above, there is no reason why LCRs should be *per se* prohibited as policy instruments on account of their alleged negative reflex on trade liberalisation goals. There are other important parameters under which LCRs should be accessed. Their social impact and their effect on the realisation of human rights should be considered as well as the existence of mechanisms of accountability, participation and transparency in the desing and implementation of the measure. Evaluating LCRs only from the perspective of the trade liberalisation objective may be misleading as these measures may contribute, under certain circumstances, to the amelioration of social and economic indicators, and may contribute to the realisation of human rights.

Portraying LCRs as an inefficient policy means a retrocession in the concept of development and a return to the idea that there is only one path to development and that industrialised nations hold the secret of progress where LCRs are not included as a "sound policy instrument'. In fact, there is no single predefined model of economic and social policies that should be chosen by a country to boost its development process. Some sets of policies may work for some but not for others and there are many variables and country-specificities that should be considered. In this context, the idea of "demonising" one type of industrial policy such as LCRs[836] does not seem accurate. As seen in Chapter 1, LCRs have been beneficial to some countries, while not effective for others. It is a context-specific measure.

835 OECD, *Glossary of Statistical Terms* (OECD, 2002), https://stats.oecd.org/glossary/detail.asp?ID=4474#:~:text=Transparency%20refers%20to%20an%20environment,the%20public%20in%20a%20comprehensible%2C.

836 See, for instance, the report of the Peterson Institute, which calls LCRs "bad policy". Hufbauer, Schott, and Cimino, *Local Content Requirements: Report on a Global Problem*.

While it is relevant to assess LCRs in light of their social impact and their effect on the realisation of human rights, it is necessary to understand if this is possible from the perspective of WTO law or to what extent this is feasible.

As it will be further discussed in Chapter 4, WTO law can be interpreted in light of non-WTO norms, including those pertaining to the normative framework for development. However, to comprehend how the legal framework for development can play a role in the interpretation of WTO rules, it is important to have a clearer understanding of their nature and scope. The next subsection details the scope and nature of relevant rules of the normative framework of development and outlines how they could potentially be applied in the field of trade law.

III.3 NORMATIVE FRAMEWORK FOR DEVELOPMENT: SCOPE AND NATURE

The present section analyses in detail the human rights principles, concepts and instruments supporting this rights-based concept of development in order to verify how their disciplines could more effectively and concretely contribute to the analysis of WTO rules applicable to LCRs.

As previously stated, the revindication of developing countries within the UN resulted in the emergence of the "ideology of development", which contributed to the incorporation of development as one of the UN priorities[837] and the progressive transformation of development into a rights-based concept. Together with the evolution of the notion of development, a normative framework for development has also been elaborated.

Since the sixties, the UN has made different proclamations of development decades, working on development issues and concerns,[838] and promulgating a series of instruments supportive of a right to development, creating a body of law referred to herein as the legal or normative framework for development.

This normative framework is mostly comprised of several instruments of a soft-law nature as many of them involve declarations and resolutions from UN organs, reports from

837 Isabelle Roger, *Le droit au développement comme droit de l'homme: genèse et concept* (Lyon: Institute d'Etudes Politiques de Lyon, Université Lumière Lyon 2, 2003), 8.

838 1960-1970 (First Development Decade); 1971-1980 (Second Development Decade); 1981-1990 (Third Development Decade); 1991-1999 (Human Development Reports); 2000-2015 (Millennium Development Goals); 2016-2030 (Sustainable Development Goals). For a detail of the documents and actions of the UN involving each decade, see http://research.un.org/en/docs/dev/intro. Access on June 10th, 2020.

specialised agencies, among others. Its foundations, however, lay in the International Bill of Rights, comprised of the Universal Declaration of Human Rights (UDHR),[839] the International Covenant on Civil and Political Rights (ICCPR)[840] and the International Covenant on Economic, Social and Cultural Rights (ICESCR). This international Bill of Rights set important principles – such as the right to have a decent life (*"vie digne"*),[841] the right to a fair social and international order,[842] and the principle of self-determination[843] – which laid the groundwork for the elaboration of the right to development. The UNDRD, in turn, has particular relevance as it consolidates the right to development as a human right.

Many of the UDHR's provisions have become incorporated into customary international law, which is binding on all states.[844] The ICCPR and ICESCR, as treaties, should be binding, although especially the latter has its normativity contested due to its open-text style and often programmatic nature. Regardless of the legal status of such instruments as hard law or soft law, it is undeniable that they have formed a robust body of norms addressing development issues from a human rights perspective and contributed to the materialisation of the right to development, which is found and cross-referenced in human rights treaties and instruments, making development a crucial element of the international order.

This robust legal framework for development sheds light on the fact that development cannot be ignored at the international level and in the process of interpretation and application of other rights and obligations. It provides guidance and parameters for elaboration, interpretation and implementation of norms and policies having an impact on development, including WTO rules applicable to LCRs.

As the right to development is potentially connected to all human rights, below we will concentrate the analysis on the pillars of its normative framework, as it would be outside the scope of this thesis and an unsurmountable work to make an extensive analysis of all human rights. We will also discuss important concepts deriving from or closely related to the right to development, in particular, the "right to regulate" and the concept of "sustainable development". The main idea is to understand how these pillars and concepts

839 United Nations. General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).
840 United Nations. General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.
841 Article 3 and 25 of the UNDR; and Article 11 of the ICESCR.
842 Article 28 of the UNDR affirms the right to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized. See also the third paragraph of the preamble of the ICESCR and article 2.
843 Articles 1 of the ICESCR and the ICCPR.
844 Hurst Hannum, "The UDHR in national and international law," *Health and Human rights* 3, no. 2 (1998): 144.

could contribute to the interpretation of WTO law, in particular, those rules applicable to LCRs, although potentially all human rights play a role under a development-oriented perspective.

III.3.1 The pillars of the normative framework for development

III.3.1.1 UDHR, ICCPR and ICESCR: the founding principles

As mentioned, the UDHR, the ICCPR and the ICESCR provide the foundation for the idea of a right to development. Most important, they consolidated the principles of inherent dignity, of a fair social and international order, and of self-determination, which were essential for the elaboration of the idea of a right to development.

The UDHR contains "a 'survival kit' that sets a minimum existence protection standard"[845] premised on the values of human dignity and on an international order in which the rights and freedoms set forth in the Declaration can be fully realised. Ultimately, the aim of both human rights and development is to guarantee the inherent dignity of all human beings by providing them minimum rights and opportunities to develop themselves individually and within the community. Both the ICCPR and the ICESCR reinforce the notion of human dignity as the foundation of freedom, justice and peace in the world. Article 11 of the ICESCR builds upon the notion of inherent dignity, recognising "the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions" and States' obligation towards taking "appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent."

The UDHR also sets the basis of the collective and international dimension of the right to development to the extent that it is established in Article 28 that "everyone is entitled to a *social and international order* in which the rights and freedoms set forth in this Declaration can be fully realized." This anticipates the idea that States have domestic obligations towards the individuals relating to the respect, protection, fulfilment of human rights, but also have a duty to cooperate internationally to achieve these objectives. Article 2.1 of the ICESCR reinforces the need of international cooperation in the achievement of human rights standards, by stating that "[E]ach State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-

845 Eibe Riedel, Gilles Giacca, and Christophe Golay, "The Development of Economic, Social and Cultural Rights in International Law," in *Economic, Social, and cultural rights in international law: Contemporary Issues and Challenges*, ed. Eibe; Riedel, Gilles; Giacca, and Christophe Golay (Oxford: Oxford University Press, 2014).

operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures." Indeed, the obligation of the international community to establish international conditions which are conducive to the domestic realisation of ESC rights is a core component of the right to development.[846]

These provisions translate the spirit of the ideology of development, according to which international cooperation is a fundamental instrument to achieve development. At the same time, development is a necessary condition for the realisation of human rights.[847]

Additionally, the right to self-determination, which has historically been articulated by developing countries amid the decolonisation process, represents a strong foundation and an inseparable part of the right to development. It is enshrined in Article 1(2) of the Charter of the United Nations (UN Charter)[848] and recognised in Article 1(1) of the ICESCR and the ICCPR, which provides that "[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

A key element of the right of peoples to self-determination is the right to freely pursue their economic development as stated in Article 1 of the ICESCR and the preamble of the UNDRD. The economic aspect of the right to self-determination is justified by the fact that development and economic and social progress are highly dependent on improvements on the social and economic structures at the national level and the establishment of social justice.[849]

This right has been reaffirmed in several other resolutions of UN bodies, including the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations;[850] the

846 Noel G Villaroman, "Rescuing a troubled concept: An alternative view of the right to development," *Netherlands Quarterly of Human Rights* 29, no. 1 (2011): 23.

847 Roger, *Le droit au développement comme droit de l'homme: genèse et concept,* 17.

848 United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

849 Aureliu Cristescu, *The right to self-determination: historical and current development on the basis of United Nations instruments*, vol. 404 (New York: United Nations, 1981).

850 United Nations. General Assembly, *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, 24 October 1970, A/RES/2625(XXV).

Resolution on Permanent Sovereignty Over Natural Resources;[851] the NIEO Declaration; and the Charter of Economic Rights and Duties of States.[852] [853]

In this context, under the right to self-determination, the State, by virtue of its sovereignty, has the primary responsibility to promote development and "the right and the responsibility to choose its means and goals of development, fully to mobilize and use its resources, to implement progressive economic and social reforms and to ensure the full participation of its people in the process and benefits of development."[854] In promoting their development strategies, no one-size-fits-all solution can be formulated. They must be elaborated in view of the national conditions and features and must incorporate each country's own approaches to its realities.[855]

The idea of self-determination, in this context, entails independent decision-making by governments, which in turn, forms another core element of the right to development: the right of the people to an independent process of economic development.

This 'independent process of economic development' presupposes that the legitimate leaders of the people can determine the direction of the country's economic development through a process that is participatory, accountable, and responsive. As explained by Villaroman:

> (…) in order for a development process to be participatory, the 'people should have control over the direction of the development process, rather than simply being consulted about projects or policies that have already been decided upon.' Conflicting development goals ought to be harmonised after meaningful consultations with the concerned sectors and other stakeholders. An 'accountable' process of development entails that the particular administration and its economic managers who are responsible for the wrong economic decision must be ultimately answerable to the people. The idea of accountability is a sort of insurance held by the people that the leaders in charge of their economy would competently perform

851 United Nations. General Assembly, *Permanent sovereignty over natural resources*, 19 December 1961, A/RES/1720.
852 United Nations, General Assembly, *Charter of Economic Rights and Duties of States*, 6 November 1974, A/RES/3281.
853 Cristescu, *The right to self-determination: historical and current development on the basis of United Nations instruments*, 404.
854 Cristescu, *The right to self-determination: historical and current development on the basis of United Nations instruments*, 404, 56.
855 Cristescu, *The right to self-determination: historical and current development on the basis of United Nations instruments*, 404. 56.

> the trust conferred upon them. There is no accountability when the economic decision is externally imposed, fare far removed from the people in terms of effective remedial measures. Finally, an independent process of economic development must be responsive to real needs and be able to shift its development goals as the need arises. Determined by internal and external factors, a country's needs vary as it moves towards modernity. Its development process should be able to respond to these needs in a fairly adequate and timely manner.[856]

Another feature of the right to self-determination and the idea of an independent process of economic development is the right of peoples to "freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law."[857]

In this sense, self-determination is proclaimed by the UN as "an essential feature of the emerging international law of development and in particular in the establishment of a new international economic order (NIEO)".[858] In its economic aspect, the principle is characterised as "the right of peoples to economic development and to full and effective exercise of State sovereignty, including, as a basic constituent, the right of any State to reintegrate its national wealth and resources into the national assets and to use them in the interests of the economic development and well-being of its people."[859]

An important connection between the principle of self-determination and ESC rights was made by the ICJ in the *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. In this case, Israel was considered a violator of obligations *erga omnes* of respecting the right of the Palestinian people to self-determination.[860] By the construction of a wall in Palestinian territories, Israel not only limited the right of movement of Palestinians, but also promoted the destruction of fertile land, aggravating food insecurity. In addition, it hampered the Palestinians' access to health services, educational establishments, workplaces and primary sources of wa-

856 Villaroman, "Rescuing a troubled concept: An alternative view of the right to development," 29-30, fn omitted.
857 Article 1.2 of the ICESCR and the ICCPR.
858 Thomas Burri and Daniel Thürer, "Self Determination," *Max Planck Encyclopedia of Public International Law, Electronic Resource* (2008).para. 30
859 Burri and Thürer, "Self Determination."para. 30
860 International Court of Justice. *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ GL No 131, [2004] ICJ Rep 136, (2004) 43 ILM 1009, 9th July 2004, para. 155.

ter. [861] In this context, the right to self-determination, as included in the ICESCR, seems to entail the right of peoples to realise their ESC rights and the correspondent obligation *erga omnes* of other states not to interfere in the means and in the process of realisation of those rights. In other words, the ICJ *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* suggests that the right to self-determination entails an obligation *erga omnes* of a State to respect the right of other people (not necessarily their own) to realise their ESC rights without interference.

At the national level, the economic dimension of the principle of self-determination involves state intervention through measures in the form of economic, industrial and social policies bearing on employment, wages, investment, democratisation, fiscal policy, social welfare and wealth distribution. [862] At the international level, it entails an obligation of non-interference. In this sense, Villaromain argues that "economic prescriptions from external actors, while not always detrimental, should carry lesser importance if they contravene the development goals prioritised and reached during the participatory process."[863]

Finally, underscoring the interconnection between the right to development and the right to self-determination, the Draft Convention on the Right to Development, which was released in 2020 and represents an effort led by the Human Rights Council to start discussions to elaborate a draft legally binding instrument on the right to development through a collaborative process of engagement, sets forth as one of its general principle the concept of "self-determined development (Article 3(d)), according to which, "the right to development and the right to self-determination are integral to each other and mutually reinforcing."[864]

861 International Court of Justice. *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ GL No 131, [2004] ICJ Rep 136, (2004) 43 ILM 1009, 9th July 2004, para. 133.

862 Cristescu, *The right to self-determination: historical and current development on the basis of United Nations instruments*, 404, 55.

863 Villaroman, "Rescuing a troubled concept: An alternative view of the right to development," 30.

864 In the commentaries to the draft, it has been argued that "8. Paragraph (d) crystallizes another fundamental principle inherent to the right to development and its proper realization – the principle that development should be self-determined. This is inherent to the right to self-determination which finds a prominent recognition in the Charter of the United Nations. It is also the very first provision of both the ICCPR and the ICESCR indicating its vital importance to the realization of all human rights in general. Unsurprisingly, it is of core essence to the right to development as articulated in article 1 of the DRTD. It is also referenced in paragraph 6 of the preamble to the DRTD. The description in this paragraph states that "the right to development and the right to self-determination are integral to each other and mutually reinforcing". This phrasing demonstrates that the relationship between the right to development and the right to self-determination is such that neither exists nor can be realized without the other. Undermining one necessarily defeats the realization of the other." United Nations. Human Rights Council. Working Group on the Right to Development. *Draft convention on the right to development, with commentaries.* UN Doc. A/HRC/WG.2/21/2/Add.1, 20 January 2020, p. 25.

In view of the above, the UDHR, the ICCPR and the ICESCR, by consolidating the principles of inherent dignity, a fair social and international order and self-determination have established the foundations for the right to development and its underlying normative framework.

III.3.1.2 ESC rights

ESC rights in their international dimension are recognised by an evolving number of instruments of hard-law and soft-law nature. Binding legal instruments include, among others, the UN Charter and the ICESCR, which is more specific. Soft-law instruments include, inter alia, the Vienna Declaration and Programme of Action (1993), the MDGs (2000) and the SGDs (2015).

Although the ICESCR is a treaty and, in theory, hard law, its provisions are considered open-textured and programmatic,[865] which could raise doubts as to their justiciability and enforceability. Nevertheless, the International Commission of Jurists in the Bangalore Declaration and Plan of Action, in analysing the scope of ESC rights, rejected the idea that their open-ended nature makes them non-justiciable:

> Specifying those aspects of economic, social and cultural rights which are more readily susceptible to legal enforcements requires legal skills and imagination. It is necessary to define legal obligations with precision, to define clearly what constitutes a violation, to specify the conditions to be taken as complaints, to develop strategies for dealing with abuses and failures, and to provide legal vehicles, in appropriate cases, for securing the attainment of the objectives deemed desirable.
>
> Paradoxically, the consequence of this long-standing notion that ESC rights are non-enforceable has been an absence of any effort on the part of the judiciary in many countries to define principles for their construction. Due to the purely rhetorical value ascribed to these rights, and to the lack of attention paid to their interpretation by the judiciary and legal academics, fewer concepts have been developed that would help to understand rights such as the right to education, the right to an adequate standard of health, the right to adequate housing or the right to food.

865 ESC rights require active intervention on the part of governments and cannot be realised without such intervention. For this reason, their realisation is progressive, in as much as their fulfilment and efficacy depend on previous conditions such as economic resources and technical standards. See Philip Alston and Gerard Quinn, "The nature and scope of states parties' obligations under the International Covenant on Economic, Social and Cultural Rights," *Hum. Rts. Q.* 9 (1987); Alberto do Amaral Junior, *Curso de direito internacional público*, 5 ed. (Brazil: Atlas, 2015).

> However, the lack of practical elaboration of many of these rights does not justify the claim that because of some essential or hidden trait, ESC rights, as a whole category, cannot be defined at all.[866]

Efforts have been made in the context of UN bodies to clarify and give more precision to the content of ESC rights. However, given the formulation of some of its provisions, a high level of precision is still lacking. Domestic courts have more recently developed case law that is offering better criteria to further specify the content of ESC rights.[867]

Although the ICESCR focuses on issues of economic and social empowerment, it neither explicitly posits development as a right nor affirm economic and social empowerment within the framework of the right to development.[868] Nevertheless, the ICESCR influenced and informed the drafting of the UNDRD, which carries important principles and development-oriented rights from this covenant, including the principles of self-determination and sovereignty over natural resources. Ultimately, Article 1 of the UNDRD states that "the right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy *economic, social, cultural* and political development (…)."[869] ESC rights represent an important component of the right to development as it entails the realisation of civil and political and ESC rights, in an indivisible manner and without establishing any preferences. Also, without such rights, minimum opportunities cannot be provided for individuals for the improvement of their well-being.

To this effect, the ICESCR stresses the idea that all human beings should enjoy "freedom from fear and want", which "can only be achieved if conditions are created whereby everyone may enjoy their economic, social and cultural rights, as well as their civil and political rights."

The ICESCR sets forth new rights in addition to those established in the UDHR such as the right to work, the right to just and favourable conditions of work, the right to fair wages and equal remuneration, the right to decent living for themselves and their families, the

866 Bangalore Declaration and Plan of Action, para. 18(2). Bangalore Declaration and Plan of Action was issued following a conference on economic, social and cultural rights and the role of lawyers, convened by the International Commission of Jurists in Bangalore, India, October 23-25, 1995. International Commission of Jurists, "Bangalore Declaration and Plan of Action," (1995). Accessed on: June 27th, 2020.

867 International Commission of Jurists, *Adjudicating Economic, Social and Cultural Rights at national level: a practitioner's guide* (Geneva2014), https://www.icj.org/wp-content/uploads/2015/07/Universal-ESCR-PG-no-8-Publications-Practitioners-guide-2014-eng.pdf.

868 Bonny Ibhawoh, "The right to development: The politics and polemics of power and resistance," *Hum. Rts. Q.* 33 (2011).

869 Although this chapter focus on economic, social and cultural rights, it is important to clarify that they are strongly linked to political and civil rights, being considered indivisible.

right to form and join trade unions, the right to strike, the right to adequate standard of living, the right to be free from hunger, to adequate food, clothing and housing, cultural rights, among others.[870]

The signatories of the ICESCR are States and they continue to have a primary role in the realisation and enforcement of ESC rights. The rights conferred under this Covenant are essentially territorial.[871] However, other actors, in special, international organisations, may also impact the enjoyment of those rights in their acts and deliberations.

The international scope of ESC rights may have its basis on the States' duty to cooperate at the international level. To this effect, Article 2 (1) of ICESCR, recognising that the realisation of these rights greatly depends on international cooperation, imposes upon States a legal obligation to "take steps, individually and through international assistance and cooperation", further strengthening the legal basis to cooperate in achieving economic and social development. In addition, according to Article 11 (1), States´ parties agree to "take appropriate steps to ensure the realization of this right [to an adequate standard of living]," recognising to this effect the importance of international cooperation.

This duty of cooperation among States to realise ESC rights, based on the principle of solidarity set forth in Article 55 of the UN Charter, reinforces the international and extraterritorial aspects of those rights.

As explained by Sellin and Coomans:

> The ICESCR itself recognises this international dimension by referring to the obligation to takes steps 'individually, and through international assistance and cooperation'. So, unlike Article 2 of the 1966 International Covenant on Civil and Political Rights, the ICESCR does not have a limiting territorial/jurisdictional clause. Also, Article 11.2 in relation to the right to an adequate standard of living, Article 15.4 in relation to science and culture, and Articles 22 and 23 ICESCR further substantiate the importance of international cooperation and assistance in fully realising the ICESCR's rights. It seems, therefore, that an international dimension to the protec-

870 Amaral Junior, *Curso de direito internacional público*, capítulo 16, p. 7.

871 International Court of Justice. *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ GL No 131, [2004] ICJ Rep 136, (2004) 43 ILM 1009, 9th July 2004, para. 112.

> tion of ESC rights was intended – or at least implicitly recognised – by the drafters to the ICESCR.[872]

Indeed, commentators have elaborated a typology for ICESCR obligations involving the obligation to respect, to protect and to fulfil. Considering its international dimension, under the right to respect, the state has the duty to refrain from any action that might impede the realisation of ESC rights by other countries. Under the obligation to protect, a State shall guarantee that a non-State actor (e.g. international organisation) where it has some degree of influence or control observes the enjoyment of ESC rights in other countries. Ultimately, the obligation to fulfil would entail an obligation for developed countries to provide some for bilateral or multilateral assistance for developing countries.[873]

The Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, an important legal opinion adopted in September 2011 by a group of experts in international law and human rights convened by Maastricht University and the International Commission of Jurists, aimed at clarifying the content of extraterritorial State obligations with a view to advancing and giving full effect to the Charter of the United Nations and international human rights law, particularly in the context of economic globalization. In particular, the principles address the extraterritorial dimensions of the obligations to respect, protect, and fulfil human rights respectively.

Under the obligation to respect set out in principles 19 to 21 of the document, "all States must take action, separately, and jointly through international cooperation, to respect the economic, social and cultural rights of persons within their territories and extraterritorially (…). They shall also "refrain from conduct which nullifies or impairs the enjoyment and exercise of economic, social and cultural rights of persons outside their territories.". In addition, "States must refrain from any conduct which: a) impairs the ability of another State or international organisation to comply with that State's or that international organisation's obligations as regards economic, social and cultural rights; or b) aids, assists, directs, controls or coerces another State or international organisation to breach that State's or that international organisation's obligations as regards economic, social and cultural rights, where the former States do so with knowledge of the circumstances of the act."

872 Sellin and Coomans, *Extraterritorial Human Rights Obligations and the Transfer of Technology for Local Production and Research & Development for Essential Medicines,* 5.

873 Fons Coomans, " Application of the International Convenant on Economic, Social and Cultural Rights in the Framework of International Organisations," in *Max Planck Yearbook of United Nations Law*, ed. A. V.; Bogdandy and Wolfrum R. (2007), 380.

Under the obligation to protect detailed in principles 23 to 27, "States must take action, separately, and jointly through international cooperation, to protect economic, social and cultural rights of persons within their territories and extraterritorially." Also, "States must take necessary measures to ensure that non-State actors which they are in a position to regulate, (…) such as private individuals and organisations, and transnational corporations and other business enterprises, do not nullify or impair the enjoyment of economic, social and cultural rights. These include administrative, legislative, investigative, adjudicatory and other measures. All other States have a duty to refrain from nullifying or impairing the discharge of this obligation to protect." Among other obligations, "States must adopt and enforce measures to protect economic, social and cultural rights through legal and other means, including diplomatic means, as regards business enterprises, where the corporation, or its parent or controlling company, has its centre of activity, is registered or domiciled, or has its main place of business or substantial business activities, in the State concerned."

The obligation to fullfill, in turn, established in principles 28 to 35, involve, among others, taking deliberate, concrete and targeted steps, separately, and jointly through international cooperation, to create an international enabling environment conducive to the universal fulfilment of ESC rights, including in matters relating to bilateral and multilateral trade, investment, taxation, finance, environmental protection, and development cooperation. The compliance with this obligation is to be achieved through, inter alia: a) elaboration, interpretation, application and regular review of multilateral and bilateral agreements as well as international standards; b) measures and policies by each State in respect of its foreign relations, including actions within international organisations, and its domestic measures and policies that can contribute to the fulfilment of ESC rights extraterritorially. It also involves coordination and allocation of responsibilities among States in order to cooperate effectively in the universal fulfilment of ESC rights; contribution to the fulfilment of ESC rights extraterritorially, commensurate with, inter alia, its economic, technical and technological; cooperation to mobilize the maximum of available resources for the universal fulfilment of ESC rights.

As explained by Coomans, the international dimension of ESC rights is still under construction. The "scope of application of human rights law has traditionally been territorial, which means limited to the territory of a State Party."[874] However, as a result of the process of globalisation, the challenge then is "to reach beyond traditional concepts of state sovereignty in order to provide for international solidarity and achieve global justice."

874 Fons Coomans, "Rights-Based Governance: The Need for Strong State Obligations to Protect Human Rights in an Era of Globalisation," *Speculum Iuris* 34, no. 3 (28 Feb 2021): 4.

As summarised by Coomans:

> the law is currently trying to catch up with the ongoing process of globalization. The normative and protection gaps that have been created are now slowly being filled. This does not occur through a well-designed process, but rather through a piecemeal approach in which various actors play a role, such as courts, governments, parliaments and civil society at different levels and fora. Different types of legal sources, hard ones and soft ones, currently contribute to clarifying which human rights obligations states have and which human rights responsibilities can be imposed on non-state actors. It is clear that states still play a key role in this process because they are duty-holders and can create new duties for other actors.[875]

In any case, "negative international obligation to respect ESC rights is more tangible and probably stronger than positive obligations to protect and fulfil."[876] An initial elaboration of the international application of ESC rights and the state's obligation to respect other people's right to self-determination is laid down in the ICJ *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, where the Court stressed that the principle of self-determination is applicable to non-governing territories and reinforced that every State has the duty to refrain from any forcible action which deprives peoples of their right to self-determination. The ICJ in this context considered that Israel violated the ICESCR to the extent that the construction of the wall and associated regime impeded the exercise by the persons concerned of the right to work, to health, to education and to an adequate standard of living.[877]

ESC rights are particularly important in the context of international organisations such as the WTO. The process of trade liberalisation, if taken without limits, can have serious implications on the realisation of ESC rights, such as the right to health, right to food, right to work and right to adequate standards of living, and ultimately on the right to development. Due to this fact, it is important that ESC rights be considered by the WTO in its discharge of functions and by the dispute settlement system in the interpretation

875 Coomans, "Rights-Based Governance: The Need for Strong State Obligations to Protect Human Rights in an Era of Globalisation," 6-7.

876 Coomans, " Application of the International Convenant on Economic, Social and Cultural Rights in the Framework of International Organisations," 390.

877 International Court of Justice. *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ GL No 131, [2004] ICJ Rep 136, (2004) 43 ILM 1009, 9th July 2004, para. 34.

of WTO rights and obligations impacting such rights whenever they are raised by the disputing parties.

III.3.1.3 UNDRD and the consolidation of the right to development

From the legal perspective, the initial demands of developing countries, which had been recently decolonised, resulted in the incorporation of general principles by international law such as the right to self-determination, sovereignty over natural resources and the principle of equality among states.[878] It also resulted in the progressive recognition of a "right to development" during the debates over the NIEO and culminated in the UNDRD, which consolidates the right to development as a human rights.[879]

This Declaration defines development in its preamble as "a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom."

In this context, the UNDRD represents an advancement on the traditional notion of development as economic growth. It entails a rights-based perspective of development that is human-centred and entails a multidimensional and dynamic process impacting the individual and the collective, the national and the international."[880] It is not only concerned with the results of the development process but also with procedural aspects relating to *how* development is achieved. This procedural component of development carries core principles of all human rights: equity, non-discrimination, active and meaningful participation, accountability and transparency.[881] Development under the UNDRD also implies a claim for a social order based on equity, i.e. social justice, calling for the elimination of social inequality within societies and of structurally-imbedded patterns of international support for those inequalities.[882] It partly originates "from a

878 Salem Nasser, "Desenvolvimento, Costume Internacional e Soft law," in *Direito internacional e desenvolvimento*, ed. Alberto do Amaral Junior (Brazil: Manole, 2005).

879 For a detailed analysis of the evolution of principles in the Declaration on the Right to Development, see: Tamara Kunanayakam, "The Declaration on the Right to Development in the context of United Nations standard-setting," in *Realizing the Right to Development: Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development* (Geneva: United Nations, 2013).

880 Kunanayakam, "The Declaration on the Right to Development in the context of United Nations standard-setting," 18.

881 Ibrahim Salama, "The right to development at 25: renewal and achievement of its potential," in *Realizing the Right toDevelopment: Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development* (Geneva: United Nations, 2013).

882 Arjun K. Sengupta, "On the Theory and Practice of the Right to Development," in *Human Rights Quarterly*, ed. Arjun; Sengupta, Archna; Negi, and Moushumi Basu (New Dehli: Sage Publications India, 2005); Stephen P Marks, "The human rights framework for development: Seven approaches," in *Reflections on the Right to Development*, ed. Arjun; Sengupta, Archna; Negi, and Moushumi Basu (New Dehli: Sage Publications India, 2005).

new conception of the redistribution of power and decision-making and sharing of the world's resources."[883]

Article 1 of the UNDRD brings the core definition of the right to development:

> 1. The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.
>
> 2. The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.

First, the UNDRD identifies the right to development as an "inalienable human right"[884] and, is premised on the idea of human dignity. The right to development is concerned not only with the material conditions that allow people to benefit from economic processes in ways that improve their conditions but also with the normative constraints on power relations to ensure human dignity and the elimination of repressive and oppressive processes.[885]

The right to development is also seen as a "composite right, integrating within its ambit the distinct categories of human rights – civil and political rights on the one hand and economic, social and cultural rights on the other".[886] It thus entails a human right

883 Secretary-General, "The emergence of the right to development," in *Realizing the Right to Development: Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development* ed. Office of the High Commissioner for Human Rights (New York: United Nations Publications, 2013), 10.

884 The right to development is understood as a human right of third generation, which consist of solidarity rights belonging to peoples and covering global concerns like development, environment, humanitarian assistance, peace, communication, and common heritage. Stephen P. Marks, "Human Right to Development: Between Rhetoric and Reality, The," *Harv. Hum. Rts. J.* 17 (2004): 138. Solidarity rights are, in turn, "a product of social history, representing collective claims on the international community and premised on the idea that human rights are dynamic and constantly evolving as each generation infuses the values of its time They have been effective in shifting the balance of power in international relations, creating widely recognized, if not always realized, entitlements in international law and responding to the societal effects of globalization. They function at a community level to assure public benefits that can only be enjoyed in common with others." Shyami Puvimanasinghe, "International solidarity in an interdependent world," in *Realizing the Right toDevelopment: Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development* (Geneva: United Nations, 2013), 183.footnotes omitted.

885 Marks, "The human rights framework for development: Seven approaches."

886 Sengupta, "On the Theory and Practice of the Right to Development," 10.

integrating all the others, shedding light to their indivisibility and interrelatedness and rejecting the traditional differentiation between categories of rights and prioritisation of one set over the other.

This formulation of the right to development did not come without critiques. On the one hand, the right to development is explicitly recognised in Article 1(1) of the UNDRD as an inalienable self-standing human right, and, on the other hand, as a right "in which all human rights and fundamental freedoms can be fully realized". Based on this, doubts have been raised as to how the right to development can be a self-standing human right, and be at the same time, a type of an amalgamation of all other human rights. The argument that the right to development has been considered in this formulation as if it were some sort of a meta-right has led to the dismissal of the right itself by some scholars.[887]

In 1999, Mr. Arjun Sengupta, in an attempt to clarify the formulation of the right to development in article 1(1) of the UNDRD, presented a Vector Model of the right, where he posited that the right to development, being a self-standing human right, must be understood as a vector, with all other human rights as its elements. As per this conceptualisation, "the vector of the right to development can be advanced only if there is an improvement in any one of these elemental rights and no deterioration in any other."[888] This model has been very important to the extent that "it helps underline the obvious fact that development by its very nature is such that, as a right, it cannot be seen to have improved, if in the development process, one human right is sought to be realized at the cost of violating some other human right. (…) This specific characteristic of the right to development is a significant value-added to the corpus of existing human rights treaties because it provides the most comprehensive normative basis for the interdependence, indivisibility and interrelated nature of all human rights." [889]

Second, the right to development builds upon the principle of self-determination, as embodied in the ICESCR. The UNDRD sets forth in Article 2(3) that *States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair*

887 United Nations. Human Rights Council. Working Group on the Right to Development. *Draft convention on the right to development, with commentaries.* UN Doc. A/HRC/WG.2/21/2/Add.1, 20 January 2020, p. 30.
888 United Nations. Human Rights Council. Working Group on the Right to Development. *Draft convention on the right to development, with commentaries.* UN Doc. A/HRC/WG.2/21/2/Add.1, 20 January 2020, p. 30.
889 United Nations. Human Rights Council. Working Group on the Right to Development. *Draft convention on the right to development, with commentaries.* UN Doc. A/HRC/WG.2/21/2/Add.1, 20 January 2020, p. 31.

distribution of the benefits resulting therefrom. In this context, it consolidates the right the people to an independent process of economic development.[890]

In this context, the right to development, as based on the principle for self-determination, provides that it is "for each people to determine its own approach to development in conformity with international human rights standards; no one model for development was adequate or appropriate for all cultures and peoples."[891]

Domestically, States have a universal right to formulate their own development policies and not to interfere with the legal, political, economic, social and cultural sovereignty of other countries. [892] As mentioned by Sengupta, "the State has the primary responsibility to identify, devise and implement appropriate development policies and to follow the requisite sequencing of strategies so as to harness the opportunities provided by the global economy."[893] Designing their own developmental policies is also necessary to address the inequalities generated by the process of globalisation.

Third, Article 3(1) of the UNDRD establishes that "States have the primary responsibility for the creation of national and international conditions favourable to the realization of the right to development." Not only States shall choose appropriate domestic developmental strategies which are conducive to the realisation of all human rights, but, from an international perspective, States shall cooperate in the regional and global level to create a supportive global environment for countries to realise those development policies[894] under the principle of solidarity.

It is important to highlight that international solidarity is "not limited to international assistance and cooperation, aid, charity or humanitarian assistance; it is a broader

890 Villaroman, "Rescuing a troubled concept: An alternative view of the right to development," 23.

891 Report of the Global Consultation on the Right to Development as a Human Right, "The challenge of implementing the right to development in the 1990s," in *Realizing the Right to Development: Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Developmen* (Geneva: 2013), 54.

892 Kunanayakam, "The Declaration on the Right to Development in the context of United Nations standard-setting," 23. Articles 2 (3) of the UNDRD sets forth that :"States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom". In addition, pursuant to Article 8 (1), "States should undertake, at the national level, all necessary measures for the realization of the right to development and shall ensure, inter alia, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income. Effective measures should be undertaken to ensure that women have an active role in the development process. Appropriate economic and social reforms should be carried out with a view to eradicating all social injustices."

893 Sengupta, "Conceptualizing the right to development for the twenty-first century," 80.

894 Sengupta, "Conceptualizing the right to development for the twenty-first century," 80.

concept and principle that includes sustainability in international relations, especially international economic relations, the peaceful coexistence of all members of the international community, equal partnerships and the equitable sharing of benefits and burdens."[895] In this context, international solidarity is seen as "a vital component of the efforts of developing countries to realize the right to development of their peoples and to promote the full enjoyment of economic, social and cultural rights by everyone."[896] It is also based upon the duty of international solidarity that States shall seek to address barriers to the development process such as "continuing patterns of domination and dependency, unequal trade relations and restrictions from external sources on the right of every nation to exercise full sovereignty over its national wealth".[897]

Overall, especially in a globalised and intertwined world where the actions of one State in terms of their economic, trade, environmental domains, will necessarily affect the other, the right to development gains renewed importance for creating a specific framework which stresses the need for (i) an independent process of development; and (ii) a national and international environment (a) conducive to the enjoyment by all individuals, in an equal manner, of all basic human rights; and (b) free from structural inconsistencies and inequitable obstacles that hamper equal access to development by one and all.[898]

While the right to development has been crystallised in the UNDRD, it has also been recognised in human rights instruments and the subsequent practices, including the African Charter on Human and Peoples' Rights of 1981, the Arab Charter on Human Rights of 2004, the Human Rights Declaration of the Association of Southeast Asian Nations of 2012, and the Abu Dhabi Declaration on the Right to Development of 2016, adopted by the Independent Permanent Human Rights Commission of the Organization of Islamic Cooperation. It has also informed the elaboration of the MDGs and the SDGs. Nowadays, efforts have been made in the context of the Human Rights Council to discuss a legally binding document on the right to development. A first draft of a convention on the right to development has been issued for further debate in January 2020.

895 United Nations. Human Rights Council, *Human rights and international solidarity: resolution adopted by the Human Rights Council*, 18 July 2016, A/HRC/RES/32/9.
896 United Nations. Human Rights Council, *Human rights and international solidarity: resolution adopted by the Human Rights Council*, 18 July 2016, A/HRC/RES/32/9.
897 Secretary-General, "The emergence of the right to development," 9.
898 Salama, "The right to development at 25: renewal and achievement of its potential," 490.

III.3.1.4 Relevant concepts intrinsically related to the right to development: the 'right to regulate' and sustainable development

Two other concepts are of utmost importance when discussing the normative framework for development. First is the idea of the State's right to regulate, which is 'an essential prerogative' or 'corollary' of sovereignty[899] and the right to self-determination, entailing the sovereign's prerogative to regulate domestic policy for public interest purposes, including development. Second is the notion of sustainable development. The interconnectedness of the right to development and sustainable development has been recognised in the Rio Declaration (principle 3) and the Vienna Declaration and Programme of Action[900] (para. 11), according to which the right to development should be fulfilled so as to meet equitably the developmental and environmental needs of present and future generations.

(i) The 'right to regulate'

As seen above, the right to development – premised on the principle of self-determination – involves the States' right and duty to formulate their own developmental policies. From this notion derives the idea of a 'right to regulate', which will be of utmost importance for the discussion of the space left for countries to regulate in view of the limitations posed by WTO agreements, but also others regional and international instruments of economic nature.

The right to regulate is an undisputed principle of customary law and represents the States' right to regulate their political, economic and social affairs and adopt laws to protect matters of public interest.[901] Its fundamental basis is that the right to development cannot be realised without guaranteeing that States are able to fully exercise their right to take regulatory measures domestically to ensure the process of development. It is inherent to State sovereignty (…)."[902] Building upon the intrinsic relationship between the right to development and the right to regulate, the Draft convention on the right to development establishes as one of its principles, in Article 3(f), the "right to regulate", according to which "the realization of the right to development entails the right for States Parties, on behalf of their peoples, to take regulatory or other related measures to achieve sustainable development on their territory."

899 Kate Mitchell, "Accomodating the Public Interest in International Investment Treaties: Police Powers, Expropriation and Treaty Interpretation" (MPhil MPhil Thesis Resubmission, University of Oxford, 2014), 4.

900 UN General Assembly, *Vienna Declaration and Programme of Action*, 12 July 1993, A/CONF.157/23.

901 Mitchell, "Accomodating the Public Interest in International Investment Treaties: Police Powers, Expropriation and Treaty Interpretation," 1. See also: *Texaco Overseas Petroleum Company v Libyan Arab Republic*, Award on the Merits, 19 January 1977 (1978) 17 ILM 3, [59].

902 United Nations. Human Rights Council. Working Group on the Right to Development. *Draft convention on the right to development, with commentaries.* UN Doc. A/HRC/WG.2/21/2/Add.1, 20 January 2020, p. 26.

The notion of a right to regulate is very common in investment law and is explored through the 'actionable legal concept' of the doctrine of policy powers[903]. It denotes, under investment law, "the legal right exceptionally permitting the host state to regulate in derogation of international commitments it has undertaken by means of an investment agreement without incurring a duty to compensate."[904] Under the power policies' doctrine, "States have the right to enact reasonable, non-discriminatory regulations aimed at the public interest and enacted in accordance with due process, and such regulations will not constitute an expropriation."[905]

Although the doctrine operates, in general, in cases of allegations of expropriation, it can also play a role in case of other breaches of an investor's right. Furthermore, although it is mostly raised in matters involving environmental issues, it can be effective in "the public interest in general", that is, "in the interests of public health, safety, morals or welfare."[906]

In *Sedco v. NIOC*, one of the first cases to deal with this doctrine, Iran-US Claims Tribunal noted that it was an "accepted principle of international law that a State is not liable for economic injury which is a consequence of *bona fide* action within the accepted police power of States."[907] In *Chemtura v. Canada*, which is considered a landmark in that it contains a clear expression of the police powers' doctrine, the United Nations Commission on International Trade Law(UNCITRAL)'s arbitral tribunal concluded that:

> "Irrespective of the existence of a contractual deprivation, the Tribunal considers in any event that the measures challenged by the Claimant constituted a valid exercise of the Respondent's police powers .... [T]he PMRA [Pest Management Regulatory Agency] took measures within its mandate, in a non-discriminatory manner, motivated by the increasing awareness of the dangers presented by lindane for human health and the environment. A measure adopted under such circumstances is a valid

903 Mitchell, "Accomodating the Public Interest in International Investment Treaties: Police Powers, Expropriation and Treaty Interpretation," 4.

904 Aikaterini Titi, *The Right to Regulate in International Investment Law* (Baden-Baden: Nomos, 2014), 18. https://books.google.com.br/books?id=W_GrngEACAAJ.

905 Mitchell, "Accomodating the Public Interest in International Investment Treaties: Police Powers, Expropriation and Treaty Interpretation," 4. See also Alain Pellet, "Police Power and the State's Right to Regulate," in *Building International Investment Law-The First 50 Years of ICSID*, ed. Meg Kinnear et al. (Kluwer International Law, 2016), 449.

906 Pellet, "Police Power and the State's Right to Regulate," 448.

907 *Sedco, Inc. et al. v. National Iranian Oil Co. et al.*, No. !TL 55-129-3, Award (28 October 1985) Iran-US C.T.R. 248.

> exercise of the State's police powers and, as a result, does not constitute an expropriation."[908]

An important element that has emerged in investor-State arbitration decisions is that "for an exercise of police power to be reasonable, the effect of the regulation must be 'proportionate' to the public interest being pursued."[909] Given its wide acceptance in case-law and presence in the new generation of international investment agreements (IIAs), involving both developed and developing States,[910] the doctrine of police powers is considered an enforceable legal principle and part of customary international law.[911]

The reaffirmation of the right to regulate/doctrine of police powers "come in the backdrop of investment disputes in the past few years where some States have seen themselves prevented or limited in the exercise of their right to regulate in order to achieve fundamental developmental goals in accordance with their national policies and their

908 *Chemtura Corporation v. Govemment of Canada*, UNCITRAL, Award (2 August 2010) (Kaufmann-Kohler, Brower, Crawford) [hereinafter Chemtura v. Canada, 265-266.

909 Mitchell, "Accomodating the Public Interest in International Investment Treaties: Police Powers, Expropriation and Treaty Interpretation," 16. *Técnicas Medioambientales Tecmed SA v United Mexican States*, ICSID Case No.Arb(AF)/00/2, Award, 29 May 2003, [122]; *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v Argentine Republic*, ICSID Case No.Arb/02/1, Decision on Liability, 3 October 2006, [195]; *Les Laboratoires Servier v Republic of Poland*, UNCITRAL, Award, 14 February 2012, [569]; *Total SA v Argentine Republic*, ICSID Case No.Arb/04/1, Decision on Liability, 27 December 2010, fn 232; *El Paso Energy International Company v Argentine Republic*, ICSID Case No.Arb/03/15, Award, 31 October 2011, [241].

910 For instance, in the 2012 Southern African Development Community (SADC) Model Bilateral Investment Treaty, States Parties stipulate in the preamble that they are "reaffirming the right of the State Parties to regulate and to introduce new measures relating to investments in their territories in order to meet national policy objectives, and—taking into account any asymmetries with respect to the measures in place—the particular need of developing countries to exercise this right". Similarly, in the 2016 Pan-African Investment Code, States Parties recognize in the preamble "their right to regulate all the aspects relating to investments within their territories with a view to meeting national policy objectives and to promoting sustainable development objectives" [Southern African Development Community. Model Bilateral Investment Treaty, 2012, available at: https://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf. Accessed on June 20th, 2020]. Article 8.9 of the investment chapter of the Comprehensive and Economic Trade Agreement (CETA) between the European Union and Canada reads as follows: 1. For the purpose of this Chapter, the Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity. 2. For greater certainty, the mere fact that a Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits, does not amount to a breach of an obligation under this Section. It is pertinent to point out that both the SADC Model BIT and the CETA "reaffirm" the right to regulate indicating that this right is to be treated as inherently present in States and is not conferred anew by those IIAs. United Nations. Human Rights Council. Working Group on the Right to Development. *Draft convention on the right to development, with commentaries*. UN Doc. A/HRC/WG.2/21/2/Add.1, 20 January 2020, p. 26-27.

911 Pellet, "Police Power and the State's Right to Regulate," 449. See also United Nations. Human Rights Council. Working Group on the Right to Development. *Draft convention on the right to development, with commentaries.* UN Doc. A/HRC/WG.2/21/2/Add.1, 20 January 2020, p. 26. For a discussion on whether the policy power doctrine is better characterised as one of the 'general principles of law recognised by civilised nations' within the meaning of Article 38 of the Statute of the International Court of Justice (ICJ) or as international customary law, see Mitchell, "Accomodating the Public Interest in International Investment Treaties: Police Powers, Expropriation and Treaty Interpretation," 34-37.

commitments under the 2030 Agenda. In this respect, these new generation of IIAs insist on the reaffirmation of the right of States to regulate within their jurisdiction, especially when States pursue developmental goals that would allow them to, essentially, realize the right to development."[912] Aside from classical general exception clauses (e.g. indicating exceptions for environmental concerns), more recent BITs and FTAs investment chapters have established "carve-out" clauses containing express reference to the policy powers' doctrine.[913]

Ultimately, the inherent connection between the right to development and the right to regulate reflect the need to ensure that policies adopted by States to realise the right to development are not impeded by investment agreements or trade agreements that may, on balance, undermine the exercise of this right in favour of uneven protection to foreign investments and investors or to the ideal of trade liberalisation.

(ii) Sustainable development

In times of climate changes and environmental problems, it is important to stress that the right to development has an important connection with the concept of sustainable development. Today, sustainable development is "broadly understood as a concept that is characterized by (1) the close linkage between the policy goals of economic and social development and environmental protection; (2) the qualification of environmental protection as an integral part of any developmental measure, and vice versa; and (3) the long-term perspective of both policy goals, that is the States' inter-generational responsibility."[914]

The Rio Declaration (principle 3) and the Vienna Declaration and Programme of Action (para. 11) both state that the right to development should be fulfilled so as to meet equitably the developmental and environmental needs of present and future generations. The 2030 Agenda states that it is informed among other instruments by the UNDRD (para. 10) and recognises respect for human rights, including the right to development,

912 United Nations. Human Rights Council. Working Group on the Right to Development. *Draft convention on the right to development, with commentaries.* UN Doc. A/HRC/WG.2/21/2/Add.1, 20 January 2020, p. 26.

913 See COMESA Common Investment Area Agreement (2007), Art. 20(8) which provldes that "[c]onsistent with the right of states to regulate and the customary international law principles on police powers, bona fide regulatory measures taken by a Member State that are designed and applied to protect or enhance legitimate public welfare objectives, such as public health, safety and the environment, shall not constitute an indirect expropriation under this Article." Pellet, "Police Power and the State's Right to Regulate," 461.

914 Ulrich Beyerlin, "Sustainable Development," in *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2013). https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1609. Access on June 11, 2020.

as a prerequisite for peace and security and, therefore, for sustainable development (para. 35).[915]

Additionally, in the Draft convention on the right to development, it has been stated in the preamble that "the realization of the right to development constitutes both the primary end and the principal means of sustainable development, and that the right to development cannot be realized if development is not sustainable." The Draft also established as one of its general principle (i) the idea of "sustainable development" where "development cannot be sustainable if its realization undermines the right to development, and the right to development cannot be realized if development is unsustainable" and (ii) "the right to regulate" where "the realization of the right to development entails the right for States Parties, on behalf of their peoples, to take regulatory or other related measures to achieve *sustainable development* on their territory".

In discussing the interplay between the right to development and sustainable development, Kanade argues that:

> (…) the RtD [right to development] and sustainable development should be seen essentially as the same concepts in different incarnations. The former gives proper shape, colour and texture to the latter by purposely stressing on the right and duty aspects of sustainable development. By insisting that development is a human right which has clearly identified duty-bearers, the RtD hammers down the point that the only way development can be sustainable is if it is itself treated as a right and not as a charity, and if it encompasses all human rights as equally important and ensures that no human right is undermined. Indeed, in a study authorized by the UN Commission on Human Rights, Gutto noted that the RtD necessarily includes the notion of sustainable development, and should be more appropriately called "Right to Sustainable Development." Unsurprisingly, several recent Declarations have directly linked sustainable development with the RtD. Most importantly, the 2030 Agenda completes the circle by categorically reaffirming the RtD in the context of implementing the SDGs and by emphasizing that it is informed as well as grounded in the DRTD [Declaration on the Right to Development].[916]

915 Office of the High Commissioner for Human Rights, Short Frequently Asked Questions on the Right to Development. Fact Sheet No. 37, 13-14.

916 Mihir Kanade, "The Right to Development and the 2030 Agenda for Sustainable Development," in *Operationalizing the Right to Development for Implementation of the Sustainable Development Goals, E-learning module by OHCHR, UPEACE, and UNU-IIGH*, ed. Mihir; Kanade and Shyami Puvimanasinghe (United Nations, 2018), 8-9, fn omitted.

It is important to stress that the right to development and the sustainable development have different roots. The former has arisen from the demands of developing countries while the latter has emerged from specific concerns with environmental protection. However, in current times of increasing awareness of the ecosystem as an indispensable natural resource basis for any good life of present and future humans, the concepts of sustainable development and the right to development becomes intertwined and an integrative approach of development is proposed where economic and social development must be an integral part of environmental protection, and vice versa. [917] Under the 1992 Rio Declaration, the concept of sustainable development also has an important role in bringing together developed and developing nations under the spirit of a global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem (principle 7), and to eradicate poverty as an indispensable requirement for sustainable development (principle 5), while also addressing the special situation and needs of developing countries (principle 6).

In this context, in an exercise to consolidate the intrinsic relation between sustainable development and the right to development, Article 22 of the the Draft convention on the right to development sets forth that "States Parties, individually and jointly, undertake to ensure that: (a) Laws, policies and practices relating to development at the national and international levels pursue and contribute to the realization of sustainable development; (b) Their decisions and actions do not compromise the ability of future generations to realize their right to development; (c) The formulation, adoption and implementation of all such laws, policies and practices aimed at realizing sustainable development are made fully consistent with the provisions of the present Convention."

III.3.2 Potential applicability to international trade law

III.3.2.1 The interpretative function of the normative framework for development

After detailing important features of the normative framework for development, this subsection outlines how the related concepts and norms could play a role in the interpretation of WTO rules. Please note that a more comprehensive exercise on how they could be used to interpret specific WTO provisions applicable to LCRs will be made in Chapter 6.

At first, it is necessary to point out that Article 3 of the DSU establishes that the dispute settlement system of the WTO "serves to preserve the rights and obligations of Members under the covered agreements, and to *clarify the existing provisions of those agreements*

917 Beyerlin, "Sustainable Development."

in accordance with customary rules of interpretation of public international law." The Vienna Convention on the Law of the Treaties (VCLT),[918] which codifies some of the customary rules of interpretation, allows that a treaty be interpreted in ligh of "relevant rules of international law", consolidating the so called "systemic interpretation" under Article 31.3(c). Therefore, in theory, WTO law could be interpreted vis-à-vis the rules belonging to the normative framework for development.

Second, even though in many instances the legal status of the rights, principles and concepts embodied in the development framework is not solidly defined, they can still play a role in interpretation of WTO norms. Ultimately, as pointed out by Schrijver, the right to development is "well rooted in the existing core human rights treaties and has the potential to play a key role as a cluster right, an integrative right and a bridging right."[919]

Many of the norms belonging to the development framework are considered soft law and not hard law in nature. Hard law, as opposed to soft law, is characterised by "legally binding obligations that are precise (or can be made precise through adjudication or the issuance of detailed regulations) and that delegate authority for interpreting and implementing the law."[920] Soft law, in turn, is a term used to distinguish a series of deviations from hard law, where "legal arrangements are weakened along one or more of the dimensions of obligation, precision and delegation".[921] At the extreme, soft law can amount to "purely political arrangements in which legalization is largely absent." [922]

In particular, ESC rights are partly of a soft nature, despite being embodied in an international treaty, which is legally binding.[923] The right to development is also considered soft law. The right to self-determination, in turn, is considered a legal principle[924], and

918 United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331.

919 Nico Schrijver, "A new Convention on the human right to development: Putting the cart before the horse?," *Netherlands Quarterly of Human Rights* 38, no. 2 (2020): 84, https://doi.org/10.1177/0924051920924547, https://journals.sagepub.com/doi/abs/10.1177/0924051920924547.

920 Kenneth W Abbott and Duncan Snidal, "Hard and soft law in international governance," *International organization* 54, no. 3 (2000): 421.

921 Abbott and Snidal, "Hard and soft law in international governance," 422.

922 Abbott and Snidal, "Hard and soft law in international governance," 422.

923 Treaties, like non-binding resolutions or declarations may be potentially normative but still 'soft' in its nature because it articulates 'principles' rather than rules'. In this case, "it is the formulation of the provision which is decisive in determining whether it is hard or soft, not its form as a treaty or binding instrument." Alan Boyle and Christine Chinkin, *The making of international law* (OUP Oxford, 2007), 174.

924 Matthew Saul, "The normative status of self-determination in international law: a formula for uncertainty in the scope and content of the Right?," *Human Rights Law Review* 11, no. 4 (2011). See also International Court of Justice. *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ GL No 131, [2004] ICJ Rep 136, (2004) 43 ILM 1009, 9th July 2004, para. 112 and 134.

the related "State's right to regulate" under the police power doctrine is considered part of customary law. Sustainable development, in turn, has a controversial normative content. Some scholars suggest that it has gained the status of a principle of customary international law, or is at least going to become such a principle. Others defend that it is within the sphere of mere political ideals. An important function has been attributed to sustainable development as a meta-principle, as it will be discussed below.

One could argue that because most of the norms associated with the development framework are soft, their relevance for interpretative purposes is diminished. This, however, is not accurate. Soft law has an important role in interpretation, influencing and shaping court decisions. Therefore, even though most of the rights in the development framework are deemed soft, they maintain their relevance in the interpretation of WTO agreements and can assist WTO adjudicating bodies in achieving a balance between trade and developmental objectives in their construction of WTO agreements. As it will be detailed in Chapter 4, in some cases, panels and the Appellate Body resorted to soft law to interpret WTO obligations.

In the field of development, the complexity of the underlying themes in social and economic terms combined with the need for long-term collective action result in open and often ambiguous commitments where States undertake to cooperate, to work together and make their best efforts to solve certain issues. The flexibility of these soft law instruments is required from the political perspective to deal with the sensitivity of development issues and the different interests and concerns of the actors involved in the process.

Development-oriented norms entail high political costs for becoming hard law as they may have potentially strong distributional effects. In this sense, their transformation into hard law involves a complex process and they may likely predominate under a soft law nature. Also, it is important to consider that the right to development as built upon by the MDG and SDG is partially linked to the idea of financial assistance from developed to developing countries. This dimension of the right to development may never become hard law. It is very difficult to make developmental assistance a binding obligation as it may be conditional upon countries' economic prospects. Economic crisis can unexpectedly affect them and therefore countries may not be willing to make strong commitments on issues affecting their budget.

In this context, soft law is an important mechanism to facilitate cooperation and supersede bargaining problems amongst heterogeneous states to the extent that it can result in a compromise among States with enough flexibility to conclude the bargain.

Accordingly, the right to development as soft law can better accommodate power differentials. Politics permeates international law and restricts its autonomy.[925] It would be an overstatement to admit that the right to development, in this sense, is not limited by politics and can acquire a hard law nature.

Although soft law norms may not be legally binding, their importance cannot be dismissed. They have specific roles in providing some predictability as to the expected conducts of States and even create certain expectations in relation to these conducts.[926] In the case of the UNDRD and related instruments, they provide some predictability as to the parameters within which the parties should work towards the realisation of the right to development.

Further, soft law can contribute to the formation or creation of law.[927] In this sense, as explained by Besson, soft law "may be vested with a certain evidentiary value in the next stages of the law-making process"[928] such as customary norms or general principles of law. To this effect, the International Court of Justice (ICJ) stated in the *Legality of Nuclear Weapons Opinion* that "General Assembly resolutions, even if they are not binding, may provide evidence important for establishing the existence of a rule or the emergence of an *opinio iuris*."[929] Although it may be premature to state that the UNDRD, the MDGs or the SDGs have created customary law, they may have this potential.

More important for the purposes of this thesis, soft law norms have also role in supplementing and filling gaps in existing law through the role of national and international courts.[930] They can also be used as "mechanisms for authoritative interpretation or amplification of the terms of a treaty, and to that extent must be taken into account."[931] In this context, they can affect the way tribunals and dispute settlement bodies interpret and apply the law to concrete cases.

925 Abbott and Snidal, "Hard and soft law in international governance," 423.
926 Nasser, "Desenvolvimento, Costume Internacional e Soft law."
927 Abbott and Snidal, "Hard and soft law in international governance." An example of soft law representing a first step in a process of negotiation of a multilateral treaty is the non-binding Universal Declaration of Human Rights which preceded the ICCPR and the ICESC.
928 Samantha Besson and John Tasioulas, *The philosophy of international law* (Oxford University Press, 2010), 171.
929 International Court of Justice. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ GL No 95, [1996] ICJ Rep 226, para. 70.
930 Mary E Footer, "The Role of 'Soft' Law Norms in Reconciling the Antinomies of WTO Law" (paper presented at the Society of International Economic Law (SIEL) Inaugural Conference, 2008).
931 Boyle and Chinkin, *The making of international law*, 171. The authors mention that the Committee on Economic and Social Rights has interpreted the ICESCR to provide a right to clean water going beyond the Convention's terms.

In the interplay of soft law with treaties (in the context of application and interpretation of the latter), the non-binding force of soft law can be mitigated. In many instances, States may not be free to disregard soft law even when it is not incorporated into a treaty. Although soft law instruments may not be legally binding, "their interaction with related treaties may transform their legal status into something more."[932]

Additionally, soft law instruments may embody certain general principles or norms that can affect the way courts decide cases or international organisations exercise discretionary powers. The UDHR is illustrative of this case. Courts may invoke general principles by making reference to soft law instruments which may influence the interpretation, application and development of other rules of law.

The principle of sustainable development seems to play an important role as an element of the process of judicial reasoning. As explained by Boyle and Chinkin:

> Sustainable development (…) becomes a mediating principle between the right to development and the duty to control sources of environmental harm. Mediating norms or principles need not impose obligations or regulate conduct, they do not depend on state practice and they do not need the same clarity or precision as rules. (…) Such principles have legal significance in much the same way that Dworkin uses the idea of constitutional principles. They lay down parameters which affect the way courts decide cases or how an international institution exercises its discretionary powers. They can set limits, or provide guidance, or determine how conflicts between other rules or principles will be resolved. They may lack the supposedly harder edge of a 'rule' or 'obligation', but they should not be confused with 'non-binding' or emerging law. That is perhaps the most important lesson to be drawn from the ICJ' s references to sustainable development in the Case Concerning the Gabčíkovo-Nagymaros Dam. Even if sustainable development is not in the nature of a legal obligation, it does represent a policy goal or principle that can influence the outcome of litigation and the practice of states and international organizations and it may lead to significant changes and developments in existing law."[933]

Judge Vaughan Lowe, following this rationale, submitted that sustainable development is "a meta-principle, acting upon other legal rules and principles – a legal concept exercis-

932 Boyle and Chinkin, *The making of international law*, 173.
933 Boyle and Chinkin, *The making of international law*, 176. fn omitted.

ing a kind of interstitial normativity, pushing and pulling the boundaries of true primary norms when they threaten to overlap or conflict with one another."[934] Lowe's interstitial norms "operate as modifying norms which 'do not seek to regulate the conduct of legal persons directly', but rather establish the relationship between primary norms (those which regulate conduct).(…) As a modifying or interstitial norm, sustainable development may be employed as a standard against which conduct will be measured, and it is as a tool in the hands of judges that it acquires its normativity. It is capable of affecting the outcome of cases by 'colouring the understanding of the norms that it modifies'."[935]

Judicial bodies have used the principle of sustainable development to legitimise recourse to evolutive treaty interpretation,[936] as a rule of conflict resolution, and even to redefine conventional obligations. Indeed, in the context of the WTO, the Appellate Body has made recourse to the concept of sustainable development to interpret the meaning of "exhaustible resources" in Article XX(g) of GATT 1994.[937]

In view of the above, it is clear that the norms pertaining to the normative framework for development can play a role in the interpretation of WTO rules even when they bear a solf law nature.

III.3.2.2 No hierarchy between WTO norms and those pertaining to the normative framework for development

As it will be further detailed in Chapter 4, interpreting WTO norms in light of non-WTO norms is different from considering non-WTO norms as applicable law in WTO disputes. While the former is permitted, the latter may not under WTO system. Consequently, the norms pertaining to the normative framework for development can play a role in the interpretation of WTO law but cannot supersede the latter, also because they are generally considered as norms of equal hierarchy.

Although some legal scholars acknowledge the primacy of human rights norms over other international obligations, in general, it is not widely accepted that human rights

934 Vaughan Lowe, "Sustainable development and unsustainable arguments," in *International law and sustainable development: past achievements and future challenges*, ed. Alan E; Boyle and David Freestone (Oxford University Press, 1999), 31.

935 Virginie Barral, "Sustainable development in international law: nature and operation of an evolutive legal norm," *European Journal of International Law* 23, no. 2 (2012): 389.

936 The *US - Shrimp* (1998) case is an example of the Appellate Body using sustainable development as a legitimizing factor for evolutive treaty interpretation. See Chapter 4.

937 "(…) The preamble of the WTO Agreement - which informs not only the GATT 1994, but also the other covered agreements - explicitly acknowledges 'the objective of sustainable development'" (Appellate Body Report, *US – Shrimp* (1998), para. 129).

(except for *jus cogens*[938]) are in a higher legal rank than WTO norms and therefore should prevail. As mentioned by Howse, "[A]lthough some human rights norms are arguably *jus cogens* and therefore of higher legal status than ordinary treaty commitments, in general, treaty-based WTO commitments and human rights treaty obligations have equal normative force in international law."[939]Accordingly, in practical terms, it is difficult to argue that a Members' human rights or human rights' interest in pursuing local content policies should prevail over WTO discipline.[940] Ultimately, WTO adjudicating bodies will have, in their interpretative exercise of WTO norms, to pursue this delicate balance between trade and development objectives in analysing local content and other policies with a developmental objective.

Although the WTO Agreement is not particularly focused on human rights and WTO adjudicative bodies do not have jurisdiction to assess whether WTO Members have fulfilled or not their human rights obligations, as it will be detailed in Chapter 4, in analysing WTO obligations, panels and the Appellate Body should be mindful that the WTO obligations are to be interpreted in light of other international norms in a way that avoids conflict, and they should maintain a proper balance between the trade liberalisation objective and societal values. In interpreting WTO law in a way that promotes and respects human rights and the development objective, WTO adjudicating bodies are not only fulfilling their role in striking this balance in light of the Embedded Liberalism compromise, but they are also avoiding legitimacy problems. Ultimately, no adjudicative body, regardless of its jurisdictional powers, wants to be associated with an image of inconsiderate to human rights. This would make them lose authority before a broader audience.

938 According to Article 53 of the Vienna Convention on the Law of the Treaties, "[A] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

939 Robert Howse, "Mainstreaming the Right to Development into the World Trade Organization," in *Realizing the Right to Development: Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development*, ed. Office of the High Commissioner for Human Rights (New York: United Nations Publications, 2013), 249.

940 Also, it is difficult to recognise the right to self-determination as related to the right to development as *jus cogens* and therefore holding a higher legal status. According to Article 53 of the VCLT, *jus cogens* should be "accepted and recognized by the international community of States as a whole", which is not the case of the right to development. There is no single authoritative list of jus cogens norms and there is no agreement about the criteria for inclusion on that list. Overall, the most frequently cited candidates for the status of jus cogens include: (a) the prohibition of aggressive use of force; (b) the right to self-defence; (c) the prohibition of genocide; (d) the prohibition of torture; (e) crimes against humanity; (f) the prohibition of slavery and slave trade; (g) the prohibition of piracy; (h) the prohibition of racial discrimination and apartheid, and (i) the prohibition of hostilities directed at civilian population ("basic rules of international humanitarian law"). International Law Commission, *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law. Conclusions of the work of the Study Group.*, 189-90.

III.3.2.3 The role of the right to development

Considering the interpretative function of sof law norms mentioned above, it is argued that the right to development could also be viewed as a mediating principle or an interstitial norm, laying down parameters and providing guidance to the interpretation of WTO law. As stated by Barral, "[T]he more flexible and vaguer the content of the rule used as a hermeneutical reference, the wider the margin of appreciation for the judge in determining the sense of the rule interpreted."[941]

As the right to development requires the integration of economic and social considerations with the realisation of human rights, it could be a useful tool for WTO adjudicatory bodies to solve disputes where such considerations are in tension, as it is the case of LCR disputes. This concept allows a balancing exercise, legitimising its outcome and the choices made by the adjudicating bodies.

As it will be detailed in Chapter 4, WTO agreements should be read in light of the wider corpus of international law. The precise limitations of this type of systemic interpretation will be discussed. For now, it suffices to say that, although the status of the right of development is not yet fully crystallised, its nature is pervasive in international law and could, in theory, inform the interpretation of WTO rules.

The right to development is anchored in legally binding instruments, such as the ICCPR, the ICESCR, and principles such as self-determination.[942] It is also present in various forms, in regional human rights instruments.[943] Furthermore, the preamble of the Marrakesh Agreement recognises that WTO Members' "relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of *sustainable development*." Considering the ample presence of the right to devel-

941 Barral, "Sustainable development in international law: nature and operation of an evolutive legal norm," 393.

942 Other treaties where the right to development is anchored include: the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child, the Convention on the Rights of Persons with Disabilities, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the ILO Indigenous and Tribal Peoples Convention (No. 169), among others.

943 The right to development is enshrined in the Charter of the Organization of American States (1948), The African Charter on Human and Peoples' Rights (1981), the African Youth Charter, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, the Arab Charter on Human Rights (2004) and the Human Rights Declaration of the Association of Southeast Asian Nations (ASEAN) (2012). Office of the High Commissioner for Human Rights, Short Frequently Asked Questions on the Right to Development. Fact Sheet No. 37, 8.

opment in international law and its interconnectedness with sustainable development, WTO agreement could be read through the lens of this concept.

By making reference to the right to development, WTO adjudicating bodies could incorporate the procedural and substantial aspects of that right and the parameters built for assessing policy measures under a rights-based approach. This would enable the interpreter of the WTO agreements to evaluate trade measures (including LCRs), not only considering the technicalities of WTO law, but also in light of their impact on the realisation of human rights and taking into account broader parameters such as how much the relevant trade measure incorporates elements of accountability, participation and transparency. As mentioned by Schrijver, the integrative value of the right to development "can be in promoting and achieving development as a holistic and comprehensive process."[944]

The right to development therefore amplifies the discourse of WTO adjudicating bodies and enables them to have more instruments to assess the appropriateness of a trade measure considering its social dimension and human-rights impact. It allows for the analysis of the potential impact of the trade measure on a myriad of human rights and the incorporation of procedural principles – transparency, participation and accountability, in the assessment of the measure. A more detailed analysis of how the right to development could be incorporated in the interpretation of specific WTO provisions applicable to LCRs will be made in Chapter 6.

As regards local content polices, while it is important to understand their impact on trade, it is equally relevant to comprehend what their economic and social impacts are on the community they are applied and how they can affect the realisation of human rights domestically. Additionally, it is important to assess how the relevant LCR was designed, if in a transparent and inclusive way, providing mechanisms for accountability of the State, or whether it was created and implemented without consideration to principles of participation, transparency and accountability, possibly anticipating problems with the legitimate purposes of the measure. Additionally, given the interconnectedness of the right to development and sustainable development, these concepts can have particular relevance in informing the interpretation of WTO rules applicable to LCRs in the renewable energy sector.

Not only the right to development as a broad concept could be used in the interpretation of WTO agreements, but specific human rights such as ESC rights, environmental

944 Schrijver, "A new Convention on the human right to development: Putting the cart before the horse?," 92.

rights and the rights of indigenous peoples. The interconnection between LCRs and such rights have already been highlighted in subsection III.3.4.

III.3.2.4 The role of the principle of self-determination and the right to regulate

Finally, of particular relevance for the interpretation of WTO provisions is the principle of self-determination and the related concept of the State's right to regulate. On one side, under the principle of self-determination and the right to regulate, States should be permitted to take measures (including the adoption of LCRs) that would otherwise violate their free trade obligations if such regulation protects public policy interests. On the other side, WTO agreements highly constricts local content policies which potentially have a development dimension.

Panels and the Appellate Body have not recognised a real tension between WTO discipline, on one side, and the notions of self-determination and the right to regulate, on the other. In their views, Members simply decided, in the exercise of their sovereignty, to sign the WTO agreements and behave accordingly. In this sense, the Appellate Body in *Japan – Alcoholic Beverages II* (1996) stated that "[T]he WTO Agreement is a treaty - the international equivalent of a contract. It is self-evident that in an exercise of their sovereignty, and in pursuit of their own respective national interests, the Members of the WTO have made a bargain. In exchange for the benefits they expect to derive as Members of the WTO, they have agreed to exercise their sovereignty according to the commitments they have made in the WTO Agreement."[945]

Also in *China – Raw Materials* (2012), the Panel submitted that "WTO Members have an inherent and sovereign right to regulate trade. WTO Members and China have exercised this right, inter alia, in negotiating and ratifying the WTO Agreement. China has exercised its inherent and sovereign right to regulate trade in negotiating, among other actions, the terms of its accession into the WTO.""[946]

In the context of LCRs, this would be the same as saying that, if WTO Members abided by the WTO agreements, they have accepted restrictions on their local content policies.

945 Appellate Body Report, *Japan- Taxes on Alcoholic Beverages II* (1996), p. 15.

946 Panel Report, *China – Raw Materials* (2012), para. 7.156. This conclusion was reinforced by the Panel in *China – Rare Earths* (2014). In this case, the Panel argued that: "(…) a State's sovereignty is also expressed in its decision to ratify an international treaty and accept the benefits and obligations that such ratification entails. In becoming a WTO Member, China has of course not forfeited permanent sovereignty over its natural resources, which it enjoys as a natural corollary of its statehood. (…) China has, however, agreed to exercise its rights in conformity with WTO rules, and to respect WTO provisions when developing and implementing policies to conserve exhaustible natural resources" (Panel Report, China – Rare Earths, 2014, para. 7.270).

The problem, however, is not so simple. It is not because one State has entered into an international agreement that it is willing to lose considerable portion of its regulatory power to achieve developmental goals. This is the whole point of the police powers' doctrine: a State will not have the obligation to compensate a third party for a breach of an IIA, a BIT or an FTA where such breach *is a consequence of* bona fide *regulation within the accepted policy space of States*. [947]

In addition, in many cases, given the openness, incompleteness and ambiguities of treaties, States do not have a precise picture *ex ante* on the level of restrictedness of the regulation on their sovereignty. Ultimately, the idea of a right to regulate is that there are inherent sovereignty rights which are not negotiable despite international commitments.[948]

In this context, the right to regulate, premised on the right to self-determination and the right to development, sheds light to the importance of balancing trade and development objectives in the context of the WTO. It adds colour to the discussion on WTO Members' regulatory autonomy (*policy space*) to promote national policies, in particular, economic and social policies which best suit their development needs. As stated in an ICJ case, States have an obligation *erga omnes* to respect the right of self-determination of peoples, including their processes and chosen paths for the realisation of ESC rights.[949] Several decisions from investments tribunals recognise the right to regulate as a legal principle and as part of international customary law.

The debate on national regulatory autonomy generally involves demands from WTO Members in the sense that (i) "domestic regulations should reflect domestic social preferences and respond to domestic needs, even if these preferences and needs differ from other Members or international standards" [950]; and (ii) "the fulfilment of domestic regulatory purposes reflected in domestic regulations should be honoured despite their adverse trade effects, as long as these regulations reflect genuine preferences and priorities of citizens of the nation state rather than trade protectionism."[951]

947 *Sedco, Inc. et al. v. National Iranian Oil Co. et al.*, No. !TL 55-129-3, Award (28 October 1985) Iran-US C.T.R. 248.

948 In *China – Raw Materials* (2012), China argued that it has retained its inherent right to regulate trade using export duties to promote non-trade interests in 'exceptional circumstances'.

949 International Court of Justice. *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ GL No 131, [2004] ICJ Rep 136, (2004) 43 ILM 1009, 9th July 2004.

950 Michael Ming Du, "The rise of national regulatory autonomy in the GATT/WTO regime," *Journal of International Economic Law* 14, no. 3 (2011): 644.

951 Ming Du, "The rise of national regulatory autonomy in the GATT/WTO regime," 644.

In this context, it is important to discuss how much space is left for WTO Members to pursue national development policies and which role the right to self-determination/ right to regulate can effectively play in clarifying this policy space within the WTO. At the core of this discussion are the very parameters of state self-determination to pursue legitimate regulatory objectives or its right to regulate. As explained by Mattoo and Subramanian:

> "A major challenge for the multilateral trading system is to secure the benefits of trade liberalization without infringing on the freedom of governments to pursue legitimate domestic objectives. The difficulty lies in distinguishing between two types of situations. In one situation, a non-protectionist government cannot prevent certain domestic policies from incidentally discriminating against foreign competitors; in the other, a protectionist government uses a legitimate objective as an excuse to design domestic policies which inhibit foreign competition. The challenge is to devise rules which are sensitive to the difference between these two situations, exonerating the former while preventing the latter."[952]

The debate on policy space presupposes a "tension between international economic integration and the autonomy available to nation States to pursue policies that effectively support their economic development"[953] The increased internationalisation of markets and the associated stronger impact of foreign factors on national development have in many instances weakened the effectiveness of domestic policies. Commentators suggest that the result of the Uruguay Round of multilateral trade negotiations has extended the scope of multilateral disciplines to include rules that impinge directly on domestic policies. Consequently, WTO agreements largely restrict the sovereignty of nation States to adopt economic and developmental policies of their choice.[954]

952 Aaditya Mattoo and Arvind Subramanian, "Regulatory autonomy and multilateral disciplines: the dilemma and a possible resolution," *J. Int'l Econ. L.* 1 (1998): 303.

953 Jörg Mayer, "Policy space: what, for what, and where?" (UNCTAD Discussion Papers n. 191, United Nations, 2008).

954 Mayer, "Short Policy space: what, for what, and where?". See also DiCaprio and Gallagher, "The WTO and the shrinking of development space: How big is the bite?."; Akyüz, *Multilateral disciplines and the question of policy space.*

In the context of the WTO, it is argued that many industrial policy instruments[955] have been constricted. For instance, performance requirements such as LCRs; export subsidies; import controls and licencing requirements to protect infant industry; reverse engineering and copying, which have been largely used by industrialised countries in the past to advance their development process are currently outlawed by the WTO law.[956] In addition, research subsidies, although not prohibited, are considered actionable under the SCM Agreement.

As it will be further discussed in Chapter 4, however, the WTO agreements themselves do not seem to have intended to eliminate the ability of States to pursue their development objectives. Ultimately, the purpose of the WTO Agreement, as can be inferred from its preamble, is in line with the modern concept of development to the extent that it makes reference to objectives such as "raising standards of living", "full employment", "sustainable development" and the Members "respective needs and concerns at different levels of economic development." [957] WTO agreements also demonstrate preoccupation with the developing countries through SDT provisions for instance. In addition, exception clauses are supposed to preserve WTO Members' regulatory autonomy to pursue legitimate policy goals. Hence, WTO agreements possess certain mechanisms to establish this balance between trade, on one side, and development, on the other, and which would enable Members to pursue their economic, social and cultural development.

More important, "WTO agreements should not be read in clinical isolation from public international law."[958] Consequently, the right to self-determination/right to regulate as international customary law should be effectively taken into consideration in the interpretation of WTO agreements. Simply stating the prevalence of WTO law by arguing that Members have contracted out from other international obligations does not solve the serious problem of addressing the need to balance trade and non-trade objectives. In

955 Industrial policies are characterised as "development strategies that are aimed specifically at shifting the productive mix of an economy away from primary products in favour of manufactured goods. They generally focus on adjusting the industrial structure of the domestic economy to favour certain types of high-value-added industries over less profitable sectors. Countries pursue these types of policies because they expect that an economy based on manufactured goods will lead to continual productivity growth, more stable export prices, and more accessible externalities. Industrial policies often do not conform to economic ideals because they are embedded in national priorities which are not necessarily economically efficient." DiCaprio and Gallagher, "The WTO and the shrinking of development space: How big is the bite?," 782.

956 DiCaprio and Gallagher, "The WTO and the shrinking of development space: How big is the bite?," 783.

957 In this sense, Marks defends that "the right to development can be inferred in the WTO Agreements, even if they do not mention it expressly." Stephen P. Marks et al., "The role of international law," in *Realizing the Right to Development: Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development*, ed. Office of the High Commissioner for Human Rights (New York: United Nations Publications, 2013), 457.

958 Appellate Body Report, *US – Gasoline* (1996), p. 16.

this sense, it is proposed a major role for the right to regulate, as customary law, in the context of the WTO law.

It is well recognised that, with the exception of *jus cogens norms*, States may depart from customary international law through the conclusion of treaties. The relevant treaty rule operates as a *lex specialis* to displace the customary rule.[959] In this context, it could be argued, as it seems to be the position of the WTO adjudicating bodies, in *Japan – Alcoholic Beverages II* (1996) and *China – Raw Materials* (2012), that WTO law have displaced the right to regulate as *lex specialis*.

Nevertheless, this interpretation is problematic, as absent explicit treaty language making clear an intention to do so, it cannot be presumed that the right to regulate has been dispensed with or has no relevance to WTO law. The right to regulate is an inherent right deriving from States' sovereignty. Should they wish to derogate it, they should have made it explicitly. In this context, it is generally accepted that principles of interpretation "neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended."[960] Ultimately, there is a presumption against conflict normative conflict in international law,[961] so that WTO law and the right to regulate should be accommodated in harmony. In addition, the underlying ideal of embedded liberalism is very strong in the conceptualisation of the GATT system and, subsequently, the WTO system. Under this notion, markets should be embedded in their social context and, to this effect, Members should be able to meet their social and economic needs through domestic policies in line with their inherent right to regulate on public policy issues.

International customary law may also play a role in interpretation of treaties and, hence, the right to regulate is important in the process of interpretation of WTO rules. The VCLT allows that customary international law be taken into account together with context in the interpretation of treaties through 'systemic integration' (Article 31.3(c) of the VCLT), providing a mechanism to harmonise customary international law and treaty law so as to render them compatible. In this context, WTO provisions should be interpreted in light of the customary right to regulate, under which States may pursue certain regulatory measures that would otherwise violate their free trade obligations if such regulation is based on legitimate public policy grounds.

959 Joost Pauwelyn, "The Role of Public International Law in the WTO: How far can we go?," *American Journal of International Law* (2001): 537.

960 Appellate Body Report, *India — Patents (US)*, para. 45.

961 International Law Commission, *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law. Conclusions of the work of the Study Group.*, 25.

Although the right to regulate under the police powers doctrine is mainly applied in investment law, there is room to argue that it can be applied in other fields, including international trade law. First, because the right to regulate is an essential feature of the right to self-determination and this principle is not applied specifically to the area of investment law. It has a broad scope. Second, restricting police powers to expropriation claims under investment law may amount to a licence for claimants to neutralise a doctrine that is founded on the State's inherent right to regulate in public policy matters in general. Third, because, as mentioned, the notion of embedded liberalism is at the core of the WTO system and it presupposes Members' right to regulate, making this principle suitable for application in international trade law.

As explained by Mitchell, "in principle, the police powers doctrine may have a role to play in other standards of protection where the conduct under challenge is a regulatory measure enacted in the public interest. That is consistent with the municipal law equivalents of the doctrine, particularly the US, where concept applies across a broad range of cases."[962]

In this context, the right to regulate is important in interpreting WTO exception clauses such as Article XX of the GATT 1994 and Article XIV of the GATS but also in the interpretation of other WTO agreement which do not contain exception clauses such as the SCM Agreement.

In the first case, i.e., interpretation of exception clauses, the right to regulate could be used so as to expand the options of Article XX for justifying a breach of the GATT 1994 (or expand the possible justifications under Article XIV of the GATS). It is commonly understood that such clauses allow Members to adopt and enforce GATT or GATS-inconsistent measures for a closed list of pre-defined purposes, and subject to the requirements established therein.[963] However, the right to regulate as a broad concept encompassing the right of the State to regulate for public policy interests entails other situations which may not necessarily fall under the closed list of Article XX of the GATT 1994 or of Article XIVI of the GATS. Ultimately, public policy is a broad notion not necessarily limited to the justifications set forth in the paragraphs of such provisions. Article XX of the GATT 1994 and/or Article XIV of the GATS, hence, read in light of the right to regulate, could be viewed as encompassing other justifications for justifying WTO-inconsistent measures on public policy grounds.

962 Mitchell, "Accomodating the Public Interest in International Investment Treaties: Police Powers, Expropriation and Treaty Interpretation," 48.

963 Rüdiger; Wolfrum, Peter-Tobias; Stoll, and Clemens Feinäugle, *WTO - Trade in Services*, Max Planck Commentaries on World Trade Law, (Brill | Nijhoff, 2008), 293.

Moreover, the right to regulate could be used to clarify the meaning of the concepts of "public morals" in Article XX(a) of the GATT 1994; and "public morals" and "public order" in Article XIV(a) of the GATS, although the Panel and the Appellate Body have already attributed an ample scope to the expressions in *US – Gambling*.[964]

Finally, even where there are no explicit exception clauses in the relevant WTO agreement as it is the case of the SCM Agreement, the right to regulate could be used as an affirmative defence for breaches of such agreement on public policy grounds. As explained above, there is nothing in the WTO agreements that indicate that they have derogated the inherent right to regulate of the State.

It is important to recall that the Appellate Body has recognised WTO Members' right to regulate in the TBT Agreement even where there was no explicit exception clause in such agreement. The Appellate Body invoked the right to regulate from the preambular language stated in that agreement. It asserted in *US – Clove Cigarettes* (2012) that:

> The sixth recital suggests that Members' right to regulate should not be constrained if the measures taken are necessary to fulfil certain legitimate policy objectives, and provided that they are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade, and are otherwise in accordance with the provisions of the Agreement. We thus understand the sixth recital to suggest that Members have a right to use technical regulations in pursuit of their legitimate objectives, provided that they do so in an even-handed manner and in a manner that is otherwise in accordance with the provisions of the TBT Agreement.[965]

964 The Panel stated that "(…) the content of these concepts for Members can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values. Further, the Appellate Body has stated on several occasions that Members, in applying similar societal concepts, have the right to determine the level of protection that they consider appropriate. Although these Appellate Body statements were made in the context of Article XX of the GATT 1994, it is our view that such statements are also valid with respect to the protection of public morals and public order under Article XVI of the GATS. More particularly, Members should be given some scope to define and apply for themselves the concepts of "public morals" and 'public order' in their respective territories, according to their own systems and scales of values" [Panel Report, *US – Gambling*, para. 6.461]. The Appellate Body, in turn, summarised the Panel's finding as follows: "In its analysis under Article XIV(a), the Panel found that "the term 'public morals' denotes standards of right and wrong conduct maintained by or on behalf of a community or nation." The Panel further found that the definition of the term 'order', read in conjunction with footnote 5 of the GATS, "suggests that 'public order' refers to the preservation of the fundamental interests of a society, as reflected in public policy and law" [Appellate Body Report, *US – Gambling*, para. 296].

965 Appellate Body Report, *US – Clove Cigarettes (2012)*, para. 95. See also Appellate Body Report, *US – Tuna II (Mexico)* (2012), para. 213; and Appellate Body Report, *US – COOL* (2012), para. 272.

Likewise, there could be some margin to recognise WTO Member's right to regulate under the SCM Agreement even absent an explicit exception clause as it is the case in the GATT and the GATS.

III:4 CONCLUSION

In this chapter, it was possible to analyse the evolution of the concept of development. It was initially conceived from a purely economic perspective, generally equating development to the economic wealth of a country. Under this perspective, classical theories of development economics have disseminated universal solutions for the development issue ranging from capital accumulation to market-oriented policies. However, the narrowness and limitations of this view was not immune from critiques.

As a result of a long process of revindications of developing countries beginning with the decolonisation process in the 50's and 60's, doctrinal work and efforts to internalise the ideology of development within the UN, the notion of development has more recently expanded 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. In this context, the assessment of development based not only in economic indicators, but also on social factors becomes relevant as well as the analysis of the impact of policy decisions on the realisation of human rights and the analysis of policy measures based on procedural standards including participation, transparency and accountability. The contemporaneous concept of development considers that many ways lead to development and there is no universal solution for developmental issues.

In light of the evolution of the concept of development, when one analyses policies such as LCRs, it is not only relevant to assess their potential effects on economic indicators such as GDP growth, industrial production, consumer prices, employment indicators, but also on social aspects and on their potential contribution to the realisation of human rights. It has been ascertained that LCRs may potentially contribute to the realisation of the right to work, right to health, cultural rights, environmental rights, and indigenous rights. In addition, given that LCRs are long-term policies, it may not be possible to assess their impact on economic indicators in the short run, given that their concrete effects take time to materialise. As a result, when assessing LCRs under a rights-based perspective, it is also important to verify if they comply with procedural standards of transparency, participation and accountability. These parameters help in the assessment of the appropriateness of the measure. As seen in Chapter 1, according

to economic literature, LCRs may have positive outcomes when, among other conditions summarised in subsection I.2.3, the process of local content policy formulation is open and transparent, backed by strong and accountable institutions and allowing for cooperation between government and the market.

The evolution of the concept of development has been accompanied by the creation of a supportive normative framework. The principles of inherent dignity, of a fair social and international order and of self-determination together with 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.

The confluence point of all the norms pertaining to such legal framework lays in right to development, which is a vector right, having all human rights as its elements. Its purpose is ensuring an independent process of development for the people and guaranteeing an enabling environment conducive to the realisation of all human rights.[966] In the latter perspective, the concept of the right to development means that the respect for human rights should be an integral part of the process of development. This entails a notion of development that is not exclusively related to an economic process but to a deeper process involving the transformation of economic, political and social structures aiming at the emancipation of individuals.[967] In this sense, States have domestically and internationally an obligation to create an environment that is conducive to the enjoyment of, but not limited to, civil, political, economic, social, cultural rights by all individuals. The right to development also entails an important procedural perspective, that is, that development process should incorporate principles of transparency, accountability and participation.

These foundations have important implications on the interpretation of WTO rules. WTO law allows its interpretation in light of other international law norms. Even though several norms pertaining to the normative framework for development are soft law, they can still play a role in the interpretation process of WTO agreements.

It was suggested that the concept of sustainable development and the right to development function as a meta principle, establishing parameters and providing guidance on the interpretation of WTO provisions and influencing the outcome of the litigation. Also,

966 High-level task force on the implementation of the right to development, Short Report of the high-level task force on the implementation of the right to development on its sixth session. Right to development criteria and operational sub-criteria., 8.

967 Roger, *Le droit au développement comme droit de l'homme: genèse et concept,* 50.

in interpreting WTO agreements in light of the right to development, WTO adjudicating bodies could potentially incorporate in the analysis of trade measures criteria that is typical of a rights-based assessment. Consequently, they could analyse a trade measure not only in light of WTO technicalities, but also considering procedural human rights standards and their impact on the realisation of human rights.

In the case of LCRs, WTO adjudicating bodies could potentially analyse them not only in light of their impacts on trade, but considering a broader scenario, including whether the relevant local content policy was designed in a transparent and participatory manner, supported by accountability mechanisms, and their potential impacts on the realisation of human rights. The feasibility of such approach, however, will be further discussed in the next chapters.

Further, as mentioned, in the interplay between WTO norms and human rights, it is not possible to affirm that the latter prevail, unless they are of a *ius cogens* nature. Therefore, ultimately the interpretative exercise lay on the balancing between these norms and their underlying values so as to avoid conflict.

Finally, the right to self-determination and the related principle of the right to regulate play a fundamental role in the interpretation and application of WTO law. As part of international customary law, the right to regulate should be accommodated harmoniously within WTO law, either as applicable law or as a guiding principle for interpretation of WTO provisions. As applicable law, the right to regulate could work as an affirmative defence for otherwise WTO-inconsistent measures which cannot be justified under the strict boundaries of GATT or GATS' exceptions. It could also be used as affirmative defence in the context of WTO agreements that do not foresee exceptions as it is the case of the SCM Agreement. As an interpretative guide, the right to regulate could inform the meaning of concepts such as "public morals" and "public order" within WTO exceptions.

CHAPTER 4

4

Factoring in development in the analysis of WTO agreements

IV.1 INTRODUCTION

As seen in the previous chapters, the use of LCRs is strongly linked to developmental objectives. Under the framework for development, it is important to assess policy instruments such as LCRs in relation to their impact not only on economic indicators, but also on social parameters, procedural standards (e.g. participation and accountability mechanisms) and their consequences on the realisation of human rights. As seen, LCRs, if adequately designed and implemented, could contribute to economic and social improvements (e.g. level of employment, transfer of technology, improvement of international competitiveness and technological capacity of domestic industries, spill-over effects) and could create an environment that is conducive to the realisation of human rights such as the right to work, right to health, right to take part in cultural life, right to a healthy environment and the rights of indigenous people.

However, as seen in Chapter 2, the current interpretation of WTO law as applicable to LCRs generally result in a prohibition of such measures. This sheds light on the possible deficiencies of WTO law and but also WTO adjudicatory bodies in addressing development concerns and taking into account the normative framework for development. As recognised by Qureshi, "the development dimension in the interpretation of the WTO agreements has been neither sufficiently articulated nor coherently structured in the architecture of international trade agreements."[968]

By articulating development in the interpretation of WTO rules on LCRs, WTO adjudicatory bodies could achieve a more adequate balancing between trade liberalisation concerns, on one hand, and non-trade interests, on the other, alleviating the burdens of free trade and better reflecting the objectives of the WTO Agreement. This balance is particularly important in the case of LCRs as they are strongly associated with development concerns.

The systematic prohibitions on LCRs under WTO law do not seem logical where (i) the modern understanding of development rejects one-size-fits-all solutions for development problems and acknowledges the diversity of policy instruments that can be used to attain development goals; (ii) the normative framework for development could be supportive of LCRs when they are adequately designed and implemented and produce positive impacts on economic and social indicators as well as human rights; (iii) WTO goals are intertwined with development in the broad sense and are not limited to trade liberalisation; (iv) WTO agreements seek to strike a balance between Members' regula-

968 Qureshi, *Interpreting WTO Agreements: Problems and Perspectives*, 181.

tory autonomy and free trade; (v) WTO law should not be read in clinical isolation from the normative framework for development.

In Chapter 3, we have argued that the normative framework for development can, in theory, play a role in the interpretation of WTO agreements. Nevertheless, it is important to analyse, in view of the particularities of WTO law and practice whether such development-oriented approach to WTO agreements is possible and what are the legal mechanisms that can be used to incorporate development in the interpretation of WTO law.

In view of the above, this Chapter will briefly explain how development has been considered in the WTO as an institution and will examine the importance of factoring in development in the interpretation of the WTO agreements. Subsequently, it will examine the interpretative techniques and principles used in the context of the WTO dispute settlement system that could be used to articulate development in the interpretation of WTO rules. It will analyse the aspects of these techniques and principles that could favour a development-oriented approach to WTO law and those that pose limitations to this approach.

IV.2 DEVELOPMENT AND THE WTO

IV.2.1 General picture

In order to understand how development is treated within the WTO, it is indispensable to clarify how development was incorporated in its predecessor, the GATT as a *de facto* international organisation,[969] its underlying agreement, the GATT 1947, and in the following rounds culminating the Uruguay Round which resulted in the creation of the WTO. The WTO inherited the GATT's history, the ideology present throughout its existence and the idea of development that was elaborated during its trajectory.

The GATT was not designed from a development-oriented perspective. It was originally created to meet the needs of a group of industrialised nations aiming to increase trade

969 As explained by Bossche and Zdouc, "although the GATT was conceived as a multilateral agreement for the reduction of tariffs, and not an international organisation, it would successfully 'transform' itself – in a pragmatic and incremental manner – into a *de facto* international organization." Bossche and Zdouc, *The Law and Policy of the World Trade Organization - Text, Cases and Materials*, 78.

opportunities among them.[970] Developing countries were largely not present in the international system at that time.

During the 1950s and the 1960s with the decolonization processes, many developing countries became signatories of the GATT. However, even in this context, "the specificities of their socio-economic make-up were not accounted for in the core principles of the negotiations or in the process of trade liberalization."[971] It is illustrative the fact that "the original GATT made no formal distinction between developed and developing countries."[972] Reciprocity in trade negotiations and "balance of concessions" were the main concerns at the time the GATT was created and presupposed that countries are treated equally. Of course, in reality, countries are far from equal.

In addition, at the inception of the GATT, developed contracting parties were not willing to make concessions on agricultural subsidies and to reduce barriers on tropical products and other goods typically produced by developing countries such as textiles and shoes. In response, developing-country signatories of the GATT sought an alternative forum more hospitable to their development concerns, the UN Conference on Trade and Development (UNCTAD). As pointed out by Prévost, "the tendency of developing countries to act collectively at that time [during the late 60s and the 70s] together with the rivalry from UNCTAD meant that developed Contracting Parties could not afford to ignore the demands of developing countries."[973]

The discussions within UNCTAD were important for the future addition of Part IV (Trade and Development) to the GATT 1947 and for the development of the enabling clause and the generalized system of preferences (GSP).

The addition of Part IV of the GATT 1947 in 1964 was an attempt to introduce development at the core of trade liberalisation disciplines. Nevertheless, the effort proved unsuccessful. Although Article XXXVI stresses the general need for improving the relationship between trade and development, most of the provisions are drafted in the form of "best efforts". Therefore, their operative, legal and practical value is highly questionable and uncertain.

970 Even though developing countries such as Brazil, Chile, India, Lebanon, Pakistan, Syria and South Africa are founding members of GATT, the agreement was mainly elaborated in view of the interests of the US and other European countries signatories of the treaty.

971 Rolland, *Development at the WTO*, 76.

972 James; Bacchus and Inu Manak, *The Development Dimension: What to Do About Differential Treatment in Trade*, Catho Institute (Washington, DC, 2020), 9.

973 Prévost, *Balancing Trade and Health in the SPS Agreement: The Development Dimension*, 39, footnotes omitted.

In this sense, Prévost explains that Part IV of the GATT 1947:

> "represented an evolution in the concept of special and differential treatment of developing countries, away from the idea that additional flexibility in GATT rules for trade restrictive measures by developing countries was sufficient, towards recognition of the need for developed countries to play an active part by granting preferential treatment to developing countries. However, Part IV is mostly hortatory, setting out principles and objectives and best-endeavor commitments."[974]

Also, as pointed out by Rolland, "Part IV effectively gave no additional opportunities for developing countries to derogate from GATT disciplines for purposes of development, nor did it obligate developed countries to make additional concessions to developing countries."[975] Indeed, developing countries claim that Part IV has been without practical value as it does not contain any obligations for developed countries.[976]

Part IV of the GATT 1947 also formally included for the first time the principle of non-reciprocity in the GATT with Article XXXVI:8,[977] which prevailed as a guiding principle in negotiations during the Tokyo Round. However, this principle did not prove very effective for developing countries as they did not obtain tariff reductions from developed countries that were interesting to the developing countries. In other words, non-reciprocity had the effect of concentrating negotiations among rich countries. As developing countries were not obliged to make concessions, they had very limited power to bargain with other countries and extend trade liberalisation to sectors where they were competitive. As a result, they become mere bystanders and not active participants of the negotiations.[978]

Developing countries' efforts within UNCTAD also laid the ground for the development of the Generalised System of Preferences (GSP) in 1968 and the introduction of the Enabling Clause in 1979. Through the GSP, developed countries could grant non-reciprocal market access to products from developing countries, and developing countries could grant each other more preferential tariffs. The purposes of this system

974 Prévost, *Balancing Trade and Health in the SPS Agreement: The Development Dimension*, 40.
975 Rolland, *Development at the WTO*, 70.
976 WTO. Trade and Development Committee. *Special and differential treatment provisions.* Available at: https://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm. Access on: 15 Sept 2021.
977 "The developed contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariff s and other barriers to the trade of less- developed contracting parties."
978 Nasser, *A OMC e os países em desenvolvimento*, 42.

were to increase developing countries' export earnings; promote their industrialisation; and accelerate their rates of economic growth. The main problem is that the grant of preferences is discretionary and revocable at will. The Enabling Clause also introduced the notion of "graduation", whereby developing countries were expected to eventually cease to use preferences as their economy grew. Experience to date has shown that developing countries have to pay a considerable price in bargaining with developed countries for benefits under the GSP.[979] Due to various reasons, especially the fact that MFN tariffs (bound as well as applied) have gone down considerably since the 1960s, the GSP became less attractive in the 80's and 90's and is not seen anymore as an effective instrument to foster trade in developing economies with a view to the development objective.[980]

Ultimately, developing countries' strategy to use UNCTAD to address their development concerns relating to the GATT proved limited. The UNCTAD resolutions are not legally binding; the GATT structure was not legally open to UNCTAD decisions or declarations in the sense of incorporating them into GATT law through legal (as opposed to political) instruments; it was a closed system where GATT parties were only bound to GATT rules and not other norms of international law. Naturally, other rules that do not fall squarely within the definition of norms of international law as established in Article 38 of the ICJ Statute as it is the case for UNCTAD declarations were also completely out of the scope of the GATT. Coordination and collaboration between the GATT and other institutions were not eagerly welcome by developed contracting parties. In fact, the problem of coordination among international organisations remains today at the WTO[981], although significant progress has been made since the GATT days.

Starting from the Tokyo Round to the Uruguay Round,[982] new matters were regulated: subsidies, services, investment and intellectual property, which reduced the policy space of developing countries to implement their development strategies.[983] These new

979 Rolland, *Development at the WTO*, 70.

980 Nasser, *A OMC e os países em desenvolvimento*, 254.

981 Rolland, *Development at the WTO*, 70.

982 During the GATT years, eight rounds of tariff negotiations were held between 1947 and 1994: Geneva (1947), Annecy (1949), Torquay (1950-51), Geneva (1956), Geneva (1960-61) - also known as the Dillon Round, the Kennedy Round (1964-67), the Tokyo Round (1973-79) and the Uruguay Round (1986-94). The first five rounds concentrated on the reduction of tariffs. As from the Kennedy Round (1964-67) on, negotiations increasingly focused on non-tariff barriers. The Uruguay Round (1986-94) resulted in the creation of the WTO. Bossche and Zdouc, *The Law and Policy of the World Trade Organization - Text, Cases and Materials*, 78-79.

983 Prévost explains that the various Codes negotiated during the Tokyo Round addressed areas such as government procurement, import licencing, customs valuation, antidumping measures, subsidies, countervailing measures, and technical barriers to trade. Developing countries' participation was limited to making proposals on the inclusion of special and differential treatment provisions, which were not fully realized. Implemented special and differential treatment provisions were, at times, vague or inadequate. Prévost, *Balancing Trade and Health in the SPS Agreement: The Development Dimension*, 47-48.

matters reflected behind-the-border measures affecting parties' domestic regulation and restricting their regulatory freedom. Although an Agreement on Agriculture and an Agreement on Textiles and Clothing (ATC) were negotiated during the Uruguay Round as a result of the pressure from developing countries, the former was clearly insufficient to address the concerns of the developing countries and to open the markets of developed countries for the products of developing nations.[984] The ATC, in turn, which established an integration programme to phase out all quota restrictions on textiles and clothing over a 10-year transition period, resulted in important gains for developing countries from world trade liberalization in this sector.[985]

In readdressing development issues during the Uruguay Round, development as a holistic and long-lasting process was not a prevailing thought in the negotiation of new rules. Rather, under the neoliberal thinking, "allowances for development are considered anomalies to be eventually phased out."[986] To this effect, development was dealt with in the Uruguay Round through several transitional periods for implementation of the agreements, limited development-oriented exceptions and derogations reflected in special and differential treatment (SDT) provisions and unilateral preferences.

The idea was to let the market as free as possible. Free trade was pictured as "the" path for development. Accordingly, development was put in a secondary place to the extent that it was considered a natural effect of trade liberalisation.[987]

The Uruguay Round ultimately established the prevalence of *ad hoc* or limited carve- outs from general disciplines to address developmental issues over one approach that could have mainstreamed development at the core of WTO.[988] However, "it is widely agreed that the Uruguay Round approach to SDT—based upon (i) preferences with unilaterally imposed non-economic conditions and exclusion of 'sensitive products', (ii) opt-outs from WTO rules, (iii) uniform and arbitrary transition periods without economic foundation, and (iv) technical assistance without consideration of supply-side constraints—has

984 Nasser, *A OMC e os países em desenvolvimento*, 51.

985 UNCTAD, *Assuring Development Gains from the International Trading System and Trade Negotiations: Implications of ATC Termination on 31 December 2004* (2004), 16.

986 Rolland, *Development at the WTO*, 63-64.

987 Nasser, *A OMC e os países em desenvolvimento*, 132.

988 Rolland explains that "[F]or example, the addition of Article XVIII to the GATT in 1955 allowed derogations to support the development of infant industries and to remedy balance of payment crises. The Decision on Safeguard Action during the Tokyo Round also provided limited derogations, as do trade preferences in favor of developing countries or between developing countries. The Uruguay Round agreements, with their plethora of "special and differential treatment" clauses, are another example. More recently, the Doha Decision on Public Health and pending TRIPS amendment are additional ad hoc measures in an area that is complex and critical to many developing countries. Such instruments often predetermine and limit the ability of developing countries to devise their own development policies" Rolland, *Development at the WTO*, 62.

not been helpful in promoting economic development in most developing countries."[989] As pointed out by Chang, "although SDT aims to preserve flexibility and policy space for developing countries so they can pursue their development goals, the current SDT is not sufficient to fully integrate developing countries into the multilateral trading system and to address their development needs." [990]

According to paragraph 44 of the Doha Ministerial Declaration, WTO Members should review all SDT provisions 'with a view to strengthening them and making them more precise, effective and operational,' while reaffirming that 'provisions for special and differential treatment are an integral part of the WTO Agreements.' Also, the WTO established the Committee on Trade and Development Special Session (CTDSS) in 2002 that intented to carry out the Doha mandate on SDT and to increase the development relevance of the WTO.[991] Up to date, there is strong disagreement among WTO Members on what new SDT provisions could be drafted and also whether SDT rules should be accorded to certain developing country Members. [992]

Although, from a practical perspective, development received this very limited and *ad hoc* approach under SDT provisions, WTO Members continue to affirm that development is at the centre of the WTO.[993] There is, however, no discussion on which concept of development Members are using, if a purely economic one or one more in line with the broader notion reflected in the normative framework for development. In addition, there is no consensus on how development could be advanced or reflected in trade negotiations.

In fact, as it will be detailed in Chapter 5, nowadays, there is a strong tension between WTO developed and developing country Members to determine what a developing country is and how they should be treated under WTO law. Currently, there is no objective definition of developing country except for least-developed countries (LDCs). Members make a "self-declaration" of their developing country status, which may be

989 Seung Wha Chang, "WTO for trade and development post-Doha," *Journal of International Economic Law* 10, no. 3 (2007): 554.

990 Chang, "WTO for trade and development post-Doha," 555.

991 Chang, "WTO for trade and development post-Doha," 554-55.

992 For instance, while developed countries did not intend to make fundamental changes to SDT discipline under the Doha mandate, developing countries saw the Doha mandate as an opportunity to rebalance rights and obligations of WTO Members and to rectify imbalances of rights and obligations between developing countries and developed countries that were embedded as a result of a single package system. Chang, "WTO for trade and development post-Doha," 554-55. See also the discussion on Chapter 5 about the US forcing certain WTO Members to abandon their developing country status under the WTO.

993 See, for instance: WTO. China's Proposal on WTO Reform. 13 May 2019. Available at: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?CatalogueIdList=254127&CurrentCatalogueIdIndex=0#. Accessed on: 26 June 2020, para. 2.32; European Commission, *Concept paper on WTO modernisation: Introduction of future EU proposals* (September 2018), 6.

problematic and open to abuse.[994] These tensions among developed and developing country Members as to the definition of development and how it should be reflected in WTO law prevent advancements in WTO negotiations and a clearer understanding on the role of development in WTO agreements.

IV.2.2 Development in the interpretation of WTO agreements

IV.2.2.1 The importance of furthering development in the analysis of WTO agreements

(i) Facilitating those aspects of the development objective that are enshrined in the WTO agreements or that are established in the normative framework for development

While development concerns have been poorly and restrictively addressed in WTO agreements though SDT provisions and although there is disagreement among WTO Members on the role of development in WTO within its political forum, it is undeniable that the WTO Agreement has a development dimension and that it could be reflected in the interpretation of the WTO law especially through purposive (teleological) and systemic analysis of WTO rules.

Furthering development in the interpretation of WTO agreements is of utmost importance to demonstrate that the development dimension of the WTO Agreement and the non-trade objectives set forth in its preamble are not there only as a matter of form or for the sake of appearances.

Advancing development in the interpretation of WTO agreements can help this institution to achieve the goals intended in its constitutive agreement. Nowadays, there is an extensive discourse that trade is not an end in itself and that it should foster development.[995] The idea of a development-oriented interpretation of WTO law is premised on the fact that development is one of the constitutional objectives of WTO expressed

994 Bacchus and Manak, *The Development Dimension: What to Do About Differential Treatment in Trade*, 3.

995 Rodrik, *The globalization paradox: democracy and the future of the world economy*; Stiglitz, *Making Globalization Work*; Sen, *Desenvolvimento como Liberdade*.See also speeches from the WTO Director-General which emphasise the need for trade to work for development and poverty alleviation: WTO. "WTO, IMF and World Bank leaders: Trade must be an engine of growth for all", 7 October 2016, available at: https://www.wto.org/english/news_e/news16_e/dgra_07oct16_e.htm, accessed on 10 May 2019; WTO. "Azevêdo: Trade works to create jobs and lift people out of poverty", 30 September 2015, available at: https://www.wto.org/english/news_e/spra_e/spra83_e.htm; accessed on 10 May 2019; WTO. "Lamy: it's time for a new "Geneva Consensus" on making trade work for development", 30 October 2006, available at: https://www.wto.org/english/news_e/sppl_e/sppl45_e.htm, accessed on 10 May 2019. The instrumental role for trade in the promotion of development is also acknowledged in the Nairobi Ministerial Declaration [WTO. Ministerial Conference. *Nairobi Ministerial Declaration*, adopted on 19 December 2015, WT/MIN(15)/DEC), paras. 6-8].

in the preamble of the Marrakesh Agreement.[996] In addition, several parts of the WTO Agreement deal with developmental issues. The GATT 1994 has a special part establishing principles, commitments and areas of collaboration for strengthening the relation between trade and development.[997] The WTO agreements have SDT provisions aiming to alleviate the difficulties developing countries face in integrating into the world trade system. Moreover, the preambles of most of the covered agreements make reference to the special needs of developing countries.[998] Ministerial declarations also recognise the development dimension of WTO agreements and the need to interpret them so as to further development.[999] Last but not least, international norms and instruments stress the importance of development and the right to development, including the UNDRD, the ICESCR, the MDGs, the 2030 Agenda for Sustainable Development (2030 Agenda), among others. The WTO law, as already recognised by the Appellate Body, cannot be read in isolation from such instruments.[1000] A development-oriented approach to WTO law could be used to make interpretation of WTO agreements more in line with the promotion of the right to development and human rights, consistent with the 2030 Agenda.

Under this interpretative approach, development has a *constitutionally enshrined and systematic*[1001] place in the interpretation of WTO agreements, being truly considered in the interpretative process as a key element for providing countries with *a share in the growth in international trade commensurate with the needs of their economic development*, as established in the preamble of the Marrakesh Agreement, and also concerning with other issues important for development such as full employment, raising people's standards of living and sustainability.

996 "The Parties to this Agreement, Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living (…) to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development (…) to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development (…)."

997 See Part IV to the GATT 1994, including Articles XXXVI to XXXVIII.

998 E.g. TRIPS Agreement; SPS Agreement; TBT Agreement; TRIMs Agreement.

999 See WTO. Ministerial Decision on Measures in Favour of Least Developed Countries, Doc. MTNfFA, Part III.I, 15 December 1993 (*1993 Ministerial Decision on Measures in Favour of Least-Developed Countries*); WTO. Doha Ministerial Conference. *Ministerial Declaration*; adopted on 14 November 2001, WT/MIN(01)/DEC/1 (Doha Ministerial Declaration); and WTO. Doha Ministerial Conference. *Declaration on the TRIPS Agreement and Public Health*, adopted on 14 November 2001, WT/MIN(01)/DEC/2.

1000 In *US – Gasoline* (1996), the Appellate Body has stated: "The general rule of interpretation [as set out in Article 31(1) of the VCLT] has attained the status of a rule of customary or general international law. As such, it forms part of the "customary rules of interpretation of public international law" which the Appellate Body has been directed, by Article 3(2) of the DSU, to apply in seeking to clarify the provisions of the General Agreement and the other "covered agreements" of the Marrakesh Agreement Establishing the World Trade Organization (the "WTO Agreement"). That direction reflects a measure of recognition that the General Agreement is not to be read in clinical isolation from public international law" (Appellate Body Report, *US — Gasoline*, 1996, p. 17).

1001 Qureshi, "International trade for development: The WTO as a development institution?," 175.

In this context, it involves putting into perspective the development objectives of the WTO; considering the condition of development in the interpretation and application of WTO agreements; integrating into the process of interpretation of WTO agreements international law norms that promote development; developing an appropriate approach to interpretation of SDT provisions; and factoring in interpretative methods that further the development objective.[1002]

So far, however, much of the discussion on development within the WTO has been focused on SDT. Even in proposals on reform of WTO law, Members have focused on ideas of making SDT more operational and concrete or expanding SDT, but never speak of reinforcing development as an overarching principle in the interpretation of WTO agreements.[1003] As observed by Rolland, development is generally treated:

> as a second-order normative consideration that does not fundamentally displace the objective of trade liberalisation as the primary mandate of the WTO. In this framework, the needs of developing members arising out of their economic, social, and political constraints are dealt with on a case-by-case basis rather than at a systemic level. Exceptions and carve-outs dealing with development issues, whether in general agreements or in individual members' schedules of commitments and accession protocols, are idiosyncratic — *ad hoc* solutions rather than instantiations of an overarching normative principle.[1004]

1002 Qureshi, *Interpreting WTO Agreements: Problems and Perspectives*, 186.

1003 For instance, China's proposal on reform of the WTO mentions that "(…) It is crucial for the WTO to safeguard the rights of developing Members to S&D and make S&D provisions more precise, effective and operational. This will be conducive to reducing development deficit in trade rules and contributing to the achievement of the Sustainable Development Goals of the United Nations 2030 Agenda. (…) China, together with some other WTO Members, has submitted joint proposal on S&D and calls for continued preservation of the rights of developing Members to S&D. China further proposes the following: First, enhance the implementation and monitoring of existing S&D provisions, particularly the implementation of Duty-Free and Quota-Free treatment and the Preferential Treatment to Services and Service Suppliers of the LDCs. Second, provide more targeted and concrete technical assistance to ensure the integration of developing Members into the multilateral trading system and global value chains. Third, advance the negotiations on S&D provisions in accordance with the Doha Ministerial Declaration. Fourth, accord adequate and effective S&D treatment to developing Members in future negotiations on trade and investment rules. Fifth, encourage developing Members to actively assume obligations commensurate with their level of development and economic capability" (WTO. China's Proposal on WTO Reform. 13 May 2019. Available at: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?CatalogueIdList=254127&CurrentCatalogueIdIndex=0#. Accessed on: 26 June 2020, para. 2.33 and 2.34). The European Union, in its concept paper for modernisation of the WTO, supports the view that developing countries should be allowed the assistance and flexibilities they need to meet their development goals. Nevertheless, it is more cautious in stating that a change is needed in the organisation regarding how flexibilities are crafted and implemented with a view to ensuring that flexibilities are made available to those Members who actually need them (European Commission, *Concept paper on WTO modernisation: Introduction of future EU proposals,* 6-7.).

1004 Rolland, *Development at the WTO*, 5-6.

It is necessary to recognise the development objective as ingrained in the WTO system, as reflected in the preamble of the WTO Agreement, and the fact that the WTO is not an isolated regime, but it exists against the background of international law and, in particular, the normative framework for development.

(ii) Alleviating some of the burdens that accompany trade liberalisation

A development-oriented approach could also contribute to reducing or alleviating some of the burdens that accompany trade liberalisation.[1005] While the creation of the WTO has been influenced by the neoliberal ideology and the idea that trade liberalisation would eventually lead to economic growth, the evolution on the concept of development has shifted from a narrow perspective related to wealth and economic growth to a broader notion encompassing a comprehensive economic, social, cultural and political process, targeting the constant improvement of the well-being and the realisation of all human rights. In this sense, it is not possible to think of the WTO disciplines only from the point of view of free trade objectives. The ways trade affects development have to be reconsidered under this new perspective and the WTO and its law should be much more development focused.

Under this new concept of development, the human rights impact of trade rules becomes relevant and so the need to strike a proper balance between trade liberalisation goals and non-trade objectives, including development itself and the WTO Members' right to formulate appropriate policies for their development. For instance, were the development dimension not factored in the interpretation of the TRIPS Agreement, such instrument would not be interpreted in a manner supportive of WTO Members' right to protect public health and to promote access to medicines for all. Factoring in development in the interpretation of WTO agreements in this sense also promotes considerations of social justice which is a value enshrined in the right to development.

A development-oriented approach is more preoccupied with how trade affects the enjoyment of the right to development and therefore the realisation of human rights than with classifying trade measures within the traditional protectionist vs. liberalising dichotomy and analysing solely economic factors. Whether the trade measure is protectionist or not is less important than how it impacts economic, social and cultural rights of individuals.[1006] As explained by Prévost: "while the economic growth achievements

1005 Qureshi, *Interpreting WTO Agreements: Problems and Perspectives*, 185.

1006 "[H]uman rights law is neutral with regard to trade liberalization or trade protectionism. Instead, a human rights approach to trade focuses on processes and outcomes – how trade affects the enjoyment of human rights – and places the promotion and protection of human rights among the objectives of trade reform". Office of the High Commissioner for Human Rights, "Human rights and trade," 3..

of international rules on trade liberalisation are important to promote development, they cannot come at the cost of other rights, such as human life, health and access to food. Instead, mechanisms must be found to appropriately balance these competing goals."[1007]

Economic analysis indicates that there is no ideal pre-established mix of interventionist and liberalising policies that ensure economic growth, development and end of poverty.[1008] Therefore, a development-oriented approach represents an alternative for assessing measures affecting trade. Ultimately, the idea of furthering the development dimension to the interpretation of WTO agreements is to alleviate the burdens of trade liberalisation and promote development, which is enshrined in the WTO Agreement. To this effect, it is necessary to consider the impact of policy decisions not only on economic and trade indicators, but also on social issues and human rights.

(iii) Facilitating fair play between WTO Members at different levels of development

In addition, it is necessary to point out that the design of multilateral disciplines is not neutral as they accommodate the development trajectories of different countries. While developed countries escape multilateral disciplines in money and finance, developing-country borrowers have been subject to the conditionalities of the IMF and the World Bank that limit their macroeconomic policies and broader development strategies.[1009] Existing multilateral rules aim at promoting free movement of industrial goods, capital and enterprises, which favours advanced countries, but not labour, agricultural products or technology, where it would be more beneficial for developing countries.

1007 Prévost, *Balancing Trade and Health in the SPS Agreement: The Development Dimension*, 23, fn omitted.

1008 Stiglitz, *Making Globalization Work*; Rodrik, *The globalization paradox: democracy and the future of the world economy*; Howse, "Mainstreaming the Right to Development into the World Trade Organization."

1009 By the mid-1990s, a set of policies leading to liberalized trade and financial flows, privatization, and deregulation known as the Washington Consensus were promoted by the IMF in cooperation with other international financial and trade institutions, and increasingly implemented in the developing world. This consensus is now widely criticised in the aftermath of the Asian financial crisis of 1997. Latin American incomes stagnated long after the Asian crisis, and African incomes have not improved since the early 1980s, despite extensive IMF lending. Global inequality is on the rise. As explained by Steinwand and Stone, "the diagnoses are as varied as the critics. On one hand, the Fund is criticized for promoting moral hazard and dependency (Goldstein 2001, Hills et al. 1999). On the other, it is accused of imposing uniform policy reforms that do not correspond to local conditions and promoting the interests of investors and powerful developed countries rather than of borrowers (e.g., Meltzer 2000, Easterly 2001, and Stiglitz 2002). Studies conducted by the IMF's Independent Evaluation Office have been critical of the Fund's response to major crises (…). A long tradition of quantitative studies has mixed and inconclusive findings, but generally casts doubt on arguments that the IMF has strong effects, either positive or negative." Martin C. Steinwand and Randall W. Stone, "The International Monetary Fund: A review of the recent evidence," *The Review of International Organizations* 3, no. 2 (2008/06/01 2008): 123, https://doi.org/10.1007/s11558-007-9026-x, https://doi.org/10.1007/s11558-007-9026-x.

In legal terms, the WTO rules and commitments provide a level playing field for all parties, but the effective constraints they impose over national policies are much tighter for developing than for developed countries to the extent that they now prohibit policy instruments that have been used by developed countries in the past to help in their developing process (e.g. selective subsidies, lack of patent protection to ease access to technology through imitation and reverse engineering, etc.).[1010] Although it is possible to discuss the appropriatedness of such instruments to promote development, the fact is that they were available for developed countries (and were extensively used by them to promote their industries) in the past and became unavailable for developing countries under the Washington Consensus,[1011] reinforcing the idea there is an imbalance on the way multilateral disciplines affect developed and developing countries.[1012]

In this context of uneven playing field for developing countries, furthering a development dimension to WTO agreements can also facilitate a fair play between developed and developing country Members, be it through the promotion of a more effective interpretation of SDT provisions or through the expansion of exceptions to WTO agreements towards developmental objectives. The uneven effects of trade liberalisation on developed and developing countries[1013] and the continuing poverty and inequality pervading developing countries in the context of globalisation increase the demands for distributive justice in international trade and an interpretation of WTO agreements that furthers the development objective.

In any case, it is important to note that WTO Members, regardless of their development status, can benefit from a development-oriented interpretation of WTO agreements as it may enable them to have more flexibilities under WTO law to justify trade measures having an impact on human rights protection and their development process. A development-oriented approach to WTO law is not exclusive of developing or least-developed countries. Considering that development is *a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom,* it involves an ongoing and dynamic process underlying the policies of all WTO Members.

1010 Akyüz, *Multilateral disciplines and the question of policy space,* 48-49.

1011 The Washington Consensus was a set of economic policies developed in the late 80s and advocated for developing countries in general by official Washington, meaning the international financial institutions (the IFIs, primarily the IMF and World Bank) and the US Treasury, that included restrictive macroeconomic policy, liberalization of international trade and investment, privatization, and deregulation.

1012 See Ha-Joon Chang, "Kicking Away the Ladder: An Unofficial History of Capitalism, Especially in Britain and the United States," *Challenge* 45, no. 5 (2002): 64, http://www.jstor.org/stable/40722165.

1013 Rodrik, *The globalization paradox: democracy and the future of the world economy*; Stiglitz, *Making Globalization Work*; Chang, *Bad Samaritans: The myth of free trade and the secret history of capitalism*.

As regards LCRs, in particular, there is no ongoing negotiation for changing current WTO rules applicable to them. Considering the WTO provisions restricting LCRs studied in Chapter 2, it was possible to see that, given its discriminatory nature, LCRs may frequently be found WTO-inconsistent if challenged in the context of the WTO dispute settlement system. Additionally, SDT rules which were supposed to give developing countries flexibilities to address development concerns do not work for LCRs. In other words, developing country Members can hardly rely on SDT provisions to defend their LCRs under WTO law.[1014] Under current interpretation of GATT general exceptions, it is also very difficult to justify LCRs. For local content subsidies, there is no explicit provision in the SCM Agreement that can be used to justify them.

In this context, a development-oriented interpretation of WTO agreements could be seen as an alternative to create more flexibilities for developing as well as developed country Members to justify their LCRs under WTO agreements where they entail legitimate policy objectives. As seen above, the broad concept of development and, more specifically, the right to development encompasses the realisation of all human rights and can be resorted to by developed and developing countries.

(iv) Implications for the legitimacy of the WTO

Moreover, factoring development in the interpretative process has implications on the legitimacy — understood as accepted authority[1015]—of the norms and institutions underlying the WTO regime. As explained by Petersmann, "in order to remain democratically acceptable, global integration law (e.g. in the WTO) must pursue not only 'economic efficiency' but also 'democratic legitimacy' and 'social justice' as defined by human rights."[1016] In this sense, an institution that is only concerned with trade gains and trade aspects of a country's policy and disregards its impact on social indicators and human rights may be considered democratically unacceptable and illegitimate.

A development-oriented perspective of WTO law is concerned that Members can fully enjoy an independent process of development for their people, as it can be deduced from the right to development and the principle of self-determination. This means respecting regulatory choices of national authorities that reflect legitimate public interests. In this context, an interpretation by adjudicators of WTO law that takes into account their development needs/concerns is necessary.

1014 See discussion on subsection II.8.

1015 Yuval Shany, "Assessing the Effectiveness of International Courts: A Goal-Based Approach," *American Journal of International Law* 106, no. 2 (2012): 265.

1016 Petersmann, "Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration," 624.

In this context, where WTO decisions outlaw developmental policies of its Members, as it is the case for certain types of local content policies, they may be seen as too intrusive on a country's national policy and sovereignty, which can also create a legitimacy problem for it to the extent that national institutions are generally regarded more familiar and accountable to the average citizen than international organisations and therefore are more likely than the latter to reflect the preferences, traditions, and the social and economic realities of the people whom the regulations may affect. Of course, however, domestic economic and other policies are too often a reflection of vested interests. For instance, as explained in Chapter One, LCRs can also be the result of lobbying of domestic industries. International organizations and rules may assist in countering the impact of these vested interests and interpretation of WTO rules on LCRs should also be able to deal with this downside of certain local content policies.

Furthermore, by outlawing LCRs in developing countries where they may be relevant for economic and social development and may generate positive impact on human rights may be seen as an inconsideration to social justice issues, especially in a reality where currently developed nations have widely used LCRs in the past to stimulate their own development.

For these reasons, striking a proper balance between WTO commitments and development concerns (and more broadly, non-trade issues) is of utmost importance for the legitimacy of the WTO and its dispute settlement system.

In summary, furthering development in the interpretation of the WTO is relevant for the purposes of a balanced interpretation of WTO rights and obligations in light of development concerns. Such balanced interpretation can mitigate the problems arising out of trade liberalisation, contribute to a more equitable response of the system to its Members with different levels of economic development and advance the broader goals of the WTO which are intrinsically connected to the modern notion of development as a holistic process that goes beyond economic considerations. Finally, advancing development in the interpretation of WTO agreements can increase legitimacy of the WTO institution, in particular, its dispute settlement as WTO adjudicatory bodies will show more concern to national development policies and, as a result, to national realities, preferences and values. This is particularly important in a scenario of rise of far-right populist leaders where a greater number of people feel stagnation in their living standards and feel that they have been left behind by globalisation, making them prone to

vote for this type of polititian [1017] that incites an antiglobalist behaviour. By interpreting WTO agreements through the lens of its spirit (telos), which incorporates the development objective, WTO adjudicatory bodies show sensitivity to the social concerns and values of peoples, placing the objective of trade liberalisation not as a priority or as an end in itself, but as embedded in societal values, possibly contributing to the mitigation of antiglobalisation sentiments.

IV.2.2.2 Mechanisms for development-oriented interpretation

Based on what has been discussed above, there are several mechanisms that can be used to further the development dimension of WTO agreements. First, the non-trade objectives of the WTO as reflected in the Marrakesh Agreement provide space for placing development – from a broader perspective - at the centre of the WTO law.[1018] "Reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations" were instruments that the WTO instituted to contribute to those non-trade objectives (e.g. raising standards of living, full employement, sustainable development, etc.) and do not reflect in any sense the end goals of this institution.[1019]

Therefore, the founding treaty of the WTO clearly envisages broader goals for this institution which cannot be limited to free trade or economic concerns. The preamble makes explicit reference to sustainable development and improved standards of living, which dialogue with an ampler perspective of development. The preamble of the Marrakesh Agreement also mentions that WTO shall take into account the specific needs and concerns of WTO Members at different levels of economic development. Although the reference is to "economic" development, an evolutionary reading of the word "development" allows for incorporation of the current concept of development in the WTO Agreement as a complex social, economic and cultural process entailing the realisation of all human rights. The Appellate Body, as will be seen below, has engaged in evolutionary interpretation of WTO treaty terms[1020] and there is no reason why it should not apply an evolutionary reading of the expression economic development. In this context, interpretation of WTO law in light of development could be reinforced by *purposive/teleological interpretation* of WTO norms.

1017 Yascha Mounk, *The people vs. democracy: Why our freedom is in danger and how to save it* (Harvard University Press, 2018), 155.
1018 Nasser, *A OMC e os países em desenvolvimento*, 86.
1019 Nasser, *A OMC e os países em desenvolvimento*, 86.
1020 See Appellate Body Report, *US – Shrimp* (1998), para. 129-130; and Appellate Body Report, *China – Publications and Audiovisual Products* (2010), paras. 396-397.

Second, the WTO therefore is not an isolated system. It exists against the background of international law and coexist with other regimes including that linked to the right to development and human rights. As pointed out by Martti Koskenniemi in the ILC Report on Fragmentation of International Law, *in international law, there is a strong presumption against normative conflict. Treaty interpretation is diplomacy, and it is the business of diplomacy to avoid or mitigate conflict.*[1021] As mentioned by Prévost:

> The law of the international trading system is not an isolated system, but is part of public international law. There is widespread recognition of the need to ensure coherence between the various functional areas of international law. This is also true for the relationship between international trade law and international human rights law. Consequently, a discussion of the impact of the rules of the international trading system on development necessarily occurs in the normative framework created by human rights law, and in particular the emerging recognition of a 'right to development'.[1022]

In the WTO practice, it is generally accepted that WTO law can be and is indeed interpreted in light of the wider corpus of international law, although there may be some restrictions to the interpretative process, as it will be detailed below. In this sense, WTO law could be interpreted in light of the normative framework for development.

As seen in Chapter 3, the principle of sustainable development has played a role in judicial decision-making acting "a meta-principle…pushing and pulling the boundaries of true primary norms when they threaten to overlap or conflict with one another."[1023] Likewise, the right to development could act as a principle orientating the harmonisation of trade and human rights standards in the interpretation of WTO agreements. Other human rights such as the right to work, right to health, right to take part in cultural life, right to a healthy environment, rights of indigenous people, among others, could play a role in the interpretation of WTO agreements. To this effect, it is worth mentioning that Article 31(3)(c) of the VCLT may allow the use of the normative framework for development as a matter of systemic integration. Even if many rights in the normative framework for development are of a soft law nature, they still have an impact on the interpretation

1021 International Law Commission, *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law. Conclusions of the work of the Study Group.*, 25.
1022 Prévost, *Balancing Trade and Health in the SPS Agreement: The Development Dimension*, 18-19, fn omitted.
1023 Lowe, "Sustainable development and unsustainable arguments," 31.

of treaties, either in expanding treaty terms or in filling gaps as noted in the previous chapter.[1024]

Third, under WTO law, the objective of trade liberalisation is modulated by wider policy objectives. Not only the preamble of the WTO Agreement sheds light to these broader goals, but, more concretely, *WTO exception clauses* act as safety valves to allow WTO Members to balance their policy goals and non-trade preferences with trade liberalisation. Therefore, the rationale of the WTO Agreement involves achieving a proper balance between international trade regulation and the right of WTO Members to "formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals", as stated in Article 2.3 of the UNDRD.

These exception clauses, such as that reflected in Article XX of the GATT 1994, could establish a relationship between trade rules and development, requiring WTO adjudicating bodies to determine the meaning of these clauses and to find out which kind of international human rights norms could be employed for interpreting them.[1025] Article XX involves the protection of several objectives, including protection of public morals, human, animal or plant life or health and the conservation of exhaustible natural resources. In this context, a reasonable interpretation of this provision allows States sufficient leeway to protect and advance human rights. [1026]

In particular, the idea of protection of public morals in Article XX(a) of the GATT 1994 is ample enough to permit all relevant human rights concerns. Indeed, panels and the Appellate Body have not adopted a strict definition of the concept, which has been understood as "standards of right and wrong conduct maintained by or on behalf of a community or nation".[1027] As indicated by Howse, "[i]n the modern world, the very idea

1024 For instance, in the context of the WTO, the Appellate Body made a progressive interpretation of Article XX(g) of the GATT 1994 by concluding that the term 'exhaustible natural resources' comprise both living and non-living (e.g. mineral) resources. To this effect, it referred to not only to conventions in environmental law, but also to the Agenda 21 - a soft law instrument -, which functioned as evidence of the common understanding of the parties as to the meaning of a term. In this sense, a soft law instrument contributed to the clarification of the meaning of terms of a WTO agreement. See Campbell McLachlan, "The Principle of Systemic Integration and Article 31(3)(C) of the Vienna Convention," *The International and Comparative Law Quarterly* 54, no. 2 (2005).

1025 Pengcheng, "Rethinking the Relationship Between the WTO and International Human Rights," 411-12.

1026 Holger P Hestermeyer, "International Human Rights Law and Dispute Settlement in the World Trade Organization. Human Rights Norms in "Other" International Courts " in *Human Rights Norms in 'Other'International Courts*, ed. Martin Scheinin (Cambridge University Press, 2019), 219.

1027 Panel Report, *US – Gambling* (2005), para. 6.465; Panel Report, *China – Publications and Audiovisual Products*, WT/DS363/R, para. 7.759; Panel Report, *EC –Seal Products* (2014), para. 7.380; Panel Report. *Colombia –Textiles* (2016), para. 7.299. See also Appellate Body Report, *EC – Measures Prohibiting the Importation and Marketing of Seal Products* (2014), para. 5.199; Appellate Body Report, *Colombia – Textiles* (2016), para. 5.67, footnote 155.

of public morality has become inseparable from the concern for human personhood, dignity, and capacity reflected in fundamental rights. A conception of public morals or morality that excluded notions of fundamental rights would simply be contrary to the ordinary contemporary meaning of the concept."[1028] Also, the term "human life or health" in Article XX(b) of the GATT 1994 is also very broad and could potentially include a wide range of ESC rights relating to a person's well-being such as the right to adequate standards of living, right to housing, right to food, right to health, among others.

Additionally, WTO agreements contain *open concepts* and *ambiguous norms and standards* which can be clarified in a way that takes development and international human rights into consideration.

Furthermore, as seen in the previous chapter, the right to regulate – which is intrinsically related to the right to development – has, as international customary law, a strong potential for working as an affirmative defence for justifying, on public policy grounds, WTO-inconsistent measures even in WTO agreements that do not have exception clauses such as the SCM Agreement. In addition, it can be used to expand the scope of WTO exception clauses such as Article XX of the GATT 1994 and Article XIV of the GATS.

In view of the above, possible mechanisms to which panels and the Appellate Body can resort in order to further development in the interpretation of WTO law are:

(a) teleological interpretation, considering the broader goals of the WTO Agreement not limited to free trade, but encompassing a development dimension (improvement of living standards, full-employment, sustainable development, concerns with different levels of economic development);
(b) use of systemic integration by interpreting WTO agreements in light of the normative framework for development;
(c) interpretation of exception clauses as encompassing a development dimension;
(d) interpretation of open clauses and ambiguous concepts in a way that further development, where possible;
(e) considering the implications of policy measures not only on trade indicators but more broadly in economic and social indicators as well as on human rights;
(f) using the right to regulate as affirmative defence for WTO-inconsistent measures and as an interpretative tool for expanding the scope of WTO exceptions.

1028 Robert Howse, "Back to court after Shrimp/Turtle? Almost but not quite yet: India's short lived challenge to labor and environmental exceptions in the European Union's generalized system of preferences," *American University International Law Review* 18, no. 6 (2003): 1368.

In this context, at least from a legal and theoretical point of view, it is possible to think of mainstreaming development in the interpretation of WTO agreements, reading WTO provisions through the lens of the objectives set forth in the WTO Agreement (teleological interpretation) and in light of the normative framework for development. Under this perspective, the role of WTO adjudicatory bodies gains particular importance in adequately addressing Members' legitimate policy goals and considering the specific needs and concerns of Members at different levels of economic development in the interpretation and application of WTO agreements.

IV.3 LEGAL LIMITATIONS FOR ARTICULATING DEVELOPMENT IN THE ANALYSIS OF WTO AGREEMENTS

IV.3.1 Initial comments

While the previous section has considered, *in theory*, possible mechanisms that could be used to articulate development in the analysis of WTO agreements, this Section IV.3 will discuss in more details the existing instruments in WTO law and the customary rules of interpretation used by panels and the Appellate Body to verify if they could, *in practice*, be used to foster development in the analysis of WTO agreements.

Based on the above, we will discuss in greater detail, by analysing the interpretative techniques and principles used by panels and the Appellate Body, whether there is space in WTO jurisprudence for advancing a development-interpretation of WTO law, analysing those elements which favour a human-rights and development-oriented approach and those representing limitations to its progress.

Interpretation is generally understood as a process of clarification of rules, of determination of the meaning and scope of the rule, of verification of the content of a legal provision.[1029] However, as regards the WTO dispute settlement, the process of interpretation has some established limits. [1030] It is based on the VCLT and other customary rules of interpretation, it cannot be *contra legem* and shall reflect the common intentions of all WTO Members. In other words, it can go as far as assisting the interpreter to ascertain "the ordinary meaning of treaty terms, reflecting the common intention of the parties to the treaty."[1031]

1029 Denis Alland, "L'interprétation du droit international public," in *Collected Courses of the Hague Academy of International Law - Recueil des cours* (Brill, 2014), 59.

1030 Natalia de Lima Figueiredo, "WTO Dispute Settlement: is there space for a development-oriented approach to WTO agreements?," *Revista ICDT* 77 (2018).

1031 Appellate Body Report, Peru – *Agricultural Products* (2015), para. 5.93.

Given the limits of the interpretative activity, which will be discussed in subsection IV.3.2 below, it is important to verify to what exteent non-WTO law, in particular, the rights and obligations pertaining to the normative framework for development, could be used to fill gaps of the WTO law or be used as a defence against a claim of violation of WTO norms. The feasibility of using the right to development, related principles and human rights as *applicable law* in WTO dispute will also be debated in subsection IV.3.3 below.

IV.3.2 Legal boundaries for development-oriented interpretation of WTO law

In interpreting WTO agreements, panels and the Appellate Body have strongly relied on the interpretation rules of the Vienna Convention on the Law of the Treaties (VCLT) and other customary rules as an objective guide for interpretation of WTO agreements.[1032] In this context, this subsection assesses the relevant customary rules of interpretation as interpreted within the WTO dispute settlement system and their potential for furthering the development dimension of the WTO law or creating barriers to it.[1033]

IV.3.2.1 The general rule of interpretation and the relationship between text, context and object and purpose

VCLT rules of interpretation are set forth in Articles 31 and 32 of the VCLT. The way the interpreter reads the relationship between the interpretative tools encompassed in the VCLT general rule of interpretation may provide more or less space for a development-oriented approach to WTO law.

Article 31(1) of the VCLT reveals three aspects of the interpretative process – text, context and object and purpose: *a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*

1032 Pursuant to Article 3.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), the WTO agreements shall be interpreted *"in accordance with customary rules of interpretation of public international law."* Several decisions from the AB confirm that the interpretation rules of the VCLT (Articles 31 to 33) have attained the status of customary rules of interpretation and therefore WTO agreements have to be interpreted accordingly. See, for instance, Appellate Body Report, *US – Gasoline* (1996), p. 17; *Japan — Alcoholic Beverages II* (1996), p. 34; Appellate Body Report, *US – Shrimp* (1998), para. 114; Appellate Body Report, *Korea – Dairy* (2000), para. 81.

1033 It is important to note that there are several aspects in the VCLT and other customary rules which could be analysed for the purposes of treaty interpretation. However, only those aspects that are most important for the purpose of interpreting WTO agreements from a development-oriented perspective will be detailed below.

Should panels and the Appellate Body decide to give primacy to a textualist approach,[1034] the possibilities for a development-oriented interpretation of WTO agreements would be reduced as the development dimension of the WTO Agreement is very much placed in its object and purpose and spirit rather than translated into the text of the provisions as clear obligations.

Commentators indicate that panels and the Appellate Body have traditionally favoured a textualist approach.[1035] This textual approach has been particularly strong in a time where the system was facing a process of consolidation as a rule-based system of adjudication.[1036] As the system became more mature, it was possible to see some decisions giving more weight to the teleological method, in particular in cases where the textual approach would not allow the Appellate Body to fulfil important objectives of the WTO.[1037] These decisions however coexist with cases where the textual approach prevails.[1038]

In any case, the Appellate Body has variously asserted that the process of interpretation, as established in the VCLT, reflects a holistic approach, where interpretative rules and methods are applied as an integrated process the elements of which are connected and mutually reinforcing,[1039] giving the idea that all methods of interpretation should be equally considered, without an *a priori* hierarchical order.

As the holistic approach functions as a neutral basis compelling the interpreter to give consideration to all interpretative methods, it prevents textual primacy. In this sense, it

1034 Authors have distinct understandings on the weight each method of interpretation has in the operation of Article 31(1). For scholars defending textual primacy, see Alexander Orakhelashvili, *The interpretation of acts and rules in public international law* (Oxford: Oxford University Press, 2008), 310. For commentators defending that no particular method prevails over the other, see: Richard Gardiner, *Treaty interpretation* (Oxford University Press, USA, 2015); Isabelle Van Damme, "Treaty interpretation by the WTO appellate body," *European Journal of International Law* 21, no. 3 (2010); Mark E Villiger, "The rules on interpretation: misgivings, misunderstandings, miscarriage? the 'crucible'intended by the international law commission," in *The Law of Treaties Beyond the Vienna Convention*, ed. Enzo Cannizzaro (Oxford Scholarship Online, 2011); Joost Pauwelyn and Manfred Elsig, "The Politics of Treaty Interpretation: Variations and Explanations Across International Tribunals," (2011); Fuad Zarbiyev, "A Genealogy of Textualism in Treaty Interpretation," in *Interpretation in International Law*, ed. Andrea Bianchi; Daniel Peat; Matthew Windsor (Oxford Scholarship Online, 2015).

1035 Contra: Isabelle Van Damme, *Treaty interpretation by the WTO Appellate Body* (Oxford University Press, 2009).

1036 Claus-Dieter Ehlermann, "Experiences from the WTO Appellate Body," *Texas International Law Journal* 38, no. 3 (2003): 470.

1037 Appellate Body Reports on *EC – Preferences* (2004); *US – Clove Cigarettes* (2012); *US – Tuna II (Mexico)* (2012) and *US – COOL* (2012).

1038 Panel Report, *EC – Fasteners (China)* (2016), para. 7.2.

1039 Appellate Body Report, *US – Continued Zeroing* (2009), para. 268. See also the Appellate Body Reports on *EC - Chicken Cuts* (2005), paras. 175–176; *China - Publications and Audiovisual Products* (2010), para. 399; and *Canada — Renewable Energy / Canada — Feed-in Tariff Program* (2013), para. 5.57.

contributes for the development dimension of interpretation of WTO law by not reducing the role of object and purpose (although not particularly favouring it).

IV.3.2.2 Teleological interpretation

As stated, most of the development-supportive elements in the WTO Agreement are contained in the preamble of the Marrakesh Agreement, in the preambles of certain covered agreements, being also apprehended from the analysis of the agreements as a whole. All these factors, combined with SDT provisions, make the development dimension of WTO law explicit. Accordingly, furthering a teleological approach is a necessary step for advancing the development objective in the interpretation of WTO agreements.[1040]

As mentioned by van Aaken, the object and the purpose of a treaty can be of special interest for defragmenting interpretation. In this sense, "if the object and the purpose of the treaty also contain human rights or sustainable development goals, these may be used in a teleological interpretation of the treaty itself, leading to harmonious interpretation."[1041]

Teleological interpretation is of particular relevance for law-making treaties creating an organisation[1042] such as the WTO. In this case, the interpretative process should be focused on promoting the fundamental purposes laid down in their constitutive agreements.[1043] The main idea is that, in these multilateral treaties, the will of the parties is externalised in the process of constitution of the organisation. Achieving its purposes becomes an important feature of interpretation. In addition, the conduct and operation of the organisation may require a dynamism that is beyond what could have been origi-

1040 The need for teleological interpretation was stressed in the Declaration on the TRIPS Agreement and Public Health: "(…) the TRIPS Agreement (…) should be interpreted and implemented in a manner supportive of WTO members' right to protect public health (…)" and "shall be read in the light of the object and purpose of the Agreement (…)."

1041 Anne van Aaken, "Defragmentation of Public International Law Through Interpretation: A Methodological Proposal," *Indiana Journal of Global Legal Studies* 16, no. 2 (2009): 495, https://www.repository.law.indiana.edu/ijgls/vol16/iss2/5.

1042 In law-making agreements, the parties are bound by identical aims. They are generally signed by a higher number of parties. Not all signatories participate in the negotiation of the treaty but some accede later on. These treaties have a strong permanence feature to the extent that changes in circumstances may not substantially affect the will of the parties to remain bound by their common purposes. Their objects, therefore, resemble more those of statutes than those of contracts. Quincy Wright, "The Interpretation of Multilateral Treaties," *The American Journal of International Law* 23, no. 1 (1929).

1043 The idea that specific rules of interpretation – those relating to statutes (as opposed to contracts) - should apply to law-making treaties was evidenced in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276*, separate opinion of Judge de Castro, I.C.J. Reports 1971, p. 181. The same idea had also been envisioned by Judge Lauterpacht in a separate opinion in *South-West Africa-Voting Procedure*, Advisory Opinion, 1955; and also by Judge De Visscher in a dissenting opinion in *International status of South-West Africa*, Advisory Opinion: I.C.J. Reports 1950.

nally envisaged by the parties. Consequently, the object and purpose of the agreement may provide an appropriate reference for the correct interpretation of treaty rights and obligations throughout the time.

This is particularly important in a context of law of cooperation (as opposed to a law of coexistence), where States are organised as a community[1044] and international organisations have a crucial role in maintaining peaceful and mutually beneficial collaboration and integration among States. Consequently, the interpretation of treaties establishing international organisations has to evolve with international law, preserving the spirit of cooperation and ensuring that institutions and the rule of law continue to be in harmony with the new conditions of life. This is not done through interpretation that slavishly follows the text, but rather through evolutionary interpretation of the telos of the treaties establishing the international organisation.[1045]

In this context, although the VCLT general rule of interpretation does not particularly favour teleological interpretation over other interpretative methods, the nature of the WTO Agreement as a law-making treaty establishing an international organisation and the broad context of the international law of cooperation encourage the use of such interpretative approach.

The Appellate Body recognises the interpretative function of the object and purpose and preambles. In *US – Shrimp* (1998), it asserted that the preambular language of the WTO Agreement *must add colour, texture and shading to our interpretation of the agreements annexed to the WTO Agreement*,[1046] identifying the object and purpose as a qualifier of the treaty text, albeit that they cannot override the latter. Nevertheless, the interpretative role of object and purpose in the WTO dispute settlement system has historically been regarded as modest.

In the same case, the Appellate Body, in assessing the meaning of the chapeau of Article XX of the GATT 1994, seemed to indicate that recourse to object and purpose would only be necessary in case of text ambiguity or in case confirmation of the correctness of the reading of the text itself was desired.[1047] It also mitigated the interpretative role of the preamble of the WTO Agreement and GATT while giving prominence to the more

1044 Declaration of Former President Bedjaoui in *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, I.C.J. Reports 1996, p. 261.

1045 Individual opinion of M. Alvarez in *Admission of a State to the United Nations (Charter, Art. 4)*, Advisory Opinion: I.C.J. Reports 1948, p. 13 and 16.

1046 Appellate Body Report, *US – Shrimp* (1998), para. 153.

1047 Appellate Body Report, *US – Shrimp* (1998), para. 114. Panels also adopted restrictive approaches as regards recourse to object and purpose. See Panel Reports on *Canada – Pharmaceutical Patents*, 2000, p. 51; and *Canada – Aircraft* (1999), p. 9.119.

immediate object and purpose of the individual provision of the relevant multilateral trade agreement being interpreted.[1048]

In addition, it stated that "maintaining, rather than undermining, the multilateral trading system is necessarily a fundamental and pervasive premise underlying the WTO Agreement; but it is not a right or an obligation, nor is it an interpretative rule (…)",[1049] suggesting that elements mentioned in the preamble of the WTO agreements could not function as interpretative parameters to the analysis of individual provisions at the risk of arriving at a "very broad formulation".

It is interesting to note, however, that although the Appellate Body attributed a limited role to teleological interpretation in analysing the introductory clauses of Article XX of GATT 1994, and seemed to mitigate the interpretative function of one of the WTO objectives stated in the preamble of the Marrakesh Agreement, it clearly paid due regard to the object and purpose relating to the protection of environment and sustainable development in assessing the meaning of "exhaustible resources" in Article XX(g) of GATT 1994.[1050]

In more recent decisions, the Appellate Body and, to a lesser extent panels, are increasingly more attentive to object and purpose in the interpretation of WTO provisions.

For instance, in *EC – Tariff Preferences* (2004), where the Appellate Body was called to examine whether, by virtue of footnote 3 to paragraph 2(a) of the Enabling Clause, preference-granting countries in Generalised System of Preferences (GSP) schemes were obliged to accord the same preferential treatment to *all* beneficiaries or whether they were entitled to make distinctions among them.

Noting that the need for positive efforts designed to secure developing countries a share in the growth in international trade was qualified by the expression *commensurate with the needs of their economic development* in the preamble of the Marrakesh Agreement, the Appellate Body concluded that this provision indicated that developing countries had *different needs according to their levels of development and particular circumstances.*[1051] Accordingly, preference-granting countries could grant "different tariffs

1048 In contrast, in *EC – Chicken Cuts,* the Appellate Body cautioned against an interpretation of the object and purpose of individual provisions which is dissociated from the broader objective and purpose of the treaty as a whole (Appellate Body Reports, *EC – Chicken Cuts,* 2005, para. 238-239).

1049 Appellate Body Report, *US – Shrimp* (1998), para. 116.

1050 "(…) The preamble of the WTO Agreement - which informs not only the GATT 1994, but also the other covered agreements - explicitly acknowledges 'the objective of sustainable development'" [Appellate Body Report, *US – Shrimp* (1998), para. 129].

1051 Appellate Body Report, *EC – Tariff Preferences* (2004), para. 161.

to products originating in different GSP beneficiaries", provided that "identical treatment is available to all similarly-situated GSP beneficiaries (…)."'[1052]

Although making referent to the preamble of the Marrakesh Agreement, this does not make it necessarity a genuine teleological interpretation to the extent that the same conclusion could be achieved by other means. An analysis of the definition of 'developing countries' based on reasonability and proportionality ("equals should be treated equally and unequals unequally") and on the fact that it encompasses a broad category of economies could also lead the WTO adjudicating bodies to conclude that preference-granting countries could grant different tariffs to products originating in different GSP beneficiaries to the extent that these GSP beneficiaries also presented different social and economic contexts. In any case, one could argue that the Appellate Body was just following the holistic approach of the VCLT rules of interpretation and not particularly favouring a interpretation of the WTO rule in light of the object and purpose of the treaty.

Also, in *China – Raw Materials* (2012), the Panel, in analysing the consistency of China's export restrictions on primary products with Article XX(g) of the GATT 1994, stated that "a proper reading of Article XX(g) in the context of the GATT 1994 should take into account the challenge of using and managing resources in a sustainable manner that ensures the protection and conservation of the environment while promoting economic development".[1053]

In *US – Clove Cigarettes* (2012), the Appellate Body, relying on the object and purpose of the Agreement on Technical Barriers (TBT Agreement)[1054] along with context, interpreted a flexibility into Art. 2.1 of the TBT Agreement that is not readily apparent in the words of that provision.[1055] In this case, Indonesia complained about a US ban on imports of cigarettes with characterising flavours other than tobacco or menthol. The US tried to justify the restraint on the grounds that it was necessary to protect the public health and to reduce the number of individuals under 18 years of age who used tobacco products.

Being classified as a technical regulation, the measure was analysed under Article 2.1 of the TBT Agreement. This agreement, unlike GATT, does not have a general exception provision that allows that the discriminatory effects of a measure to be balanced with

1052 Appellate Body Report, *EC – Tariff Preferences* (2004), para. 173.
1053 Appellate Body Report, *China – Raw Materials* (2012), para. 7.375.
1054 Agreement on Technical Barriers to Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 120.
1055 This approach was followed by the panel and the Appellate Body in *US – Tuna II (Mexico)* (2012) and *US – COOL* (2012).

national policy considerations. Nevertheless, the Appellate Body concluded, in carrying out the 'no favourable treatment' test under Article 2.1 of the TBT Agreement, that de facto discriminatory measures having a "detrimental impact on competitive opportunities for imports" were not prohibited as long as the detrimental impact stemmed "exclusively from legitimate regulatory distinctions".[1056] This conclusion was reached after a detailed analysis of the object and purpose of the TBT Agreement, especially after the consideration that it strikes "a balance between, on the one hand, the objective of trade liberalization and, on the other hand, Members' right to regulate"[1057] similar to that set out in GATT by means of Art. XX. Also, the absence of an Art. XX-like exception was an element of 'context' taken into account by the Appellate Body.[1058] [1059]

The type of approach of the Appellate Body in these cases reveals that it may be more open to a contextual and teleological interpretation of WTO provisions, especially in cases involving sensitive issues such as *EC – Tariff Preferences* (2004), which dealt with the needs of developing countries, and *US – Clove Cigarettes* (2012), *US – Tuna II (Mexico)* (2012) and *US – COOL* (2012), which involved regulatory issues affecting Members' policy space.

In the cases mentioned above, the object and purpose of the treaty was resorted to specially to clarify the meaning of treaty provisions and, in particular, in *US – Clove Cigarettes* (2012), *US – Tuna II (Mexico)* (2012) and *US – COOL* (2012), to remedy gaps, i.e. the one left by the lack of exceptions provisions in the TBT agreement. [1060] However, there is still space for remedying gaps in other important agreements such as the SCM Agreement and making hortatory provisions effective. This is particularly important from the perspective of a development-oriented approach. The SCM Agreement regulates instruments traditionally used for developmental purposes and, despite its lack of preamble, interpreting it in light of the development objective of the WTO Agreement as a whole is of utmost importance for providing WTO Members with flexibilities for using subsidies which may be important for their social, economic and technological development.

1056 Appellate Body Report, *US – Clove Cigarettes* (2012), para. 215.
1057 Appellate Body Report on *US – Clove Cigarettes* (2012), para. 174.
1058 Appellate Body Report on *US – Clove Cigarettes* (2012), paras. 99; 101, 176 and the following paragraphs.
1059 The interpretation of other elements of Article 2.1 such the concept of "like product" was also characterised by a strong focus on the preamble of the TBT Agreement as well as other contextual elements such as Article III.4 of the GATT.
1060 Although in certain cases, the object and purpose has remedied gaps, it is not seen in WTO jurisprudence as an independent source of rights and obligations overriding the text of WTO provisions. See Appellate Body Report, *Japan – Alcoholic Beverages II* (1996), footnote 20; and Panel Report, *EC - Bed Linen (Article 21.5 - India)* (2003), para. 6.86.

In addition, there are several SDT provisions of limited operational value. Realising the development objective within the WTO involves reinforcing these important mechanisms which are destined to level the playing field between developing and developed countries. Using teleological interpretation could be one of the means to enforce these provisions, especially those bearing hortatory language or asking countries to exercise best efforts or to endeavour to accomplish a stated goal.[1061] The objectives of the WTO Agreement would not be taken into consideration in interpretation if SDT provisions were deprived of legal value and not considered legal commitments with binding and operational force. In any case, it is important to recognise that the explicit wording of these hortatory provisions makes it difficult to attribute stronger normativity to them without causing the WTO adjudicating bodies to engage judicial activism.

Teleological interpretation could also be useful in the analysis of the allocation of the burden of the proof. If the WTO Agreement contemplates a development objective, the rule on the burden of proof should also establish a level playing field between developed and developing countries. For instance, in analysing Article 12.3 of the TBT Agreement, which requires WTO Members to take into account the developing countries' needs in the preparation and application of its technical regulations, standards and conformity assessment procedures, the panels in *US – Clove Cigarettes* (2012) and *US – COOL* (2012) ultimately concluded that the burden of proof is on the complaining party and that S&D treatment provisions do not entitle developing countries to a shift in the normal distribution of burden of proof.[1062]

The panels, however, did not elaborate on the reason why the onus could not shift to the respondent (in the case, the US) in respect of Article 12.3 of the TBT Agreement. Depending on the circumstances, demonstrating the party's omission to take account of the developing countries' needs is difficult (amounting to a kind of devil's proof). Thus, it is problematic to require that the complaining party provides *prima facie* evidence in this regard. The country that is supposed to take into account the factors set forth in Article 12.3 is in a better position to show that it has actually taken the required measures, which should result in a shift of the burden of proof to the latter.

This does not mean that whenever it is difficult for a developing country Member to demonstrate inconsistency of another Member with a WTO obligation, the burden of proof

1061 A number of these best effort provisions exist in the WTO Agreement, including: Articles XXXVII:3 and XXXVI:9 of GATT 1994; Article XV:1 of GATS; Articles 10.1 and 10.4 of the SPS Agreement; Articles 10.3, 12.2, 12.5 and 12.9 of the TBT Agreement; Article 15 of the Antidumping Agreement; and Article 4.10 of the DSU. Rolland, *Development at the WTO*, 120.fn 15.

1062 Panel Report, *US – Clove Cigarette* (2012), para. 7.633-7.634; and Panel Reports, *US – COOL* (2012), para. 7.770.

should shift to the responding developed country Member. However, whenever there is an SDT that establishes a positive obligation that a Member takes account of the special development, financial and trade needs of developing country Member, this Member shall provide proper evidence in this regard as it is in a best position to do so, apart from being required to do so under WTO law. In *EC – Tariff Preferences* (2004), the Appellate Body did shift in some respects the burden of proof that normally applies to exceptions. In this case, the burden of proof generally falls on the respondent. However, the Appellate Body considered that the Enabling Clause was not a typical exception. It plays an important role in stimulating development by authorising preferential treatment for developing countries and encouraging deviation from the Most Favoured Nation (MFN) rule. This deviation, however, is stimulated only to the extent that preference-granting countries complies with its extensive requirements. [1063] Given the special characteristics and the several requirements of the Enabling Clause, the Appellate Body considered that the complainant bore the initial burden of identifying "those provisions of the Enabling Clause with which the scheme is allegedly inconsistent. As such, it stated that:

> The responsibility of the complaining party in such an instance, however, should not be overstated. It is merely to identify those provisions of the Enabling Clause with which the scheme is allegedly inconsistent, without bearing the burden of establishing the facts necessary to support such inconsistency. That burden, as we concluded above 243, remains on the responding party invoking the Enabling Clause as a defence.[1064]

In *US – Animals* (2015), the Panel reading into a SDT clause, simplified the burden of proof of the developing country complainant. In particular, in analysing Article 10.1 of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement)[1065], which requires Members to take account of the special needs of developing country Members, the Panel stated it was "cognisant that in considering what is required to show an inconsistency with Article 10.1 we cannot create a potentially insurmountable burden on the complainant. This is all the more so in the context of the obligation in Article 10.1 which is aimed at protecting the interests of developing countries."[1066]

Consequently, WTO adjudicating bodies should, in analysing SDT provisions, not only pay due regard to interpretation techniques that favour the concretisation of the sub-

1063 Appellate Body Report, *EC – Tariff Preferences* (2004), paras. 106-113.
1064 Appellate Body Report, *EC – Tariff Preferences* (2004), para. 115.
1065 Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 493.
1066 Panel Report, *US – Animals* (2015), para.7.698.

stance of the rule, but also adopt an allocation of burden of proof that takes into account their fundamental role and specific characteristics.

In view of the above, the fact that panels and the Appellate Body have been progressively relying on object and purpose to interpret sensitive issues within WTO law could indicate that they could also be more open to analyse development-oriented arguments based on teleological interpretation of WTO agreements. However, further advancement of the development dimension of interpretation of WTO agreements also requires that WTO adjudicating bodies have recourse to object and purpose to fill gaps in WTO law, give operational value to SDT provisions and establish rules on allocation of burden of proof that is consistent with the fundamental role of SDT provisions in promoting economic growth and development.[1067] Such an approach may be considered judicially activist and face political criticism from WTO Members as it will be explained in Chapter 5.

IV.3.2.3 Interpretation of WTO law in light of the wider corpus of international law

Article 31.3(c) of the VCLT requires that *any relevant rules of international law applicable in the relations between the parties* be taken into account together with context in the interpretation of treaties, establishing the principle of systemic integration of international law.[1068] While teleological interpretation of WTO agreements is important to keep the development objective in perspective, consideration of other norms of international law in the interpretation and application of WTO law can provide the interpreter with more elements to make the development dimension of WTO law more concrete.[1069]

First of all, it is important to differentiate the recourse to other international norms as applicable law in WTO disputes from interpretation of WTO agreements in light of other international rules. Both the situations may have a positive outcome in terms of advanc-

1067 A small number of SDT provisions have been used with any degree of frequency by developing countries. Id. at, 110. In addition, although developing country members have made reference to their developing condition in circumstances relating to SDT provisions, they have not directly based on it Qureshi, 210. 2015. Consequently, it seems that there is also space for developing countries to raise more arguments based on SDT provisions, provoking panels and the Appellate Body to decide on these issues.

1068 International Law Commission, *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law. Conclusions of the work of the Study Group.*, 2.

1069 For instance, the ICESC contain several obligations providing details on several aspects of economic rights which could give the interpreter more substance to interpret and apply the WTO agreements.

ing the development objective within the WTO.[1070] However, the former may not be possible by virtue of the limited jurisdiction attributed to Panels and the Appellate Body in WTO jurisprudence, as it will be detail in subsection IV.3.3 below.[1071] In practice, more integration with international law norms is more likely to happen through interpretation, considering the current case law.

Since the beginning of its operation, the Appellate Body expressed the view that *the covered agreements are not to be read in clinical isolation from public international law*[1072] calling for a more systemic (as opposed to a self-contained) interpretation of the WTO agreements against the background of international public law. Panels and the Appellate Body have consistently argued for the harmonisation of WTO law with other international obligations.

The fact that the basic interpretative technique of the Appellate Body denies the idea of the WTO as a self-contained regime shows that it is "in principle open to interconnectedness in the interpretation of 'development'."[1073] To the extent that several international instruments are concerned in promoting development and the right to development – UNDRD, ICESCR, the MDGs, the 2030 Agenda, among others, the advancement of the development dimension of WTO law may be substantially impacted by the way WTO adjudicating bodies interpret the relationship between WTO law and other international law norms, especially human rights instruments.

1070 Application of other international law norms by panels and the Appellate Body in the settling of disputes could potentially have changed the outcome of *China – Raw Materials* (2012). In this case, the Panel, in interpreting article XX(g) of GATT 1994, understood that it established a measure of evenhandiness where similar or parallel restrictions concerning the protection of exhaustible resources had to be imposed both in domestic and foreign consumers. As in the case China did nothing to restrict domestic extraction or consumption of the raw materials but imposed restrictions on foreign consumers, the Panel considered it was violating GATT. Were the ICESCR considered "applicable law" in this dispute, the outcome could potentially have been different. ICESCR allows for some degree of differentiation among nationals and non-nationals as regards protection of economic rights (Article 2.3). At the same time, it guarantees the "inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources" (Article 25). Moreover, it sets forth that "no restriction upon or derogation from any of the fundamental human rights recognized or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent" (Article 5.2). Considering that the ICESC allows for differentiation between nationals and non-nationals, the requirement of even-handiness established in GATT XX(g) could theoretically have been considered contrary to the ICESCR. Having the citizens of one country the inherent right to enjoy and utilise fully and freely the natural wealth and resources of their own country, restrictions imposed on national consumers should not be required to be similar to those imposed on foreign consumers as, pursuant to the ICESC, they have different degrees of rights in relation to Chinese natural resources.

1071 So far, the jurisprudence of the WTO has not accepted that non-WTO norms can be part of the applicable law in WTO disputes, except where these norms reflect customary international law from which the WTO treaty agreements have not contracted out. See Appellate Body Report, *Mexico – Taxes on Soft Drinks* (2006), paras. 56 and 78; Appellate Body Report, *Peru – Agricultural Products* (2015), para. 5.97; Panel Report, *Korea - Procurement* (2000), para. 7.96.

1072 Appellate Body Report, *US – Gasoline* (1996), para. 43.

1073 Office of the High Commissioner for Human Rights, "Human rights and trade," 8.

Nevertheless, two main factors prevent a deeper interconnectedness of WTO law with other international law norms.

Firstly, decisions vary substantially on the level of relevance and role attributed to international law in the interpretation of WTO agreements. While in some decisions, it is possible to see that other international law norms effectively played a role in determining the meaning of WTO law; in other decisions, the decision-making body focused on indicating that WTO law and the other international law norm coexist and can harmonise with each other, without providing a satisfactory explanation on how the non-WTO law actually impacts the interpretation of WTO law and influences the meaning of WTO provisions.

For instance, in *US – Shrimp* (1998) the Appellate Body, considering *modern international conventions and declarations* on environment protection, actually clarified the meaning of Article XX(g) of the GATT 1994 by concluding that the term 'exhaustible natural resources' comprise both living and non-living (e.g. mineral) resources. In *China – Raw Materials* (2012), in contrast, in interpreting the same WTO provision, in particular, the expression *made effective in conjunction with restrictions on domestic production or consumption*, vis-à-vis the principle of sovereignty, the Panel gives the impression of giving consideration to the latter in the interpretation of WTO agreements, but it ultimately does not play a substantial role. In stating that China's sovereignty over its natural resources has to conform with WTO parameters as a result of the country's accession to the WTO Agreement,[1074] the Panel's approach to Article XX(g) does not actually explain how the principle of sovereignty could clarify the scope of these parameters.

Secondly, a narrow reading of certain elements of Article 31.3(c) limits its scope and the possibility of consideration of other international norms in the process of interpretation of WTO agreements.[1075] In particular, this provision raises questions on (a) what categories or types of legal rules should be considered; (b) what rules are 'relevant'; and (c) which are the parties to be considered, for the purposes of this provision. In addition, (d) this provision does not clarify *whether the applicable rules of international law are to be determined as at the date on which the treaty was concluded, or at the date on which the dispute arises.*[1076] The interpretation of panels and the Appellate Body in respect of

1074 Panel Report, *China – Raw Materials* (2012), para. 7.405.

1075 References to international law norms in the interpretation of WTO agreements can be made without reference to Article 31.3(c) of the VCLT. However, they are limited to those situations where international rules can assist in clarifying the ordinary meaning of words of the treaties being interpreted or where they are considered supplementary means of interpretation (e.g. they are part of the historical background of the relevant WTO agreement). Joost Pauwelyn, *Conflict of norms in public international law: how WTO law relates to other rules of international law*, vol. 29 (Cambridge University Press, 2003).

1076 McLachlan, "The Principle of Systemic Integration and Article 31(3)(C) of the Vienna Convention," 290-91.

these issues poses limitations on how Article 31.3(c) can be used as a tool assisting in the promotion of a development-supporting interpretation of WTO Agreements.

(a) What categories of legal rules?

In general, there is some understanding among legal scholars that the relevant rules of international law include at least international conventions, international custom, and general principles of law.[1077]

Important instruments recognising the right to development, however, do not reflect these traditional sources of international law. For instance, there is no doctrinal consensus on the status of the right to development[1078] and the UNDRD. In addition, instruments such as the MDGs and the 2030 Agenda are commonly classified as soft law. This poses initial challenges for the role of Article 31(3)c of the VCLT in furthering a development-oriented approach to WTO law based on these soft law instruments.[1079] In any case, since the right to development encompasses the realisation of all human rights, human rights which are associated to international conventions such as the ICESCR, reflect international customs and general principles of law, could also be used for the purpose of systemic integration of WTO law.

However, except in punctual instances, panels and the Appellate Body do not generally use non-traditional sources of law in the interpretation of WTO agreements.[1080] In addition, so far, the Appellate Body has not relied on human rights law to interpret WTO law. In fact, human rights have rarely been mentioned in WTO dispute settlements at all."[1081] The Appellate Body has preferred to let human rights concerns enter the system of WTO

1077 Gardiner, *Treaty interpretation*; Qureshi, *Interpreting WTO Agreements: Problems and Perspectives*; Orakhelashvili, *The interpretation of acts and rules in public international law*..

1078 Prévost, *Balancing Trade and Health in the SPS Agreement: The Development Dimension*, 21; Isabella D Bunn, *The right to development and international economic law: legal and moral dimensions* (Bloomsbury Publishing, 2012). Nevertheless, several components of this 'umbrella' right have been given legal effect in various human rights instruments, that could be interpretative tools.

1079 Potentially, soft law instruments could be used as supplementary means of interpretation. However, supplementary means of interpretation are of limited applicability as they shall be resorted to only if the conditions set forth in Article 32 of the VCLT are met.

1080 The Panel in *EC – Approval and Marketing of Biotech Products* (2006), para 7.67, considered as 'rules', for the purpose of Article 31(3)(c), only those conventional elements of hard law: (i) international conventions (treaties), (ii) international custom (customary international law), and (iii) the recognised general principles of law. The Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)* (2011), paras. 307 and 308, equated 'rules of international law' to those sources defined in Article 38 of the ICJ Statute. In *US – Shrimp* (1998), para. 130, the Appellate Body, when interpreting the term 'natural resources' in Article XX(g) of the GATT, made reference to the Agenda 21, which is soft law. In this case, this legal instrument functioned as evidence of the common understanding of the parties as to the meaning of a term. McLachlan, "The Principle of Systemic Integration and Article 31(3)(C) of the Vienna Convention."

1081 Hestermeyer, "International Human Rights Law and Dispute Settlement in the World Trade Organization. Human Rights Norms in "Other" International Courts " 216.

law through the provisions of that regime itself as values rather than as human rights. Several provisions within WTO law can serve as entry points for non-trade interests, including the preamble of the WTO Agreement and Article XX of the GATT. [1082]

Nevertheless, many human rights, including ESC rights, preserve their relevance as tools for promoting a development-oriented approach in WTO law. A deeper consideration of the development dimension of WTO law would require that panels and the Appellate Body expand the interpretation of WTO Agreements vis-à-vis human rights, regardless of their status as hard law or soft law. This would be in line with the legal development in the jurisprudence of other international courts, where the role of soft law in treaty interpretation is increasing.[1083]

(b) Which rules are 'relevant'?

According to the case law of the Appellate Body, international law rules will be relevant, for the purposes of treaty interpretation, to the extent that they *concern the same subject matter as the treaty terms being interpreted*.[1084]

The interpretation of the expression "same subject matter" may be considered too restrictive and therefore prejudicial for the advancement of a development-oriented approach to WTO law. For instance, legal instruments relating to the right to development, economic, social and cultural rights may not concern the exact same subject matter as WTO agreements, but they may still be useful in clarifying some of their provisions, as trade and development are intrinsically related matters.

The text of Article 31(3)(c) does not fix a narrow criterion according to which rules must concern the same subject matter. In fact, the provision does not establish any criteria apart from the "relevance" of the rule, which is more naturally linked to its ability to clarify another rule and not necessarily to the fact that they concern the same subject matter.[1085] Any rule of international law capable of clarifying a treaty term should fall

1082 Hestermeyer, "International Human Rights Law and Dispute Settlement in the World Trade Organization. Human Rights Norms in "Other" International Courts " 217.

1083 The jurisprudence of the European Court of Human Rights shows several cases where sources of law which have not been signed or ratified; which are not conventional means of interpretation; and which are intrinsically non-binding instruments of the Council of Europe Bodies have been used for interpretative purposes. Gardiner, *Treaty interpretation*, 307-10.

1084 Appellate Body Reports on *US – Antidumping and Countervailing Duties (China)* (2011), para. 308; *EC and certain member States — Large Civil Aircraft* (2011), para. 846-855; *Peru – Agricultural Products* (2015), paras. 5.102-5.103.

1085 The French version of the provision refers to *"toute règle pertinente de droit international applicable dans les relations entre les parties."* "Pertinente" is the quality of relating to the thing that is being thought about or discussed; or the quality of being appropriate.

within that provision.[1086] In addition, the definition of "same subject matter" is imprecise, considering the various intersections between different areas (e.g. trade and environment, trade and investment).

Therefore, it is too restrictive to require that international rules concern the same subject matter of the treaty being interpreted. It should suffice that they relate to the treaty being interpreted and are able to clarify its provisions. This more reasonable approach enables that development-related instruments be taken into account in the interpretation of WTO agreements, even when they do not touch on the specific subject matters of WTO agreements (e.g. subsidies, trade-related investments, etc.).

(c) Which parties?

The reference in Article 31(3)(c) to international law rules 'applicable between the parties' does not clarify whether these rules shall apply only to the parties to the dispute or whether it should be applicable to *all* the parties to the treaty under interpretation.

Where the relevant rules of international law are customary law or general principles of international law such as the right to regulate, this discussion is not relevant to the extent that they will be binding to each and every State. This issue is particularly relevant when it comes to resorting to treaties other than the one being interpreted, because, in this case, not all parties to the dispute or to the treaty being interpreted may be bound by the treaty being resorted to.

This discussion has direct implications on the development-oriented interpretation of WTO law. It is difficult to find treaties involving development rights (e.g. human rights treaties) whose parties correspond to the whole WTO membership, also because some WTO Members are not States, and therefore not a party to (most) international agreements For instance, the parties to the ICESCR are not the same as the WTO Members. Just to cite one example, although the US signed the ICESCR, it has never ratified it. In this sense, there could be some doubt on whether the ICESCR can be raised in WTO disputes as a tool assisting in the interpretation of WTO law.

Four solutions for this question are found in international law doctrine:

(1) Recognising that the international rules referred to must be binding on all parties to the treaty being interpreted.

1086 Qureshi, *Interpreting WTO Agreements: Problems and Perspectives*, 47.

(2) Allowing that the relevant rules of international law be binding only on the parties to the dispute.[1087]
(3) Requiring that the treaty being referred to reflects customary international law.[1088]
(4) Requiring that the non-WTO rule be "at least implicitly accepted or tolerated by all WTO members, in the sense that the rule can reasonably be said to express the common intentions or understanding of all members as to what the particular WTO term means."[1089]

In *EC – Approval and Marketing of Biotech Products* (2006), the Panel, based on the idea that "party" in Article 2.1(g) of the VCLT means those States which have consented to be bound by the treaty, opted for the most restrictive solution, i.e., requiring that the relevant rules of international law be applicable in the relations between *all* the parties to the treaty under interpretation, that is, all WTO Members. According to the Panel, this approach "ensures or enhances the consistency of the rules of international law applicable to these States and thus contributes to avoiding conflicts between the relevant rules."[1090]

That drew criticism from legal scholars who stressed that, although the WTO jurisprudence signalled that its law should not be read 'in clinical isolation' from public international law, this narrow reading of Article 31(3)(c) VCLT effectively guaranteed such clinical Isolation.[1091] The International Law Commission (ILC) noted that interpreting article 31(3)(c) so that the treaty to be taken account of must be one to which all parties to the WTO treaty are parties almost nulifies the role of other treaties in assisting the interpretation of WTO law.[1092]

Although in that case the Panel stressed that 'parties' for the purposes of Article 31(3)(c) would mean all parties to the agreement being interpreted, it also highlighted that,

1087 This solution, however, could entail potential conflicting interpretations. Qureshi, *Interpreting WTO Agreements: Problems and Perspectives*, 47; McLachlan, "The Principle of Systemic Integration and Article 31(3)(C) of the Vienna Convention.".
1088 Although this solution may be correct in technical terms, "(i) it could preclude reference to treaties which have very wide acceptance in the international community (…) but which are nevertheless not universally ratified and which are not accepted in all aspects as stating customary international law (…); (ii) it could also preclude references to treaties which represent the most important elaboration of the content of international law on a specialist subject matter, on the basis that they have not been ratified by all parties to the treaty under interpretation". McLachlan, "The Principle of Systemic Integration and Article 31(3)(C) of the Vienna Convention," 314.
1089 Pauwelyn, *Conflict of norms in public international law: how WTO law relates to other rules of international law*, 29, 261.
1090 Panel Report, *EC – Approval and Marketing of Biotech Products* (2006), para. 7.70.
1091 Jan Klabbers, "Beyond the Vienna Convention: Conflicting Treaty Provisions," in *The Law of Treaties Beyond the Vienna Convention*, ed. Enzo Cannizzaro (Oxford Scholarship Online, 2011).
1092 International Law Commission, *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law. Conclusions of the work of the Study Group.*, 227-28.

because the relevant rules were not even binding on the parties to the dispute, it did not need to take a position on whether in such a situation it would be entitled to take the relevant rules of international law into account.[1093] Consequently, it left open the possibility of resolving the case using solution (2) above.[1094]

In *EC and certain member States – Large Civil Aircraft* (2011), the Appellate Body did not take a conclusive approach on the meaning of 'parties' for the purposes of Article 31(3)(c) of the VCLT, but it suggested that application of Article 31.3(c) required a reasonable equation between, on one side, the principle of systemic integration, and, on the other side, the rights and obligations assumed by WTO Members which may not be part to the other international instruments.[1095]

More recently, in *Peru – Agricultural Products* (2015), the Appellate Body arguably suggested (but it did not rule on the issue) that recourse to Article 31.3(c) may presuppose that all parties to the WTO are bound by the rules of international law.[1096] In explaining (i) that interpretation is a process that requires an homogeneous understanding by all the parties to the treaty reflecting their common intentions; and (ii) that it is not possible to conduct a partial interpretation of a treaty based on the understanding of only some parties, the Appellate Body has given an indication that it may consider the term "parties" as all the parties to a treaty, for the purposes of Article 31(3)(c):

> (…) Article 31(1) of the Vienna Convention states that '[a] treaty shall be interpreted' such that the object of the interpretative exercise is the treaty as a whole, not the treaty as it may apply between some of its parties. We thus understand that, with multilateral treaties such as the WTO covered agreements, the "general rule of interpretation" in Article 31 of the Vienna Convention is aimed at establishing the ordinary meaning of treaty terms reflecting the common intention of the parties to the treaty, and not just the intentions of some of the parties. While an interpretation of the treaty may in practice apply to the parties to a dispute, it must serve to establish the common intentions of the parties to the treaty being interpreted.[1097]

1093 Panel Report, *EC – Approval and Marketing of Biotech Products* (2006), para. 7.72.
1094 Bossche and Zdouc, *The Law and Policy of the World Trade Organization - Text, Cases and Materials*, 190-91..
1095 Qureshi, *Interpreting WTO Agreements: Problems and Perspectives*, 47. Appellate Body Report, *EC and certain member States – Large Civil Aircraft* (2011), para. 845.
1096 Because the AB did not find that the international norms resorted to by Peru were "relevant" for the purposes of Article 31.3(c), it argued that it did not need to address the meaning of the term 'parties' in this provision. However, from the reading of the AB report, it is possible to make some inferences as to its understanding of this term.
1097 Appellate Body Report, *Peru – Agricultural Products* (2015), para. 5.95.

Another possible interpretation is that the Appellate Body requires that the interpretation in light of relevant rules of international rules be consistent with the common intentions of the parties. This is in line with Appellate Body ruling on *EC and certain member States – Large Civil Aircraft* (2011) where it stated that interpretation of "the parties" in Article 31(3)(c) should be oriented by the fact that the purpose of treaty interpretation is to establish the common intention of the parties to the treaty.[1098]

An interesting approach was the one conducted by the Appellate Body in *US – Shrimp* (1998). In this case, the Appellate Body did not enter in the discussion of what is considered "parties" under Article 31.3(c) of the VCLT, it simply recognised, in view of modern international conventions and declarations on environmental law, that international community acknowledged the importance of concerted bilateral or multilateral action to protect living natural resources. This, together with the explicit recognition by WTO Members of the objective of sustainable development in the preamble of the WTO Agreement, was relevant for the purposes of interpreting Article XX(g) of the GATT 1994 as referring to the conservation of exhaustible natural resources, whether living or non-living. Therefore, rather than making a strict definition of what constitutes parties under Article 31.3(c), it is important to verify if the international rules being resorted to carry principles or values that are acknowledged by international community.[1099]

(d) Temporality

Article 31(3)(c) of the VCLT does not make it clear whether, in the interpretation of a treaty, account must be taken of relevant rules of international law that (i) existed at the time of conclusion of the treaty being interpreted or (ii) emerged later on and exist at the time of interpretation.

The first proposition of the International Law Commission (ILC) special rapporteur Sir Humphrey Waldock was to take into account, for interpretation purposes, only those rules existing at the time of the conclusion of the treaty. However, the ILC realised that this formula would not address intertemporal problems and would not reflect the evolution of international law.[1100] Consequently, by not setting forth any specific rule on temporality, the VCLT rules of interpretation left open the possibility of interpreting treaty provisions in light of the relevant rules of international law existing at the time of the conclusion of the treaty or at the time interpretation issues are raised.

1098 Appellate Body Report, *EC and certain member States – Large Civil Aircraft* (2011), para. 845.
1099 Appellate Body Report, *US – Shrimp* (1998), para. 130-131.
1100 Mustafa Kamil Yasseen, *L'interprétation des traités d'après la Convention de Vienne sur le droit des traités* (Martinus Nijhoff, 1976).

The Appellate Body has applied in certain cases evolutionary interpretation of treaty terms, especially in view of the indefinite duration of the agreement and the need to keep WTO law in line with the development of international law and the values of the international community.

In *US – Shrimp* (1998), in interpreting the term "exhaustible natural resources" under Article XX(g) of the GATT 1994, the Appellate Body noted that those words were "crafted more than 50 years ago" and "must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment."[1101] Moreover, this construction is reinforced by the fact that "the preamble attached to the WTO Agreement shows that the signatories to that Agreement were, in 1994, fully aware of the importance and legitimacy of environmental protection as a goal of national and international policy"[1102] and that "modern international conventions and declarations make frequent references to natural resources as embracing both living and non-living resources."[1103] Given the "evolutionary", rather than "static" definition of the term, the Appellate Body considered that it comprised both living and non-living (e.g. mineral) resources.

Likewise, in analysing the scope of China's commitment under its GATS Schedule, in particular, the entry "sound recording distribution services", the Appellate Body, in *China – Publications and Audiovisual Products* (2010), considered that the WTO Agreement is a treaty of indefinite duration and that generic terms may be interpreted differently over time, contrasting China's arguments that its commitments should be interpreted based on the meaning of those terms at the time the former were made.[1104]

Panels, in turn, have made recourse to evolutionary interpretation in some cases, while declining its application in others.[1105] As explained by Van den Bossche:

> WTO panels and the Appellate Body have not had frequent recourse to evolutionary interpretation, and (…) when they did, the approach taken was generally in line with the ICJ's approach to evolutionary interpretation. When giving an evolutionary interpretation to terms and concepts in WTO law, the Appellate Body and panels have stayed within the framework of

1101 Appellate Body Report, *US – Shrimp* (1998), para. 129.
1102 Appellate Body Report, *US – Shrimp* (1998), para. 129.
1103 Appellate Body Report, *US – Shrimp* (1998), para. 130.
1104 Appellate Body Report, *China – Publications and Audiovisual Products* (2010), paras. 396-397. Panels, in contrast, seem more hesitant in applying evolutionary interpretation. See Panel Reports on *EC – IT Products* (2010), para. 7.600 and footnote 806; *EC – Chicken Cuts (Brazil)* (2005), para. 7.99.
1105 Peter Van den Bossche, "Is there Evolution in the Evolutionary Interpretation of WTO Law?," in *Evolutionary Interpretation and International Law*, ed. Georges Abi-Saab et al. (Oxford: Hart Publishing, 2019), 226-27.

> the rules of interpretation set out in Articles 31 and 32 of the VCLT. They set out to establish the ordinary meaning of the generic, non-static terms and concepts at issue, in their context (broadly understood) and in light of the object and purpose of the WTO agreement at issue. Evolutionary interpretation, as endorsed and applied by the Appellate Body, is not a distinct rule of, or approach to, interpretation but the result of a proper application of the VCLT rules of interpretation, as a means by which to establish the intention of the parties to the WTO agreement at issue. In all the instances of evolutionary interpretation discussed above, it was the generic, non-static nature of the terms and concepts at issue that allowed for an evolutionary interpretation. The fact that generic, nonstatic terms and concepts were used in a WTO agreement reflects the intention of the parties to allow the rights and obligations under that agreement to evolve with the changing circumstances and situations in which they were to be applied.

Evolutionary interpretation is very important for a development-oriented interpretation of WTO agreements. Several instruments are constantly emerging in connection with development and sustainable development (e.g. MDGs, 2030 Agenda, Framework Convention on Climate Change, among others). The fact that the Appellate Body applied evolutionary approach to generic terms in WTO law that allows it to better address changes in societal values pursued by the international community or its members may also open space for a development-supporting interpretation of WTO agreements.

IV.3.2.4 Principle of effectiveness

The principle of effectiveness[1106] – which has been recognised by the Appellate Body as *one of the corollaries of the "general rule of interpretation" in the Vienna Convention*[1107] – plays an important role in advancing the development dimension of the WTO law, especially in cases where the explicit intentions of the parties are not clearly articulated in the WTO provisions and the principle, as a mandate for interpreting the treaty as a whole and with a view on the purpose which the treaty is considered to fulfil,[1108] enables the interpreter to fill in gaps or read WTO obligations consistently with the development objective of the WTO.

1106 For an extensive analysis of the functions of the principle of effectiveness in the jurisprudence of the Appellate Body, see Van Damme, *Treaty interpretation by the WTO Appellate Body*, 275-30.

1107 Appellate Body Report, *US - Gasoline* (1996), p. 23.

1108 Hersch Lauterpacht, "Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties," *Brit. YB Int'l L.* 26 (1949).

An international treaty – including the WTO Agreement – inevitably "bears the imprint of many hands" and its text is "sometimes negotiated to a point where an agreement to regulate a matter could only be reached on the basis of constructive ambiguity."[1109] Where the common intentions of the parties are not clearly stated or not at all present to the minds of the parties when they negotiated, the principle of effectiveness requires that the judge acts "on the implied intention of the parties, i.e. on his understanding, having regard to the contract as a whole and to surrounding circumstances, as to what would have been the attitude of the parties if confronted with the issue."[1110]

In WTO jurisprudence, however, a more modest view of the principle of effectiveness have been applied. In general, it has been equated to the mandate that "interpretation must give meaning and effect to all the terms of the treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility".[1111] WTO adjudicating bodies have advocated that, according to this principle, "a treaty interpreter must read all applicable provisions of a treaty in a way that gives meaning to all of them, harmoniously."[1112]The WTO agreements contains obligations relating to trade and development (e.g. Article XXXVI of GATT) which are characterised by their vague nature, in addition to SDT provisions lacking operational value.

In relation to provisions where Members are supposed to take into account the special needs of developing countries, the WTO jurisprudence has generally attributed a very low level of responsibility to the party that is supposed to give special regard to the situation of the former. The principle of effectiveness could in certain instances contribute to clarifying the scope of such clauses despite their hortatory language.

In *US — Steel Plate* (2002), the Panel assessed the extent of Member's obligation under Article 15 of the Antidumping Agreement, under which special regard must be given to developing countries when considering the application of antidumping measures. The Panel considered that there are no specific legal requirements for specific action in the first sentence of Article 15 and that, therefore, "Members cannot be expected to

1109 Appellate Body Report, *US – Continued Zeroing* (2009), para. 306.

1110 Lauterpacht, "Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties," 80.

1111 Appellate Body Report, *US — Gasoline* (1996), p. 23. See also: Appellate Body Report, *Canada — Dairy* (1999), para. 133; *Korea — Dairy*, para. 81; Appellate Body Report, *US — Section 211 Appropriations Act* (2002), para. 338; Appellate Body Report, *US — Offset Act (Byrd Amendment)* (2003), para. 271; *US — Upland Cotton* (2005), para. 549; *US — Softwood Lumber V (Article 21.5 — Canada)* (2006), para. 99.

1112 Appellate Body Report, *Argentina — Footwear (EC)* (2000), para. 81. See also *Canada — Renewable Energy / Canada — Feed-in Tariff Program* (2013), para. 5.26.

comply with an obligation whose parameters are entirely undefined."[1113] In *EC — Tube or Pipe Fittings* (2003), the Panel similarly stated that Article 15 "clearly contains no operational language delineating the precise extent or nature of that obligation or requiring a developed country Member to undertake any specific action."[1114] Likewise, the Panel in *EC — Bed Linen* (2001) stated that "(…) Article 15 does not require that 'constructive remedies' must be explored, but rather that the 'possibilities' of such remedies must be explored, which further suggests that the exploration may conclude that no possibilities exist, or that no constructive remedies are possible, in the particular circumstances of a given case. (…) It does, however, impose an obligation to actively consider, with an open mind, the possibility of such a remedy prior to imposition of an anti-dumping measure that would affect the essential interests of a developing country."[1115]

In interpreting Article 10.1 of the SPS Agreement, which urges WTO Members to consider the special needs of developing countries in the preparation and application of sanitary and phytosanitary measures, the Panel in *EC – Approval and Marketing of Biotech Products* (2006), by adopting a very literal approach, considered that the dictionary definition of 'take account of' was the same as "consider along with other factors before reaching a decision". Consequently, it considered that "Article 10.1 does not prescribe a specific result to be achieved. Notably, Article 10.1 does not provide that the importing Member must invariably accord special and differential treatment in a case where a measure has led, or may lead, to a decrease, or a slower increase, in developing country exports."[1116]

Likewise, in analysing the term *"take account of"* in Article 12.3 of the TBT Agreement, the Panels in *US – Clove Cigarette* (2012) and *US – COOL* (2012) both considered that Article 12.3 did not require a specific action or result from the country implementing the measure. In *US – Clove Cigarette* (2012), the Panel stated that "this provision does not, in our view, 'prescribe a specific result to be achieved'. Rather, we read Article 12.3 as an obligation to 'take account of" the special needs of developing countries'."[1117] Likewise, the Panel in *US – COOL* (2012), based on dictionary definition of the term, took the view that "'to take account of' and 'to take into account' mean to consider, but not necessarily to act in line with the specific need, view or position under consideration."[1118] In addition, it found that "Article 12.3 of the TBT Agreement does not amount to a requirement for WTO Members to conform their actions to the special needs of developing countries but

1113 Panel Report, *US - Steel Plate* (2002), para. 7.110.
1114 Panel Report, *EC - Tube or Pipe Fittings* (2003), para. 7.68.
1115 Panel Report, *EC - Bed Linen* (2001), para. 6.233.
1116 Panel Report, *EC – Approval and Marketing of Biotech Products* (2006), para. 7.1620-7.1621.
1117 Panel Report, *US – Clove Cigarette* (2012), para. 7.617.
1118 Panel Reports, *US – COOL* (2012), para. 7.776.

merely to give consideration to such needs along with other factors before reaching a decision."[1119]

Imposing no concrete requirement to show that active and meaningful consideration has occurred may frustrate the objective of the respective provisions and go against an effective and teleological interpretation thereof. Without imposing a more substantive obligation, equating 'take account of' to accord consideration to certain factors may result in the relevant country being very receptive to developing countries' concerns during the decision-making process, holding consultations with them, etc. but ultimately doing nothing that actually reflects the special needs of developing countries in its regulations (which is inconsistent with the development objective of the WTO Agreement). While 'take account of' may not be a requirement for WTO Members to conform their actions to the special needs of developing country, they should at least be obliged to justify on objective and reasonable grounds the lack of incorporation of the concerns of developing countries in their regulations.

Moreover, general exceptions in the WTO agreements also contain an open-textured language (e.g. definition of public morals in Arts. XX(a) of GATT 1994, XIV(a) of the GATS, and XXIII:2 of the GPA; public order in Art. XIV(a) of GATS and 27.2 of the TRIPS Agreement; human life in Arts. XX(b) of GATT 1994; XIV(b) of GATS, XXIII:2 of the GPA and 27.2 of the TRIPS Agreement). Under the principle of effectiveness, the interpreter could potentially expand the scope of such provisions, including developmental concerns as appropriate exceptions to trade rules.

As mentioned, in *US – Clove Cigarettes* (2012), *US – Tuna II (Mexico)* (2012) and *US – COOL* (2012), despite the absence in the TBT Agreement of a general exception like Article XX of GATT 1994 allowing that the discriminatory effects of a measure be balanced with national policy considerations, the Appellate Body considered that it was possible to make this kind assessment under Article 2.1 of the agreement. This represents a strong focus on effective and teleological interpretation that could be replicated in similar situations requiring a balance between trade and non-trade concerns.

IV.3.2.5 Interpretation of general exceptions

As mentioned above, the use of the general exceptions set forth in Article XX of the GATT 1994 and Article XIV of the GATS are an important instrument through which WTO Members could incorporate development concerns in the interpretation of WTO agreements. Such exceptions encapsulate non-trade objectives of the WTO Agreement and

1119 Panel Reports, *US – COOL* (2012), para. 7.781.

as such bridge the general rules to this other dimension of the WTO Agreement relating to development, environment, public health, human rights, etc. As mentioned by Van den Bossche and Zdouc, in interpreting Article XX of the GATT 1994, the Appellate Body "strikes a balance between on one hand, trade liberalisation, market access and non-discrimination rules and, on the other hand, other societal values and interests. Article XX is a balancing provision."[1120]

The Panel in *US - Tariff Measures* (2020) summarized the role of Article XX as follows:

> WTO Members can resort to Article XX as an exception to justify measures that would otherwise be inconsistent with their GATT 1994 obligations. Specifically, the subparagraphs of Article XX list various categories of policies that WTO Members may invoke to justify the potential inconsistency of their (challenged) measures with the substantive obligations of the GATT1994.
>
> As prior WTO adjudicators have consistently noted, the exceptions of Article XX may be invoked "as a matter of legal right". In other words, WTO Members have the legal right to invoke the policies listed in the subparagraphs of Article XX to justify inconsistencies with their obligations under the GATT 1994, precisely because these policies have been recognized as important and legitimate in character. Thus, Article XX allows WTO Members to adopt measures, which are a priori WTO-inconsistent if they do so in order to protect certain values or provide for certain policies. This legal right is subject to the challenged WTO-inconsistent measures complying with the requirements of the relevant provisions of Article XX. Because of the importance that WTO Members accord to this protection, the Panel recalls that the right to invoke the exceptions of ArticleXX is"not to be rendered illusory".
>
> At the same time, the exercise by a WTO Member of its right to invoke the exceptions o fArticle XX, if abused or misused, will erode or render naught the substantive treaty rights of otherWTO Members. For that reason, each of the subparagraphs of Article XX should be seen as a limited and conditional exception from the substantive obligations contained in the other provisions of the GATT 1994. Thus, the burden lies on the respondent invoking the defence of Article XX to prove that its challenged

1120 Bossche and Zdouc, *The Law and Policy of the World Trade Organization - Text, Cases and Materials*, 547.

> measure falls within the scope of the invoked subparagraph(s), and meets therequirements of the chapeau.
>
> It is generally accepted that the interpretation and application of Article XX should be informed by the need to maintain a balance between the right of a WTO Member to invoke an exception under Article XX and the duty of that same Member to respect the treaty rights of the other WTO Members.In other words, while the respondent may invoke the exceptions of Article XX as a matter of legal right, they should not be applied so as to frustrate or defeat the legal obligations of the holder of the right under the GATT's substantive rules.The balance between the right of a WTO Member to invoke the ArticleXX exceptions and its obligation to respect the rights of other WTO Members under the substantive provisions of the GATT1994 is not fixed and unchanging but moves depending on the type and shape of the challenged measures and the factsin each case.[1121]

General exceptions therefore allow for integration of WTO objectives and connect the WTO Agreement with the rest of the international order and its agenda on trade and non-trade concerns. In this sense, they are relevant for facilitating the development dimension of WTO law and allowing policy space for WTO Members to implement measures designed to protect their developmental goals. As "general exceptions", they presuppose that the trading system will tolerate certain national policy measures even though they deviate from, and thus could be said to undermine, the core obligations of the GATT 1994.[1122] Ultimately, Article XX of the GATT 1994 allows WTO Members, under certain circumstances, to deviate from specific obligations under GATT 1994 so as to address relevant societal values and interests.

The main challenge is to evaluate whether the alleged societal values and interests argued by the WTO Member wishing to deviate from the GATT 1994 is really a legitimate interest. Sometimes, Members can hide protectionist interest in allegedly societal concerns. As explained by Kapterian:

> [T]he WTO Agreement simultaneously aims to encourage trade liberalization by condemning measures that illegitimately advantage domestic industry, while specifically carving out multiple exceptions to allow sufficient space for the pursuit of other important policy objectives. The

1121 Panel Report, *US - Tariff Measures* (2020), para. 7.103-7.106.

1122 Sanford Gaines, "The WTO's reading of the GATT Article XX chapeau: a disguised restriction on environmental measures," *U. Pa. J. Int'l Econ. L.* 22 (2001): 772.

> factual basis for this difficulty lies in the fact that a Member's decision to regulate often advantages domestic industry, though the measure may not necessarily have been drafted with any protectionist intent. Thus, the issue facing the WTO adjudicatory bodies is whether the measure is legitimately aimed at non-trade goals with unintentional but unavoidable consequences for international trade or a disguised attempt to protect or boost domestic industry. The issue has perhaps gained more importance recently in light of the current economic crisis, to which many Members have responded by enacting measures aimed at supporting domestic industry crucial to the survival of their domestic economies.[1123]

Ultimately, Article XX of the GATT 1994 allow WTO Members to implement legitimate non-trade objectives and their social preferences, placing them in a higher position in comparison to the trade liberalisation goal of the WTO Agreement. Public morals, protection of human health, and all the other grounds mentioned in Article XX of the GATT 1994 are not set aside in the name of trade liberalisation commitments."[1124]

In order to analyse whether the GATT-inconsistent measures adopted by Members are legitimate and can be justified under Article XX of the GATT 1994, a two-tiered analysis must be made. First, the measures must be provisionally justified by one of the exceptions listed in paragraphs (a) to (j); and, second, the measure shall be assessed under the introductory clauses of Article XX.[1125]

However, in interpreting Article XX of the GATT 1994, panels and the Appellate Body have created obstacles for the justification of non-trade measures and for the assessment of its evenhandiness. As it will be argued below, certain aspects of the interpretation of the Appellate Body of Article XX undermine the balance intended by the provision. In this sense, current interpretation of Article XX does not particularly favour a development-oriented interpretation of WTO agreements.

First, as it will be argued below, although the Appellate Body is increasingly abandoning the idea that exceptions shall be interpreted restrictively, the general textual (or its limited contextual) approach to WTO law still prevents an expansive reading of exceptions into WTO agreements so as to include development concerns. Second, certain aspects of

1123 Gisele Kapterian, "A Critique of the WTO Jurisprudence on 'Necessity'," *The International and Comparative Law Quarterly* 59, no. 1 (2010): 89-90, www.jstor.org/stable/25622271.

1124 Petros C. Mavroidis, *The Regulation of International Trade : GATT. The Regulation of International Trade.* (Cambridge, Massachusetts: The MIT Presss, 2016), 415.

1125 See Appellate Body Report, *US – Gasoline* (1996), 22; Appellate Body Report, *US – Shrimp* (1998), para. 119-120; Appellate Body Report, *Brazil – Retreated Tyres* (2007), para. 139.

the Appellate Body's interpretation of Article XX prevents a full proportionality analysis of the interests at stake: Members' societal concerns, on one side, and trade interests, on the other side. In particular, the "necessity test" developed by WTO jurisprudence under Article XX of the GATT 1994 lacks a subsequent analysis of proportionality *stricto sensu* which evaluates whether the effects of a measure are disproportionate or excessive in relation to the interests involved and puts an undue emphasis on the analysis of less-trade restrictive alternatives. Additionally, the interpretation of the chapeau may not allow for an adequate balancing of trade and non-trade concerns, because although its analysis is interdependent with the that of the paragraphs of Article XX, in practice, the two-tiered test mentioned above ends up segmenting the analysis in a way that prevents a more integrated assessment of the measure in terms of its proportionality.

Finally, of particular relevance for a development-oriented approach to WTO law is to understand whether GATT general exceptions can be applied beyond the GATT 1994, in particular, to the SCM Agreement. As seen in previous chapters, while certain GATT-inconsistent targeted economic development subsidies could be justified under GATT general exceptions, they could not be so under the SCM Agreement, absent a similar exception clause in such agreement. Therefore, from a practical perspective, if GATT exceptions are not applicable to the SCM Agreement, these subsidies may still be considered WTO-inconsistent and the usefulness of the general exception will become void for these cases. The applicability of the GATT exceptions to the SCM Agreement under WTO law and practice is also discussed below.

(a) Textual approach to WTO agreements preventing the application of exception clauses

The VCLT rules of interpretation do not contain special norms for interpreting exceptions. However, there is a legal maxim that exceptions shall be interpreted restrictively, meaning that in case of a contest between a general rule and an exception, any doubt may be resolved in favour of the former. Nevertheless, it is not clear whether this canon is of mandatory or discretionary application in international law.[1126]

The practice in the GATT and some early panels[1127] in the WTO, have adopted this legal maxim in the interpretation of exceptions. However, the Appellate Body has departed

1126 Qureshi, *Interpreting WTO Agreements: Problems and Perspectives*, 170.

1127 GATT Panel Report, *EEC (Member States) - Bananas I* (1993), para. 339; GATT Panel Report, *Canada – Ice Cream and Yoghurt* (1989), para. 59; GATT Panel Report, *US – Tuna (Mexico)* (1991), para. 5.22; GATT Panel Report, *US – Sugar Waiver* (1990), para. 5.9; GATT Panel Report, *US – Canadian Pork* (1991), para. 4.4; GATT Panel Report, *US – Customs User Fee* (1987), para. 84; Panel Reports on *US - Shrimp* (1998), para. 7.46; *US – Underwear* (1997), para. 7.21; and *US — Section 110(5) Copyright Act* (2000), para. 6.97.

from the presumption of restrictive interpretation of exceptions.[1128] In *US – Gasoline* (1996) and *US – Shrimp* (1998), Appellate Body has interpreted Article XX based on normal rules of treaty interpretation, based on the ordinary meaning of the treaty text in light of its context.

In this sense, in *US – Gasoline* (1996), the Appellate Body stated that "the relationship between the affirmative commitments set out in, e.g., Articles I, III and XI, and the policies and interests embodied in the "General Exceptions" listed in Article XX, can be given meaning within the framework of the General Agreement and its object and purpose by a treaty interpreter only on a case-to-case basis, by careful scrutiny of the factual and legal context in a given dispute, without disregarding the words actually used by the WTO Members themselves to express their intent and purpose."[1129] In *US – Shrimp* (1998), no restrictive interpretation was adopted. As mentioned above, the Appellate Body even adopted a evolutionary interpretation of its paragraph as a "result of a proper application of the VCLT rules of interpretation, as a means by which to establish the intention of the parties to the WTO agreement at issue."[1130]

Even though there is now a discourse that exceptions should be interpreted under normal rules of treaty interpretation, and indeed there are cases where the Appellate Body analysed exceptions with an open mind such as in *EC – Tariff Preferences* (2004), where teleological interpretation played an important role, there are also cases in which the Appellate Body adopted a very textualist approach which prevented a more expansive reading of exceptions, undermining the realisation of important objectives of the WTO.

For instance, while in *China – Publications and Audiovisual Products* (2010), the Appellate Body found that, by virtue of the introductory clause of para. 5.1 of China's Accession Protocol, China could invoke Art. XX(a) to justify provisions found to be inconsistent with China's trading rights commitments under its Accession Protocol and Working Party Report,[1131] the same conclusion was not reached in relation to *China – Raw Materials* (2012).

In *China – Raw Materials* (2012), the issue of whether Article XX of GATT 1994 could be used to justify export duties that are found to be inconsistent with China's obligations

1128 Qureshi, *Interpreting WTO Agreements: Problems and Perspectives*, 152.
1129 Appellate Body Report, US – Gasoline (1996), p. 18.
1130 Bossche, "Is there Evolution in the Evolutionary Interpretation of WTO Law?," 228.
1131 The Appellate Body interpreted the language of Paragraph 5.1 of China's Accession Protocol as including a reference to Article XX, especially in view of *"China's right to regulate trade in a manner consistent with the WTO Agreement"*. See Appellate Body Report, *China — Publications and Audiovisual Products*, paras. 218, 226–230, 233.

under Paragraph 11.3 of China's Accession Protocol was raised. Because the text of the latter provision expressly refers to Article VIII of the GATT 1994, but does not contain any textual reference to other provisions of the GATT 1994, including Article XX, the Appellate Body considered it as an indication that Article XX could not be used as a defence by China in this case.[1132] In addition, it argued that the absence of a reference to the GATT 1994 in Paragraph 11.3 in contrast with the references to this agreement in Paragraphs 11.1 and 11.2 of China's Accession Protocol further supported the interpretation that China may not have recourse to Article XX.[1133] In particular, the Appellate Body found that because *"such language is not found in Paragraph 11.3 of China's Accession Protocol"*, Article XX could not be used to justify export duties that are inconsistent with Paragraph 11.3 of its Accession Protocol.[1134]

Additionally, the Appellate Body found that neither of the objectives in the preamble of the WTO Agreement nor the balance struck between trade and non-trade concerns contained therein "provides specific guidance on the question of whether Article XX of the GATT 1994 is applicable to Paragraph 11.3 of China's Accession Protocol." [1135]

This textual approach in *China – Raw Materials* (2012) in analysing whether exceptions are applicable to the dispute is in contrast to the teleological interpretation applied by the Appellate Body in *US – Clove Cigarettes* (2012), *US – Tuna II (Mexico)* (2012) and *US – COOL* (2012), which read in flexibilities which were not apparent from the text of the TBT Agreement. In *China - Raw Materials* (2012), despite the fact that there was no specific textual reference to the GATT 1994 in Paragraph 11.3 of China's Accession Protocol, the Accession Protocol is considered an 'integral part' of the WTO Agreement and the introductory language of Paragraph 5.1 establishes a general right to regulate trade that should be considered in relation to all obligations contained in the Accession's Protocol. These factors were controversially discarded by the Appellate Body as relevant elements supporting the existence of a right to regulate trade by China to be balanced against its export duties.

Consequently, the interpretation followed by the Appellate Body in *China – Raw Materials* (2012) overrestricted the applicability of the right to regulate trade which has an utmost importance for realising non-trade concerns. The right to regulate trade and therefore to resort to Article XX as a defence for export duties should not be interpreted as having been excluded from China's Accession Protocol, at the risk of being considered

1132 Appellate Body Report, *China – Raw Materials* (2012), para. 303.
1133 Appellate Body Report, *China – Raw Materials* (2012), para. 293.
1134 Appellate Body Report, *China – Raw Materials* (2012), para, 304.
1135 Appellate Body Report, *China – Raw Materials* (2012), para. 306.

"somewhat like the pact with the devil".[1136] Its elimination ultimately resulted in a severe mitigation of China's policy space for addressing non-trade concerns in case of export duties. This type of interpretation could also restrict the applicability of Article XX of the GATT 1994 to the SCM Agreement, as it will be discussed below.

As seen, the right to regulate is a principle of international customary law and should inform the interpretation of WTO agreements. General exceptions are enforceable legal instruments aimed at protecting the right to regulate, but this principle also has an autonomous existence, distinct from GATT Article XX or GATS Article XIV. To this effect, China's Accession Protocol could be analysed in view of such principle of international customary law independently of more explicit references to GATT exceptions in China's Accession Protocol.

In *China – Rare Earths* (2014), China again asked the Panel to rule on the availability, to China, of general exceptions enshrined in the GATT1994, to excuse a potential violation of Paragraph 11.3 of China's Accession Protocol. The Panel ultimately took the previous position declared by the Panel and the Appellate Body in *China – Raw Materials* (2012), but one dissenting panellist, based on a holistic interpretation of the WTO Agreement and the Chinese Accession Protocol as an integral part thereof, expressed the view that the obligations in Paragraph 11.3 of China's Accession Protocol are subject to the general exceptions in Article XX of the GATT 1994.[1137]

To this effect, the dissenting panellist recalled the components and functioning of the WTO Agreement as a Single Undertaking in the sense of being a single treaty for which there are no reservations and where all WTO provisions are generally simultaneously and cumulatively applicable.[1138] Consequently, Paragraph 11.3 should be read cumulatively and simultaneously with related GATT Articles II and XI and as an integral part of the GATT system of rights and obligations. Consequently, the defences provided in the GATT 1994 are automatically available to justify an obligation arising from China's Accession Protocol - unless a contrary intention is expressed by the acceding Member and WTO Members.[1139] However, nothing in China's Accession Protocol clearly indicated such a waiver. As a concluding remark, the dissenting panellist argued that *finding that the obligation in Paragraph 11.3 is subject to the general exceptions in Article XX of the GATT 1994 allows China to exercise its rights and obligations with a view to favouring its sustainable development*.[1140] The Appellate Body was not called to make a determination on this

1136 Qureshi, *Interpreting WTO Agreements: Problems and Perspectives*, 142.
1137 Appellate Body Report, *China – Rare Earths* (2014), para. 7.119-7.138.
1138 Appellate Body Report, *China – Rare Earths* (2014), para. 7.121 and 7.127.
1139 Appellate Body Report, *China – Rare Earths* (2014), para. 7.136 and 7.138.
1140 Appellate Body Report, *China – Rare Earths* (2014), para. 7.138.

topic, however, it did analyse the relationship between China's accession Protocol, on the one hand, and the WTO Agreement, on the other hand, which represents an important preliminary topic for discussing whether China could resort to the policy exceptions set forth in Article XX of the GATT 1994

It stated that Paragraph 1.2 of China's Accession Protocol serves to build a bridge between the package of protocol provisions and the existing package of rights and obligations under the WTO legal framework. As a result, the Marrakesh Agreement, the Multilateral Trade Agreements, and China's Accession Protocol together form one package of rights and obligations that must be read in conjunction. However, in the Appellate Body's view, "*the mere fact that each of the Multilateral Trade Agreements is an integral part of the Marrakesh Agreement by virtue of Article II:2 of the Marrakesh Agreement does not, in and of itself, answer the question as to how specific rights and obligations contained in those Multilateral Trade Agreements relate to each other, particularly when they are contained in different instruments that nevertheless relate to the same subject matter.*"[1141]

According to the Appellate Body, the specific relationship among individual terms and provisions of the Multilateral Trade Agreements (including accession protocols), and between such provisions and the Marrakesh Agreement, must be determined on a case-by-case basis through a proper interpretation of the relevant provisions of these agreements. In other words, this specific relationship must be ascertained through scrutiny of the provisions concerned, read in the light of their context and object and purpose, with due account being taken of the overall architecture of the WTO system as a single package of rights and obligations, and any specific provisions that govern or shed light on the relationship between the provisions of different instruments (such as the General Interpretative Note to Annex 1A). [1142]

Ultimately, the Appellate Body did not consider that its analysis in *China – Raw Materials* was limited to the text of Paragraph 11.3 alone. It considered that it relied on the context provided by Annex 6 of China's Accession Protocol, Article VIII of the GATT 1994, and the relevant structure of the Accession Protocol, including the specific exceptions to China's obligations to eliminate export duties. On this basis, the Appellate Body concluded that "a proper interpretation of Paragraph 11.3 of China's Accession Protocol does not make available to China the exceptions under Article XX of the GATT 1994". Considering that in the appeal in *China – Rare Earth* no participant challenged the Appellate Body's ruling in *China – Raw Material,* the Appellate Body saw no reason to revisit such ruling. [1143]

1141 Appellate Body Report, *China – Rare Earths* (2014), para. 5.52.-5.53.
1142 Appellate Body Report, *China – Rare Earths* (2014), para. 5.55.
1143 Appellate Body Report, *China – Rare Earths* (2014), para. 5.65.

The Appellate Body's arguments are of course well-ground in terms of interpretative reasoning and methodology. It justified previous critiques that it adopted a textual reading of China's Accession Protocol and clarified that it did take into account context, that is, Annex 6 of China's Accession Protocol, Article VIII of the GATT 1994, and the relevant structure of the Accession Protocol. However, the Appellate Body did have other options in interpreting such legal instrument. It could interpret it in light of a closer/more restricted context (e.g. the structure of the Accession Protocol and the GATT 1994) or a broader context (e.g the rationale of the WTO Agreement; the right to regulate as a principle of customary law, etc.). As interpretation is also a matter of choice based on institutional and political environment (see Chapter 5), the Appellate Body made the interpretative choice which it deemed more adequate considering its institutional and political setting and construed Paragraph 11.3 of China's Accession Protocol in view of a more restricted context.

In view of the above, although the Appellate Body has left aside the notion that exceptions shall be interpreted restrictively, a textual reading or a restrictive contextual interpretation of WTO law still prevents an expansive reading of exceptions into WTO agreements and restricts the applicability of Article XX beyond the GATT 1994. Not only a truly holistic interpretation of WTO provisions is necessary but also teleological interpretation of WTO law and systemic interpretation in light of the right to regulate are necessary for opening up the possibility of exceptions. This may contribute to the development-oriented approach to WTO agreements to the extent that more situations connected to public policy interests may be justified under WTO exception clauses.

(b) The challenges related to the "necessity test"

Another point that restricts the development-oriented approach to WTO law is the way panels and the Appellate Body conduct the proportionality analysis under GATT and GATS exceptions. As explained by Henckels:

> Proportionality analysis is a discursive judicial technique or analytical structure for adjudicating disputes concerning measures intruding on protected rights or interests but pursuing a public objective or communal aim. Originating in German administrative law, it is now employed by many international and supranational courts and tribunals in a variety of contexts, is evolving as the dominant judicial technique for mediating between the competing values of rights protection (or protection of the legal regime's primary interest, such as free movement of goods) and the

> public interest pursued by government policy, and may be emerging as a general principle of international law.[1144]

While there is no single coherent approach to proportionality analysis, in the European tradition the technique comprises a preliminary assessment of the legitimacy of the measure's objective, then three analytical stages: suitability, necessity and proportionality *stricto sensu*.[1145] Van den Bossche explains the meaning of the analytical stages as follows:

> The first step is the assessment of suitability, i.e. whether the measure at issue is suitable or appropriate to achieve the objective it pursues. Suitability requires 'a causal relationship between the measure and its object.' The second step of the full proportionality test is the assessment of necessity, i.e. whether there exists an alternative measure which is less trade restrictive than the measure at issue and which is (at least) equally effective in achieving the pursued objective. If such alternative measure exists, the measure at issue is not 'necessary'. The third and final step is the assessment of proportionality *stricto sensu*, i.e., proportionality in its narrow sense. This step involves an assessment of whether the effects of a measure are disproportionate or excessive in relation to the interests involved.[1146]

WTO jurisprudence to some extent follows this approach to proportionality in European tradition. The most problematic step in this approach is the necessity test, which, in the WTO case, applies to the interpretation of Article XX(a) (*necessary to protect public morals*); Article XX(b) (*necessary to protect human, animal or plant life or health*); and Article XX(d) (*necessary to secure compliance with laws or regulations*) of the GATT 1994.[1147] Other paragraphs of this provision have other grounds of justification and requirements on the relationship between the measure at issue and the societal value pursued.[1148]

1144 Caroline Henckles, "Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor-State Arbitration," *Journal of International Economic Law* 15, no. 1 (2012): 226.

1145 Henckles, "Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor-State Arbitration," 227; Peter Van den Bossche, "Looking for Proportionality in WTO Law," *Legal Issues of Economic Integration* 35, no. 3 (2008): 285.

1146 Bossche, "Looking for Proportionality in WTO Law," 285.

1147 Similarly, the necessity test is used in the analysis of subparagraphs (a), (b) and (c) of Article XIV of the GATS.

1148 Bossche and Zdouc, *The Law and Policy of the World Trade Organization - Text, Cases and Materials*, 554.

It is important to note that the WTO does not adopt the full proportionality test under the European tradition. It basically makes reference to the first and second steps of the analytical method in European tradition: (i) analysis of suitability of the measure and (ii) assessment of necessity, i.e. whether there exists an alternative measure which is less trade restrictive than the measure at issue and which is (at least) equally effective in achieving the pursued objective. No proportionality *stricto sensu* test is actually conducted.

The necessity test under Article XX of the GATT 1994 is summarised by the Appellate Body in *Brazil – Retreaded Tyres* (2007):

> "(…) in order to determine whether a measure is "necessary" within the meaning of Article XX(b) of the GATT 1994, a panel must consider the relevant factors, particularly the importance of the interests or values at stake, the extent of the contribution to the achievement of the measure's objective, and its trade restrictiveness. If this analysis yields a preliminary conclusion that the measure is necessary, this result must be confirmed by comparing the measure with possible alternatives, which may be less trade restrictive while providing an equivalent contribution to the achievement of the objective. This comparison should be carried out in the light of the importance of the interests or values at stake. It is through this process that a panel determines whether a measure is necessary." [1149]

Therefore, under WTO jurisprudence, the necessity analysis involves a 'weighing and balancing' test, which is followed by the 'less-trade restrictive alternative' (LTRA) test. It is a sequential analysis.

In this sense, the Appellate Body, in *US – Gambling*, addressed, in the context of Article XIV(a) of the GATS, the proper means of assessing "necessity" through a process of "weighing and balancing" a numberof factors. The Appellate Body explained that the process begins with an assessment of the relative importance of the interests or values furthered by the challenged measure. A panel should then turn to the other factors that are to be weighed and balanced, which will in most cases include: (i) the contribution of the measure to the realization of the ends pursued by it; and (ii) the restrictive effect of the measure on international commerce. Additional factors may be relevant in specific cases. Once a panel has identified the factors to be weighed and balanced, comparison

1149 Appellate Body Report, *Brazil — Retreaded Tyres*, para. 156.

of the challenged measure and possible alternatives should be undertaken, and the results considered in the light of the importance of the objective pursued.[1150]

Additionally, the Appellate Body in *China – Publication and Audiovisual Products*, building upon previous analysis of the necessity test stated:

> We do not see that the Appellate Body's approach to the "necessity" analysis in *Brazil –Retreaded Tyres* differs from that in *US – Gambling*, which in turn referred to *Korea – Various Measures on Beef*. In each case, a sequential process of weighing and balancing a series of factors was involved. *US – Gambling* sets out a sequence by using the phrases: "The process begins with an assessment of the 'relative importance' of the interests or values furthered by the challenged measure"; "Having ascertained the importance of the particular interests at stake, a panel should then turn to the other factors that are to be 'weighed and balanced'"; and "A comparison between the challenged measure and possible alternatives should then be undertaken". The description of this sequence in *Brazil – Retreaded Tyres* mentions, first, the relevant factors to be weighed and balanced for the measure sought to be justified, and continues that the result of this analysis "must be confirmed by comparing the measure with possible alternatives, which may be less trade restrictive while providing an equivalent contribution to the achievement of the objective". Although the language used is not identical, both reports articulate the same approach and, like the Appellate Body report in *Korea – Various Measures on Beef*, emphasize the need to identify relevant factors and undertake a weighing and balancing process including, where relevant, with respect to propose alternative measures that may be less trade restrictive while making an equivalent contribution to the relevant objective. These three reports also all recognize that a comprehensive analysis of the "necessity" of a measure is a sequential process. As such, the process must logically begin with a first step, proceed through a number of additional steps, and yield a final conclusion.[1151]

The main problem lies in the fact that the necessity test under WTO jurisprudence is not part of a broader/full proportionality analysis. After analysing whether less-trade restrict alternatives exist, panels and the Appellate Body should also examine whether

1150 Appellate Body Report, *US – Gambling* (2005), paras. 306-308. In paragraph 305, the Appellate Body quoted from paragraph 166 of Appellate Body Report, *Korea – Various Measures on Beef.*

1151 Appellate Body Report, *China – Publication and Audiovisual Products* (2010), para. 242.

the effects of a measure are disproportionate or excessive in relation to the interests involved (proportionality *stricto sensu*). Ultimately, there is too much emphasis in the LTRA test and not on the overall balance of the measure considering the legitimate interests pursued by the Member and its restrictiveness to trade. Although such balance is examined in the 'weighing and balancing' stage,[1152] if panels and the Appellate Body finds a suitable LTRA, the measure at dispute is not defensible anymore under Article XX of the GATT 1994.

As explained by Cottier et al, "panels and the Appellate Body mainly operate proportionality within the concept of necessity. The obligation to show and prove less stringent measures by the complaining party is at the heart of the test."[1153]

Panels and the Appellate Body do not incorporate the LTRA test into the 'weighting and balancing' analysis, making it an additional step of the analysis and not an integrated one. Nevertheless, integrating the LTRA test in the weighting and balancing analysis would be more in line with a broader/full proportionality examination.

It is interesting to note that although WTO follows the rationale of the necessity test from continental European tradition, not all jurisdictions apply the necessity analysis in the same way. As explained by Andenas and Zlepnig, "looking at some English cases, such as the Shayler judgment, necessity is interpreted differently from the classical three-step test outlined in this section. The English courts tend to align 'necessity' with the principle of proportionality stricto sensu."[1154]

As explained by Alcaraz, "the application of this criterion by panels was subject to great criticism because of their tendency to admit the existence of alternative less trade restrictive measures without a rigorous examination of the level of protection demanded

1152 In *Colombia – Textiles* (2016), the Appellate Body noted that "Whether a particular degree of contribution is sufficient for a measure to be considered "necessary" cannot be answered in isolation from an assessment of the degree of the measure's trade-restrictiveness and of the relative importance of the interest or value at stake; for example, a measure making a limited contribution to protecting public morals may be justified under Article XX(a) in circumstances where the measure has only a very low trade-restrictive impact, taking into account the importance of the specific interest or value at stake; similarly, it may be that a measure making a significant contribution is not justified under Article XX(a) if that measure is highly trade restrictive; thus, if a panel finds some degree of contribution, but ceases to analyse the other factors (the degree of trade-restrictiveness and the relative importance of the interest or value at stake), a weighing and balancing exercise cannot be conducted, and thus a proper consideration of a respondent's defence that the measure is necessary is foreclosed" (Appellate Body Report, *Colombia – Textiles* (2016), para. 5.77).

1153 Thomas Cottier et al., *The Principle of Proportionality in International Law*, NCCR Trade Working Paper (Switzerland: NCCR Trade Regulation, 2012), 30.

1154 Mads Andenas and Stefan Zleptnig, "Proportionality and balancing in WTO law: a comparative perspective," *Cambridge Review of International Affairs* 20, no. 1 (2007): 75. See *R v Shayler* [2003] 1 AC 247 (House of Lords) relating to the compatibility of the Official Secrets Act 1989 with the Human Rights Act 1998.

by members and whether the measure is reasonably available to them."[1155] In addition, the idea that Members are arguably obliged to adopt first-best efficient policies are at odds with GATT-Realpolitik[1156] and the original compromise of the Members that their non-trade objectives and social preferences should be respected. GATT did not impose a measure that their Members implement national policies in perfect consonance with economic theory.

Deciding on the suitability of less trade-restrictive measures may represent an intrusion in the Members' sovereignty and right to regulate that they may not have agreed to cede when becoming a Member of the WTO. As explained by Amaral Júnior, "[T]he applicability of Article XX has been severely limited insofar as 'necessary' is now tantamount to 'measure for which there is no reasonable alternative' as a result of the case *US-Section 337*."[1157]

In this context, Members have expressed dissatisfaction with the rigid application of the necessity test, in particular, the examination of "less-trade restrictive alternatives". For instance, *US – Shrimp* (1998), the United States argued that the necessity test 'required dispute settlement panels to dictate the specific measure to be adopted by the WTO member, since presumably there was only one measure among all the alternatives that was the least inconsistent with the GATT 1994'. Furthermore, United States claimed that the elements included in the necessity test were not able to be inferred from the text of Article XX. United States considered that application of the chapeau of Article XX would have been enough to prevent protectionist ends. There is a perception by WTO Members that the application of the 'less-trade restrictive' test is a disregard of their right to regulatory autonomy. [1158]

Panels and the Appelate Body, therefore, should be very careful in establishing the parameters of the necessity test. As noted by Ortino, "[T]he difficult task in the "necessity" calculation (…) is not only to determine whether there exist other regulatory measures that affect trade to a lesser extent compared to the measure chosen by the Member State; it is principally to establish whether these alternatives are indeed capable of

1155 Isabel Cristina Salinas Alcaraz, "The concept of necessity under the GATT and national regulatory autonomy," *Via Inveniendi Et Iudicandi* 10, no. 2 (2015): 84.
1156 Mavroidis, *The Regulation of International Trade : GATT. The Regulation of International Trade.*, 415.
1157 Alberto do Amaral Junior, "WTO as a Self-Limited Regime: The Case of Article XX of GATT," in *The WTO Dispute Settlement Mechanism: A Developing Country Perspective*, ed. Alberto do; Amaral Júnior, Luciana Maria de Oliveira Sá; Pires, and Cristiane Lucena Carneiro (Springer, 2019), 69.
1158 Alcaraz, "The concept of necessity under the GATT and national regulatory autonomy," 84.

achieving the specific public policy objective as effectively and to the same extent as the chosen measure."[1159]

First of all, when examining the less trade-restrictive alternatives, panels and the Appellate Body should be attentive in assessing whether the suggested alternative actually meets the desired level of protection with respect to the objective pursued. WTO adjudicatory bodies are already paying attention to this factor. In *China – Publications* (2010), the Appellate Body stated that *"a 'reasonably available' alternative measure must be a measure that would preserve the responding party's right to achieve its desired level of protection with respect to the objective pursued under Article XX of the GATT 1994."*[1160] In *EC – Seal Products*, the Appellate Body asserted that *"in order to qualify as a 'genuine alternative', the proposed measure must be not only less trade restrictive than the original measure at issue, but should also 'preserve for the responding Member its right to achieve its desired level of protection with respect to the objective pursued'"*.[1161] Likewise, in Colombia – Textiles, the Appellate Body mentioned that *"in most cases, a panel must compare the challenged measure and possible alternative measures that achieve the same level of protection while being less trade restrictive."*[1162] This type of approach does not put into question the objective pursued by the Member, but is intended to provide a standard to evaluate the necessity of a domestic measure.[1163]

However, one thing is establishing the parameter in theory, the other is applying it in practice. This type of analysis opens space for subjective interpretation by panels and the Appellate Body as they can use their own value system and reasoning to jugde the level of protection conferred by the alternative measure.[1164]

Therefore, panels and the Appellate Body should assess whether the alternative measure meets the same level of protection by making reference to qualitative and also quantita-

1159 Federico Ortino, *Basic legal instruments for the liberalisation of trade : a comparative analysis of EC and WTO law*, Studies in international trade law, (Oxford: Hart Publishing, 2004), 471.

1160 Appellate Body Report, China - Publications and Audiovisual Products (2010), para. 318.

1161 Appellate Body Report, *EC – Seal Products* (2014), para, 5.261.

1162 Appellate Body Report, Colombia - Textiles (2016), para. 5.74

1163 Andenas and Zleptnig, "Proportionality and balancing in WTO law: a comparative perspective," 80.

1164 As explained by Andenas and Zleptnig, "The necessity test seems to imply the following. A measure is necessary if it is either indispensable or alternative measures are not reasonably available to achieve the same legitimate public policy objective.18 This determination is made upon a weighing and balancing of different factors, including the trade-restrictive effects of the measure, the importance of the aim pursued, and the contribution made by possible alternative measures to achieve that aim pursued. This test certainly introduces a flexible balancing approach into Article XX GATT and a certain degree of subjectivity on the part of the judiciary. At the same time, it requires both the judiciary and the parties to the dispute to structure and justify their arguments along the lines defined by the AB in its jurisprudence and to present the arguments in such a way that they fit with the requirements imposed by the necessity analysis". Andenas and Zleptnig, "Proportionality and balancing in WTO law: a comparative perspective," 80.

tive data whenever possible.[1165] Where the comparability of the level of protection of the measures is blurred or difficult to establish, panels and the Appellate Body could take this in consideration in the proportionality *stricto sense* test or solve the issue based on rules of burden of proof. Where the complanaint could not sufficiently articulate the comparability of the level of protection of the original measure and of its alternative, then the original measure could be considered 'necessary' to protect the stated interests under Article XX(a), (b) or (d) of the GATT 1994.

It is important to remind that, in determining the level of protection of a measure and determining their expected effects in economic and social terms, WTO Members may resort to different economic models. However, economics is not an empirical science: "it is not based on empirical data, is not descriptive of the real-world economy, and has little forecasting power."[1166] Therefore, comparing the level of protection and the impacts of the original measure with those of an allegedly less-trade restrictive alternative could be a misleading process. This is precisely the reason why not too much focus can be placed in this stage of analysis and a broader proportionality analysis should be conducted.

In any case, the burden of proof in the analysis of the less-trade restrictive measure is a parameter which should be clearly defined. In *US – Gambling* (2005), the Appellate Body stated that *"the complaining Member bears the burden of identifying possible alternatives to the measure at issue that the responding Member could have taken; a complaining party must identify any alternative measures that, in its view, the responding party should have taken; a responding party need not identify the universe of less trade-restrictive alternative measures and then show that none of those measures achieves the desired objective; the WTO agreements do not contemplate such an impracticable and impossible burden."*[1167] In *China – Publications and Audiovisual Products* (2010), the Appellate Body further explained that *"this burden does not imply that the responding party must take the initiative to demonstrate that there are no reasonably available alternatives that would achieve its objectives; when, however, the complaining party identifies an alternative measure that, in its view, the responding party should have taken, the responding party will be required*

1165 In *EC – Seal Products*, the Appellate Body stated that "whether a measure is "necessary" cannot be determined by the level of contribution alone, but will depend on the manner in which the other factors of the necessity analysis, including a consideration of potential alternative measures, inform the analysis; it will also depend on the nature, quantity, and quality of evidence, and whether a panel's analysis is performed in quantitative or qualitative terms (Appellate Body Report, EC – Seal Products (2014), para. 5.213-5.215).

1166 Sergio Focardi, "Is economics an empirical science? If not, can it become one?," Hypothesis and Theory, *Frontiers in Applied Mathematics and Statistics* 1, no. 7 (2015-July-21 2015).

1167 Appellate Body Report, *US – Gambling* (2005), para. 311. See also: Appellate Body Report**,** *Brazil – Retreaded Tyres* (2007), para. 156; Appellate Body Report, *EC – Seal Products*, paras. 5.169 and 5.269.

to demonstrate why its challenged measure nevertheless remains 'necessary' in the light of that alternative."[1168]

In analysing theoretical less trade-restrictive alternative measures, panels and the Appellate Body also request the respondent to demonstrate with data or estimate that the cost in adopting the proposed theoretical less trade-restrictive measure (proposed by the complainant) would be unreasonably high or even prohibitive[1169] so that it is not reasonably available. This was the case in *China – Publications and Audiovisual Products* (2010), where the Panel required China to demonstrate that the alleged less-restrictive alternative proposed by the US would impose on China an undue burden, whether financial or otherwise[1170] The Appellate Body also requested China to demonstrate the nature or magnitude of the costs involved in using the theoretical less trade-alternative measure proposed by the US.[1171]

In this context, it is important that panels and the Appellate Body do not take an active role in suggesting alternatives not proposed by the complaining Member, raising issues about 'making the case' for that Member. In addition, when assessing the respodent's arguments that the alternatives were not reasonably available or 'unreasonably burdensome' in an economic or technical sense,[1172] more clarity is necessary as to how this will be judged and what degree of deference (if any) would be given to a Member's assessment of its circumstances. As explained by Kapterian, while concern has been expressed that these variables "invite the Panel to engage in issues of domestic resource allocation and the structure of a Member's regulatory administration, its limited application indicates that it has not been used for such intrusion. Instead, it has been used to assess the true viability of proposed alternatives in the particular Member's circumstances."[1173] In any case, panels and the Appellate Body should be mindful of the technical and institutional difficulties especially faced by certain developing countries in providing complex analysis related to these aspects.

In addition, as stated, panels and the Appellate Body should also apply the proportionality *stricto sense* test. Although Article XX(a), (b) and (d) explicitly state that the measure

1168 Appellate Body Report, *China – Publications and Audiovisual Products* (2010), para. 319.
1169 Panel Report, *China – Publications and Audiovisual Products* (2010), para. 7.905.
1170 Panel Report, *China – Publications and Audiovisual Products* (2010), para. 7.906
1171 Appellate Body Report, *China – Publications and Audiovisual Products* (2010), para. 316.
1172 The Appellate Body recalled in Brazil – Retreated Tyres (2007) its finding in US – Gambling (2005) (concerning the 'necessity' requirement under Article XVI(a) of the GATS that "[a]n alternative measure may be found not to be 'reasonable available'…where it is merely theoretical in nature, for instance, where the responding Member is not capable of taking it, or where the measure imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties."
1173 Kapterian, "A Critique of the WTO Jurisprudence on 'Necessity'," 115.

at issue (or the trade restriction caused) must be 'necessary', the whole rationale of an "exception clause" does not preclude the application of a proportionality *stricto sense* test. The whole purpose of Article XX is to allow the prevalence of Members' legitimate policy interests vis-à-vis specific WTO rules. It was common sense for the GATT creators that the success of the system depended on the elimination of tariff barriers at the same that the governments' freedom to protect their sensitive interests was guaranteed.[1174]

Ultimately, which should be at stake is evaluation of legitimate societal concerns and values vis-à-vis the trade liberalisation interests. This requires the establishment of the proper relation (*"proportionality* strictu sensu" or "balancing") between the importance of achieving the legitimate societal goal and the importance of maintaining free trade, or in other words, the benefit of promoting the legitimate societal goal *versus* the damage caused to free trade as a result of allowing a WTO Member to deviate from a certain WTO obligation. It requires a balancing between free trade and the societal interests that conflict with them. The examination of the urgency of achieving the societal goal should also play a role in the determination of the proportionality *stricto sensu* test, which also assigns weight to the degree of urgency of the purpose. This more complete analysis of proportionality would make the necessity test under WTO jurisprudence more substantial, as it sheds attention to different aspects of the measure and does not put an inadequate emphasis on the existence of less-trade restrictive alternative measures. Ultimately, the idea is to assess whether the effects of a measure are not disproportionate or excessive in relation to the interests affected.[1175]

In fact, in cases involving complex social issues, the ECJ and the ECtHR have stated that a finding of proportionality does not require a test of strict necessity. It is sufficient that the authorities have selected from a range of reasonable alternatives.[1176] In explaining the practice of the ECTHR, Calamita notes that "the Court's examination of the state's measures does not involve an examination of whether the measures were strictly necessary to achieve the aim pursued by the state and, indeed, a finding by the Court that alternative, less intrusive measures might have been taken with equal effectiveness and

1174 Amaral Junior, "WTO as a Self-Limited Regime: The Case of Article XX of GATT," 70.
1175 Andenas and Zleptnig, "Proportionality and balancing in WTO law: a comparative perspective," 76.
1176 ECtHR, *Tre Traktorer Aktiebolag v Sweden*, 7 July 1989, Series A, No. 159, at para 69; ECJ, Case C-62/90, *Commission of the European Communities v Federal Republic of Germany (Medicines)* [1992] ECR I-2575, at paras 24–25; ECJ, Case C-110/05, *Commission of the European Communities v Italian Republic* [2009] ECR I-519, at paras 66–67.

less individual impact will not necessarily be fatal to a judicial conclusion that the state's action nevertheless has been 'fair'."[1177]

This is so because they examine whether a measure is *proportional sensu stricto*. Such type of proportionality analysis therefore can mitigate the rigidness of a necessity test which gives too much emphasis on the LTRA test. In this context, in order to allow a more development-supportive approach of WTO law, the necessity test could be mitigated and followed by a proportionality *stricto sensu* test so that WTO adjudicating bodies can analyse a broader range of factors when balancing societal concerns and trade values and when assessing whether the effects of the WTO-inconsistent measure are disproportionate or excessive in relation to the ends pursued. In this sense, the UN Office for High Commissioner of Human Rights, when advancing an interpretation of Article XX according to human right provisions of international treaties, defend that States "would be justified in arguing that fundamental values of society were at stake, and that a dispute panel should adopt a less onerous version of the necessity test. [1178]

The adoption of a proportionality *stricto sensu* analysis by panels and the Appellate Body, however, is not widely accepted. Neumann and Türk argue that:

> Apart from the special area of counter-measures and safeguards, the WTO legal system does not contain a general proportionality requirement. Neither do the current rules on 'necessity' incorporate an explicit reference to proportionality, nor have WTO tribunals adopted a true fully-fledged proportionality test in their case law. If WTO law contained such a general proportionality rule and if such obligation applied to every sort of trade restriction, this would have far-reaching implications for the interaction between WTO law and the legal orders of WTO Members.
>
> A strict proportionality requirement would allow panels and the AB to outlaw measures, the trade restrictive effects of which they consider 'excessive' or 'out of balance' to positive non-economic effects pursued through these measures. While banning 'excessive' acts sounds positive, it is questionable whether WTO tribunals at the international level would have sufficient guidelines for balancing economic versus non-economic

1177 N Jansen Calamita, "The Principle of Proportionality and the Problem of Indeterminacy in International Investment Treaties," in *Yearbook of Inernational Investment Law and Policy* (Oxford University Press, 2014), 181; Calamita, "The Principle of Proportionality and the Problem of Indeterminacy in International Investment Treaties."See *James v United Kingdom* (1986) 8 E.H.R.R. 123, [51].

1178 UN Office for High Commissioner of Human Rights, *Human Rights and World Trade Agreements: Using General Exception Clauses to Protect Human Rights*, 15.

> factors, in particular as most of the latter would arise at the domestic level.[1179]

The authors undestand that the WTO adjudicatory bodies do not have democratic legitimacy to balance economic and non-economic values. In their view:

> (…) the WTO is not ready for classical proprotionatily from an institutional perspective. It is doubful whether an international court should be entrusted with such fundamental balancing exercise as arising in proportionality testing. Such balancing choices should remain the rerogative of domestic legislators and adjudicators. While some argue that a proportionality requirement is necessary to ensure that extreme trade restrictions are not tolerated, there are other means to reach that goal without impinging too heavily on Members' domestic policy choice.[1180]

In addition, Ortino notes that:

> While WTO jurisprudence on the application of the necessity test (under both Article XX GATT as well as under the reasonableness approach of the TBT and SPS) has so far correctly understood and applied this standard, thus recognising the right of Members to set their appropriate level of protection, ECJ case-law, on the other hand, shows a certain tendency to hide a review of the appropriate level of protection (ie a review of the "proportionality stricto sensu") behind what appears to be an assessment of "necessity". It was noted that even in the famous Cassis de Dijon decision, by not taking into consideration the level or degree of consumer protection that the German measure was—or might have been—aimed at, the Court of Justice indirectly hinted that a high level of protection (zero consumer confusion) was in any case disproportionate vis-à-vis the adverse effects that such high level of protection had on intra-Community trade (no importation of Cassis into Germany). Seen in this light, then, what may appear to be a review of the measure's "necessity" or "least-restrictiveness", in reality becomes an assessment "in disguise" of its proportionality stricto sensu. The unwillingness of the Court of Justice to adopt a clear-cut distinction between the test of necessity and the test

1179 Jan Neumann and Elizabeth Turk, "Necessity Revisited: Proportionality in World Trade Organization Law After Korea--Beef, EC--Asbestos and EC--Sardines," *Journal of World Trade* 37, no. 1 (2003): 231-32.

1180 Neumann and Turk, "Necessity Revisited: Proportionality in World Trade Organization Law After Korea--Beef, EC--Asbestos and EC--Sardines," 233.

> of proportionality stricto sensu may suggest not just that the dividing line between the two standards is not as fixed as it might otherwise appear, but principally the high degree of sensitivity of striking down a national regulation on the basis of the disproportion between the trade-restrictive effects and the public policy benefits of the measure. Substituting its own value judgment for that of the Members (often reached by a democratically elected legislative body) clearly constitutes an extraordinary intrusion into national regulatory sovereignty. This is often the (difficult) task of a constitutional court. It might occasionally be the task of the ECJ, but it certainly should not be the task of the Appellate Body. Accordingly, WTO law does not, and I also believe should not, include, even in its more modern "reasonableness" disciplines embodied in the TBT and SPS Agreements, the principle of "proportionality stricto sensu".[1181]

It is important to note, however, that the open-texted language of chapeau Article XX does provide room for a proportionality *stricto sensu*. The whole rationale of the Article is to strike a balance between on one hand, trade liberalisation commitments, and, on the other hand, other societal values and interests. This is the very essence of proportionality which requires a balance to be drawn between frequently conflicting values. In other words, it is unavoidable to have a proportionality test established in a law which embodies conflicts of interest.

Although democratic legitimacy concerns in connection to WTO adjudicatory bodies can arise, this is an issue which is applicable to all international tribunals. Ultimately, when WTO Members decide to establish a dispute settlement system, they also agree to transfer to a third-party adjudicator the solution of an impasse according to pre-established rules. Ultimately, one party to the dispute will win and end up satisfied and the other will lose and be dissatisfied with the loss. This does not give the losing party the right to question the legitimacy of the adjudicatory body. For the dissatisfied party in disputes involving societal values conflicting with trade objectives, there will always be room for questioning the level of intrusion of the adjudicatory body on the party's regulatory autonomy.

Balancing trade and non-trade interests is always a delicate task. Some level of subjective value judgment and indeterminacy is unavoidable. [1182] Although tribunals tend

1181 Ortino, *Basic legal instruments for the liberalisation of trade : a comparative analysis of EC and WTO law*, 471-72.

1182 Judith Gardam, "Proportionality in International Law," *Oxford Bibliographies Online* (2014), https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0147.xml. Accessed on 14 Oct 2021.

to develop some methodologies and rely on them in a consistent manner, the act of balancing conflicting interest is very context-specific and depend on different factors. There is no one-size-fits-all approach to proportionality that is common in all contexts in which it operates or any consensus as to its application across the board. Ultimately, accepting the application of a proportionality *stricto sensu* analysis involves recognising some level of indeterminacy that is inherent to the process of interpretation particular of complex cases involving different variables.

Any attempt to develop strict methodologies such as a necessity test strongly relying on the LTRA test jeopardises the flexibility which is required to deal with complex cases involving conflicting interests and values. Ultimately, proportionality is about equity, about reasonableness and finding "reasonable and fair results by taking recourse to factors and criteria which are identified in a particular context and brought to mutual bearing and relations."[1183]

Arguing that the application of the proportionality *stricto sensu* results in the Appellate Body substituting its own value judgment for that of the Members (often reached by a democratically elected legislative body) and in an extraordinary intrusion into national regulatory sovereignty, while the necessity test does not have the same effect is equal to pretending that the latter analysis does not involve subjective judgment. Every step of the proportionality analysis entails some subjective assessment as this is inherent to the balancing test it requires.

The main point here is that a necessity test focused on a rigid LTRA test may not be appropriate to deal with all factors involved in a complex case, as it does not involve a broad weighting and balancing exercise. It also overrelies on the finding that the relevant alternatives are indeed capable of achieving the specific public policy objective as effectively and to the same extent as the chosen measure. In addition, by focusing the necessity analysis on the LTRA test, it may be more difficult to justify legitimate policy measures. As seen from the experience of the ECJ and the ECtHR, it may be possible to justify inconsistent measures selected from a range of reasonable alternatives and, even where an alternative measure is found, the relevant measure can still be justified. Additionally, the necessity test based on continental European tradition is one possible methodology for assessing proportionality. It is neither the only one nor the one that is universally accepted. As seen, in the UK the necessity analysis entails a strict proportionality assessment.

1183 Cottier et al., *The Principle of Proportionality in International Law,* 33.

The institutional and political feasibility of adopting a strict proportionality test by panels and the Appellate Body, however, will be further analysed in Chapter 6.

(c) Interpretations for the chapeau of Article XX

According to panels and the Appellate Body's interpretation of Article XX of the GATT 1994, after having found that a measure is provisionally justified under its paragraphs, they shall analyse whether it meets the requirements of the chapeau which imposes that the relevant measure is *not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.*

The purpose of the chapeau of Article XX, according to WTO jurisprudence, is to prevent abuses or misuses from the GATT exceptions. To this effect, the Appellate Body ruled in *US – Gasoline* (1996) that:

> [T]he chapeau is animated by the principle that while the exceptions of Article XX may be invoked as a matter of legal right, they should not be so applied as to frustrate or defeat the legal obligations of the holder of the right under the substantive rules of the General Agreement. If those exceptions are not to be abused or misused, in other words, the measures falling within the particular exceptions must be applied reasonably, with due regard both to the legal duties of the party claiming the exception and the legal rights of the other parties concerned."[1184]

More broadly, Article XX is understood as a limited and conditional restraint on the exercise of certain national rights to the extent that policy measures undertaken by national governments must comply with the requirements of the chapeau.[1185]

The interpretation of chapeau Article XX of the GATT 1994 (which also informs the interpretation of GATS exceptions) also involves a delicate task of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions of the GATT 1994:

1184 Appellate Body Report, *US – Gasoline* (1996), p. 22.

1185 See Appellate Body Report, *US – Shrimp* (1998), para. 157, stating that "the language of the chapeau makes clear that each of the exceptions in paragraphs (a) to (j) of Article XX is a limited and conditional exception from the substantive obligations contained in other provisions of the GATT 1994, that is to say, the ultimate availability of the exception is subject to the compliance by the invoking Member with the requirements of the chapeau."

> [A] balance must be struck between the right of a Member to invoke an exception under Article XX and the duty of that same Member to respect the treaty rights of the other Members. The task of interpreting and applying the chapeau is, hence, essentially the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions (e.g., Article XI) of the GATT 1994, so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement. The location of the line of equilibrium, as expressed in the chapeau, is not fixed and unchanging; the line moves as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ.[1186]

As explained by Van den Bossche and Zdouc, "in short, the interpretation and application of the chapeau in a particular case is a search for the appropriate line of equilibrium between, on one hand, the right of Members to adopt and maintain trade-restrictive legislation and measures that pursue certain legitimate societal values and, on the other hand, the right of other Members to trade."[1187]

The chapeau of Article XX requires therefore a balancing of conflicting interests that is typical of the proportionality analysis. This balancing is clear from the language used by the Appellate Body in *EC – Seal Products* (2014), where it stated that "the chapeau operates to preserve the balance between a Member's right toinvoke the exceptions of Article XX, and the rights of other Members to be protected from conduct proscribed under the GATT 1994.Achieving this equilibrium is called for 'so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves.'"[1188]

While the chapeau of Article XX provides room for panels and the Appellate Body to apply a proportionality *stricto sensu* analysis, as proposed above, the fact that WTO adjudicatory bodies adopt a strict two-tiered test to interpret such provision means that, where less-restrictive alternatives are allegedly found, panels and the Appellate Body do not even analyse the measure in view of the chapeau of Article XX, which could enable a relaxation of the necessity test under Article XX(a), (b) and (d).

1186 Appellate Body Report, *US – Shrimp* (1998), paras. 156 and 159.
1187 Bossche and Zdouc, *The Law and Policy of the World Trade Organization - Text, Cases and Materials*, 574.
1188 Appellate Body Report, *EC – Seal Products* (2014), para. 5.297.

In this context, it would make sense to recognise that a more integrated analysis between the paragraphs of Article XX of the GATT 1994 and its chapeau is necessary. Although it is clear that "the chapeau and the paragraphs of Article XX contain independent requirements that must be satisfied for a measure to be justified"[1189], the two steps of analysis of Article XX are interdependent, and not isolated from each other.[1190] Stopping the analysis of the relevant measure in view of the LTRA test where an allegedly reasonable alternative is found prevents a broader assessment of the measure in light of the chapeau and the application of a full proportionality analysis which Article XX entails.

In addition, in certain instances, WTO adjudicatory bodies have, to some extent, applied the necessity test when interpreting the relevant measure in light of the chapeau of Article XX, while they should be making a different type of analysis.

For instance, in *US–Gasoline* (1996), a dispute relating to the implementation by the US of its domestic legislation on control of toxic and other pollution caused by the combustion of gasoline manufactured in or imported into the US, the Appellate Body analysed the measure under Article XX(g) ("relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption"). While under such provision, the Appellate Body may not apply the necessity test, as elaborated for subparagraphs "a", "b" and "d", it did resort to one of the elements of such test when analysing the chapeau of Article XX of the GATT 1994, i.e., the existence of less trade-restrictive alternatives. Accordingly, the Appellate Body held:

> There was more than one alternative course of action available to the United States in promulgating regulations implementing the CAA. These included the imposition of statutory baselines without differentiation as between domestic and imported gasoline. This approach, if properly implemented, could have avoided any discrimination at all. Among the other options open to the United States was to make available individual baselines to foreign refiners as well as domestic refiners. The United States has put forward a series of reasons why either of these courses was not, in

1189 Appellate Body Report, *Indonesia - Import Licensing Regimes* (New Zealand) (2017), para. 5.95.

1190 In *US – Shrimp* (1998), the Appellate Body has considered that, in interpreting the chapeau of Article XX, it should verify whether "the application of a measure may be characterized as amounting to an abuse or misuse of an exception of Article XX", which will occur "not only when the detailed operating provisions of the measure prescribe the arbitrary or unjustifiable activity, but also where a measure, otherwise fair and just on its face, is actually applied in an arbitrary or unjustifiable manner" Appellate Body Report, *US – Shrimp*, 1998, para 160) In the case at hand, the Appellate Body sanctioned the US because it did not offer equal opportunity to negotiate agreements on fishing techniques to all WTO members.

its view, realistically open to it and why, instead, it had to devise and apply the baseline establishment rules contained in the Gasoline Rule.

Ultimately, panels and the Appellate Body enjoy a high level of discretion in the analysis of the open-textured concepts of the chapeau. Depending on how they are construed, they can result in additional obstacles for Members to justify national policies pursuing non-trade objectives, especially when WTO adjudicatory bodies limits the scope of analysis of Article XX, including its chapeau, to elements of the necessity test, instead of conducting a full proportionality analysis which would enable a proper balancing between conflicting interests in light of different factors and circumstances.

(d) Applicability of GATT exceptions to the SCM Agreement

Exceptions clauses are very important for WTO Members to defend their non-trade values vis-à-vis WTO discipline. Where WTO Members cannot argue public interest issues consistently among WTO agreements, their measures targeting policy (including development) objectives may be at risk or, in other words, may be considered WTO-inconsistent. To this effect, for developmental purposes, it is important that GATT general exceptions can be raised in the context of the SCM Agreement.

It has been argued above that a textual approach to WTO law may impede the application of Article XX beyond the GATT 1994. In contrast, systemic interpretation of WTO law in light to the "right to regulate" favour an expansive reading of GATT general exceptions.

In fact, the applicability of the GATT exceptions beyond GATT and, in particular, to the SCM Agreement is a non-resolved issue.

Many object to beyond-the-GATT applicability of Article XX on the grounds that this would undermine the 'inner balance of the rights and obligations' of the SCM Agreement, which already had a category of justifications (i.e. non-actionable subsidies) that has expired. A finding that Article XX of the GATT 1994 can be applicable to the SCM Agreement would change this balance - against the intention of the Members - and could potentially have broader negative systemic implications, opening such claims of applicability for all other covered agreements.[1191]

1191 Luca Rubini, "Ain't wastin'time no more: Subsidies for renewable energy, the SCM agreement, policy space, and law reform," *Journal of International Economic Law* 15, no. 2 (2012): 562.

On the other hand, there are several arguments that support the application of Article XXof the GATT 1994 to the SCM Agreement. First, GATT exceptions have a central position in the WTO system and reflect the compromise for embedded liberalism made between its Members where trade considerations should be embedded in a social context and Members should not loose their ability to guarantee safety cushions for their social and developmental policies. In this context, Article XX would have a natural expansiveness because of its major role in the system, its general and broad wording, and its policy value.[1192] In addition, there is no need for an express reference in the SCM Agreement to give way to the application of a provision with such a general nature as it is the case of Article XX of the GATT 1994.

In an amicus brief in the *Canada - Renewable Energy* case (DS412), several NGOs made the argument for GATT Article XX to be treated as an exception to the SCM Agreement. It was stated that:

> 1.3 The reference to 'this Agreement' in Article XX does not foreclose its applicability to the SCM Agreement
>
> The term 'this Agreement' in the chapeau of Article XX of the GATT 1994 has no clear 'ordinary' meaning of its own. This term was contained in the GATT 1947, prior to the Uruguay Round, when the GATT 1947 itself constituted the primary multilateral trade agreement. The GATT 1947 was carried over into the WTO Agreement essentially as it is, without being rewritten to take into account its new place as one of many related 'goods' agreements, bound together in an annex. The reference to 'this Agreement' must, therefore, necessarily be interpreted in the light of today's placement of this provision and the link of the GATT 1994 to other Annex 1A agreements, as discussed above.
>
> In China – Audiovisuals, the Appellate Body did not interpret the reference to 'this Agreement' as limiting the application of Article XX to the GATT 1994. In the earlier Brazil — Desiccated Coconut case, the Appellate Body found that the meaning of 'this Agreement' in Article 32.3 of the SCM Agreement refers to the SCM Agreement and Article VI of the GATT 1994.

1192 Rubini, "Ain't wastin'time no more: Subsidies for renewable energy, the SCM agreement, policy space, and law reform," 562.

> Accordingly, the meaning of 'this Agreement' is not inherently limited to the covered agreement that it is used in.[1193]

Furthermore, as argued by the dissenting panellist in *China – Rare Earth* (2014), the WTO is a Single Undertaking and, as such, all its rules dialogue with each other and are generally simultaneously and cumulatively applicable where there is no conflict, in accordance with the General Interpretative Note to Annex 1A of the WTO Agreement.[1194] The SCM Agreement is a development of GATT Articles VI and XVI with respect to subsidies to industrial goods and therefore GATT general exceptions should apply to the former.

Pursuant to Article II:2 of the Marrakesh Agreement, "[T]he agreements and associated legal instruments included in Annexes 1, 2 and 3 are integral parts of this Agreement, binding on all members." According to Feld and Switzer:

> The Appellate Body has consistently interpreted this language as calling for the constituent parts of the WTO Agreement to be interpreted as a cohesive treaty, "in a way that gives meaning to all of them, harmoniously." That instruction suggests that adjudicators should not allow the commitments in the non-GATT agreements to undermine the rights that Article XX protects because doing so would deprive Article XX of its "meaning." Arguably, the most straightforward way of preventing that result is to allow Article XX to be used as a defense against a breach of another WTO Agreement.[1195]

Additionally, the former existence of non-actionable subidies did not and do not prevent the application of GATT Article XX to the SCM Agreement. There is no text in the SCM Agreement suggesting this. Moreover, "the negotiating history does not offer clear indications that the non-actionable category was supposed to be the only avenue of justification of certain 'good' subsidies, and that Article XX of the GATT 1994 either could or should not apply to subsidies."[1196]

1193 Simon Lester, "GATT Article XX as an Exception to the SCM Agreement," *International Economic Law and Policy Blog*, Oct 8, 2012, https://ielp.worldtradelaw.net/2012/05/gatt-article-xx-as-an-exception-to-the-scm-agreement.html.

1194 *General interpretative note to Annex 1A:* In the event of conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex 1A to the Agreement Establishing the World Trade Organization (referred to in the agreements in Annex 1A as the "WTO Agreement"), the provision of the other agreement shall prevail to the extent of the conflict.

1195 Danielle Spiegel; Feld and Stephanie Switzer, "Whither Article XX? Regulatory autonomy under non-GATT agreements after China—raw materials," *Yale Journal of International Law Online* 38 (2012): 20.

1196 Rubini, "Ain't wastin'time no more: Subsidies for renewable energy, the SCM agreement, policy space, and law reform," 563.

Finally, the Appellate Body has already recognised the WTO Members' right to regulate as an inherent governmental power. In *China – Publications and Audiovisual Products* (2010), the Appellate Body stated: "we see the 'right to regulate', in the abstract, as an inherent power enjoyed by a Member's government, rather than a right bestowed by international treaties such as the WTO Agreement."[1197]

As stated in OECD Best Practice Principles for Regulatory Policy, "*regulation is a key tool for achieving the social, economic and environmental policy objectives of governments. Governments have a broad range of regulatory schemes reflecting the complex and diverse needs of their citizens, communities and economy*".[1198] Regulations can take many forms, from from parliamentary law to ministerial orders to municipal by-law, and are among the most important tools of government to achieve objectives to deliver better economic and social outcomes and thus enhance the life of citizens and business. Subsidy programs enacted by governments take the form of regulations and, depending on the circumstances, can help them to achieve important policy objectives. In this context, subsidisation schemes could be associated to a country's right to regulate.

As seen in Chapter 3, the right to regulate is a customary right and is corollary of the principle of self-determination. In this sense, in making an expansive reading of the reach of GATT Article XX, WTO adjudicating bodies could resort to such norms or even consider the right to regulate as an affirmative defense for subsidies violating the SCM Agreement.

According to Rubini, however, it remains to be seen "whether the recognition of the 'abstract right to regulate' can constitute the future normative foundation for the applicability of GATT Article XX to other WTO Agreements, particularly by embedding the mindset where the power to regulate is inherent and treaty language can only operate to constrain this built-in prerogative and, arguably, must do so in a clear fashion."[1199]

There seems to be a political dimension in this discussion, since, from a purely legal point of view, it is possible to reasonably justify the application of Article XX of the GATT 1994 to the SCM Agreement. The main problem is what WTO Members will think about this and whether WTO adjudicating bodies will be considered too "activist" in pursuing this interpretative approach, which may be problematic, as it will be discussed in Chapter 5. Lastly, it is important to clarify that even if application of Article XX of the

1197 Appellate Body Report, *China – Publications and Audiovisual Products* (2010), para. 222.
1198 OECD, *OECD Best Practice Principles for Regulatory Policy - The Governance of Regulators* (OECD Publishing, 2014), 13.
1199 Rubini, "Ain't wastin'time no more: Subsidies for renewable energy, the SCM agreement, policy space, and law reform," 565.

GATT 1994 is expanded to the SCM Agreement, the process of justification under Article XX is an arduous one, as seen above, especially as concerns the analysis of "necessity." Additionally, the scope of Article XX is not as broad as the "right to regulate,"[1200] which could limit the range of justifications for subsidies which are inconsistent with the SCM Agreement (including local content subsidies).

IV.3.3 Normative framework for development as applicable law in WTO disputes?

Given the limits of the interpretative exercise and of the interpretation of WTO law in light of the development objective, one could think whether the rights and obligations pertaining to the normative framework for development could play a role not as interpretative parameters of WTO law but as part of the "applicable law", filling gaps of the WTO law or being used as a defence against a claim of violation of WTO norms.

As seen above, there are possible interpretative approaches (e.g. textual, teleological, systemic) that can be used, resulting in different outcomes when interpreting a rule. Additionally, systemic interpretation of WTO agreements faces constraints as a result of panels and the Appellate Body's interpretation of VCLT Article 31.3(c). Open-ended concepts of Article XX of the GATT and Article XIV of the GATS can also lead to different interpretations and different levels of applicability of such provision for justifying GATT or GATS-inconsistent measures. Consequently, the interpretative activity does not necessarily lead to a firm consideration of the development objective in the WTO agreements.

Additionally, as explained, *interpretation cannot be contra legem*. Indeed, in *Peru-Agricultural Products* (2015), the Appellate Body determined that there can be no *contra legem* interpretation.[1201] In this sense, it stated that interpretation under Article 31 of the VCLT "is meant to assist an interpreter in ascertaining the ordinary meaning of treaty terms, reflecting the common intention of the parties to the treaty."[1202]

In such scenario, WTO values and objectives, possibly free trade, may arguably be prioritised over other values in case of discrepancies between a WTO provision and a non-WTO norm. This may result in a mere adaptation of non-WTO law to fit the trade liberalisation rationale as in *China - Raw Materials* (2012), where the panel had to

1200 Feld and Switzer, "Whither Article XX? Regulatory autonomy under non-GATT agreements after China—raw materials," 28.

1201 Joost Pauwelyn, "Interplay between WTO Treaty and other international legal instruments and tribunals: Evolution after 20 years of WTO jurisprudence " (paper presented at the Québec City Conference on the WTO at 20, Québec, 2015).

1202 Appellate Body Report, *Peru – Agricultural Products* (2015), para. 5.93.

interpret Article XX(g) of the GATT 1994, in particular, the expression "made effective in conjunction with restrictions on domestic *production or consumption*", vis-à-vis the principle of sovereignty. In this case, although the language of the decision takes into account the principle of sovereignty, ultimately it does not add more meaning to what is already stated in the WTO provision. In stating that China's sovereignty over its natural resources has to '*conform with WTO parameters*' as a result of the country's accession to the WTO Agreement,[1203] the Panel's approach ultimately confirm that there is no *contra legem* interpretation and the non-WTO law will have to curve to WTO specific provisions which at times are interpreted under a textual rather than under a teleological approach (therefore not considering the broader goals of the WTO).

By accepting application of non-WTO law and not only interpretation of WTO law in light of them, panels and the Appellate Body can possibly take more self-conscious and transparent decisions where it objectively chooses the objectives and values guiding the decision, which does not need to be free trade. Nevertheless, it is debatable whether it is within the mandate of WTO panels and the Appellate Body to decide disputes on a basis other than WTO law.

As it will be seen below, currently WTO jurisprudence denies the use of non-WTO law as a defence for breach of WTO obligations. Legal doctrine, in its majority, also rejects this possibility. For these reasons, factoring development in the WTO law through application of rights and obligations from the normative framework for development in WTO disputes is currently not an option.

This is particularly harmful to the development-oriented approach to the extent the right to regulate, as an international customary rule, could serve as an affirmative defence for SCM Agreement-inconsistent measures, even where the SCM Agreement does not have an exception clause; and could work as affirmative defence for those measures which do not necessarily fall within the strict justifications under GATT Article XX or GATS Article XIV but still could be analysed based on public interest grounds.

One could argue whether countries would still be interested in negotiating agreements on the use of subsidies if the "right to regulate" could always be invoked as an affirmative defense. However, the jurisprudence on international investment law on the police powers' doctrine[1204] (which is intrinsically related to the right to regulate) show that it

1203 Panel Report, *China – Raw Materials* (2012), para. 7.405.

1204 The police powers doctrine provides that a State possesses an inherent right to regulate in protection of the public interest and does not act wrongfully when, pursuant to this power, it enacts b o n a fide, non-discriminatory and proportionate regulations in accordance with due process.

has not prevented Members from entering into investment agreements. In addition, international adjudicators mold the interpretation of such concepts in a way that does not make them a carte blanche for countries to violate their international obligations at the same time as allowing flexibilities for the defense of legitimate public policy measures.

IV.3.3.1 WTO jurisprudence on the application of non-WTO law

Application of non-WTO law in the WTO dispute system is currently limited to fill procedural gaps of the DSU, for instance, burden of proof, evidence, good faith or due process.[1205] So far, mostly due to how defendants have presented their cases, without explicitly defending the 'application' of other international law norms, the Appellate Body has "not applied a self-standing defence under general international law or non-WTO treaties to justify a WTO breach."[1206] Panels and the Appellate Body are still struggling from a material (and not procedural) perspective, to "learn from and situate itself vis-à-vis other sub-branches of international law."[1207]

In most cases, other international law norms are argued so that WTO provisions can be 'interpreted' in light of them. To stay on the safe side, parties argue interpretation of WTO law in light of other international norms and not application of non-WTO law, first, because Article 3.2 of the DSU explicitly confirms application of customary rules on treaty interpretation, including vis-à-vis relevant rules of international law (Article 31.3(c) of the VCLT); second, because arguments supporting the possibility of the application of non-WTO in WTO dispute settlement system could increase the complexity of the case; and third, the Appellate Body may not have wanted to enter deeply in this discussion in order to avoid political distress among WTO Members impacting the functioning of the dispute settlement system.[1208]

In only two cases, a more detailed discussion on the possibility of application of non-WTO law took place. In *Mexico – Taxes on Soft Drinks* (2006), the Panel and the Appellate Body had to analyse whether Mexico could sustain a WTO-inconsistent measure which was allegedly justified by a US breach to NAFTA. In *Peru – Agricultural Products* (2015), in turn, they had to assess whether a WTO-inconsistent measure could be justified by a provision from an FTA entered into by and between Peru and Guatemala. The cases are detailed below.

1205 Pauwelyn, *Conflict of norms in public international law: how WTO law relates to other rules of international law*, 29, 205-11.

1206 Pauwelyn, "Interplay between WTO Treaty and other international legal instruments and tribunals: Evolution after 20 years of WTO jurisprudence " 26.

1207 Pauwelyn, "Interplay between WTO Treaty and other international legal instruments and tribunals: Evolution after 20 years of WTO jurisprudence " 6.

1208 Some Members may be more open to the thesis of application of other international law norms; other may be most closed.

In *Mexico – Taxes on Soft Drinks* (2006), the US challenged a Mexican tax on soft drinks which Mexico had enacted in retaliation of an alleged US breach of NAFTA and a US refusal to appoint panellists to decide the dispute under NAFTA dispute settlement system.

In this case, Mexico argued that the "applicability" of its WTO obligations towards the United States would be "call[ed] into question" as a result of the United States having prevented Mexico, by an illegal act (namely, the alleged refusal by the United States to nominate panellists to the NAFTA panel), from having recourse to the NAFTA dispute settlement mechanism to resolve a bilateral dispute between Mexico and the United States regarding trade in sweeteners.

The Panel refused to accept Mexico's argument on the ground that it "would entail a determination whether the United States has acted consistently or inconsistently with its NAFTA obligations" and therefore would mean that Panels and the Appellate Body would be adjudicating non-WTO disputes, which is not the function of the DSU.[1209] According to the Appellate Body, "Article 3.2 of the DSU states that the WTO dispute settlement system 'serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements'".[1210] In its view, "accepting Mexico's interpretation would imply that the WTO dispute settlement system could be used to determine rights and obligations outside the covered agreements." [1211]

It is important to note, though, that Mexico presented this case since the beginning as a matter of jurisdiction and not as a matter of applicable law. In its first written submission to the Panel, Mexico requested that the Panel decided, as a preliminary matter, to "decline to exercise its jurisdiction in this case" and that it "recommend to the parties that they submit their respective grievances to an Arbitral Panel, under Chapter Twenty of the NAFTA, which could address both Mexico's concern with respect to market access for Mexican cane sugar in the United States under the NAFTA and the United States' concern with respect to Mexico's tax measures."

Mexico submitted that WTO panels, like other international bodies and tribunals, "have certain implied jurisdictional powers that derive from their nature as adjudicative bodies."[1212] According to Mexico, such powers would include the power to refrain from

1209 Appellate Body Report, *Mexico – Taxes on Soft Drinks* (2006), para. 56 and 78.
1210 Appellate Body Report, *Mexico – Taxes on Soft Drinks* (2006), para. 56.
1211 Appellate Body Report, *Mexico – Taxes on Soft Drinks* (2006), para. 56.
1212 Mexico's appellant's submission, *Mexico – Taxes on Soft Drinks* (2006), para. 65.

exercising substantive jurisdiction in circumstances where "the underlying or predominant elements of a dispute derive from rules of international law under which claims cannot be judicially enforced in the WTO, such as the NAFTA provisions" or "when one of the disputing parties refuses to take the matter to the appropriate forum."[1213]

Although in this case the subjects of jurisdiction and applicable law can be somewhat blurred,[1214] the Appellate Body would typically not enter into such a sensitive discussion (i.e. applicable law) when the defendant itself limited the issue to jurisdiction. As noted by the Appellate Body, Mexico did not claim "that there are legal obligations under the NAFTA or any other international agreement to which Mexico and the United States are both parties, which might raise legal impediments to the Panel hearing this case".[1215]

The Appellate Body, when referring to typical provisions that, according to some commentators, limit the ability of Panels and the Appellate Body to apply non-WTO law, explicitly affirm that they deal with the scope of the Panel's jurisdictional power and not their ability to apply or not other international norms.[1216]

Given the particularities of the case, it is possible to say that the Panel and the Appellate Body did not have the chance to fully examine the issue of applicable law.

In turn, in *Peru – Agricultural Products* (2015), the Panel was established to consider a complaint by Guatemala with respect to additional duties imposed by Peru on imports of a number of agricultural products from Guatemala under a variable import tax mechanism called "Price Range System" (PRS). Guatemala claimed that the PRS was inconsistent with Article 4.2 and footnote 1 of the Agreement on Agriculture; and Articles II:1(a), II:1(b), X:1, X:3(a), XI and XI:1 of the GATT 1994.

Peru requested the Panel to find that Guatemala had not initiated these dispute settlement proceedings in good faith, contrary to Guatemala's obligations under Articles 3.7 and 3.10 of the DSU, because Guatemala had allegedly accepted the maintenance of the PRS in a free trade agreement (FTA) signed between Peru and Guatemala on 6 December 2011.

1213 Mexico's appellant's submission, *Mexico – Taxes on Soft Drinks* (2006), para. 73.
1214 Pauwelyn, "Interplay between WTO Treaty and other international legal instruments and tribunals: Evolution after 20 years of WTO jurisprudence " 11-12.
1215 Appellate Body Report, *Mexico – Taxes on Soft Drinks* (2006), para. 7.13.
1216 "With these considerations in mind, we examine the scope of a panel's jurisdictional power as defined, in particular, in Articles 3.2, 7.1, 7.2, 11, 19.2, and 23 of the DSU." Appellate Body Report, *Mexico – Taxes on Soft Drinks* (2006), para. 47.

Also, in the event that the Panel were to find that the measure at issue is not WTO-consistent, Peru contended that this would generate an inconsistency between the WTO covered agreements and the FTA between Peru and Guatemala, and that, in such a case, the terms of the FTA should prevail.

The Panel found that there was no evidence that Guatemala had brought these dispute settlement proceedings in a manner contrary to good faith, and, therefore, there was no reason for the Panel to refrain from assessing the claims put forward by Guatemala.[1217] In addition, it considered that inasmuch as the FTA between Peru and Guatemala had not entered into force, it was not necessary for the Panel to rule on whether the parties could, by means of the FTA, modify as between themselves their rights and obligations under the WTO covered agreements.[1218]

In assessing these matters, the Appellate Body considered that, in order to have a violation of good faith, a clear stipulation of a relinquishment of Guatemala's right to have recourse to the WTO dispute settlement system would have to exist in this case in relation to, or within the context of, the DSU. [1219] In other words, the Appellate Body considered that while it did not exclude the possibility of articulating the relinquishment of the right to initiate WTO dispute settlement proceedings in a form other than a waiver embodied in a mutually agreed solution, any such relinquishment should be made clearly.[1220]

In the case at issue, however, the Appellate Body did not find that the FTA constituted a solution mutually acceptable to both parties within the meaning of Article 3.7 of the DSU. [1221] In addition, Article 15.3 of the FTA provided that, *"[i*]n the event of any dispute that may arise under this Treaty or under another free trade agreement to which the disputing Parties are party or the WTO Agreement, the complaining Party may choose the forum for settling the dispute." Thus, according to the Appellate Body, even from the perspective of the FTA, parties to the FTA have the right to bring claims under the WTO covered agreements to the WTO dispute settlement system.[1222]

As to the alleged prevalence of the FTA terms over WTO provisions, Peru argued before the Appellate Body that, in light of Article 31(3)(a) and (c) of the VCLT the Panel should have interpreted the terms "shall not maintain" in Article 4.2 of the Agreement on Agri-

1217 Panel Report, *Peru – Agricultural Products* (2015), para. 8.1.a.
1218 Panel Report, *Peru – Agricultural Products* (2015), para. 8.1.f.
1219 Appellate Body Report, *Peru – Agricultural Products* (2015), para. 5.28.
1220 Appellate Body Report, *Peru – Agricultural Products* (2015), para. 5.25.
1221 Appellate Body Report, *Peru – Agricultural Products* (2015), para. 5.26.
1222 Appellate Body Report, *Peru – Agricultural Products* (2015), para. 5.27.

culture as meaning "may maintain" in the relationship between Peru and Guatemala, by relying on paragraph 9 of Annex 2.3 to the FTA and on ILC Articles 20 and 45. By the same token, Peru suggested that, by relying on paragraph 9 of Annex 2.3 to the FTA and on ILC Articles 20 and 45, the Panel should have interpreted Article II:1(b) of the GATT 1994 as allowing Peru to maintain the PRS.[1223]

The Appellate Body analysed whether the terms of Article 31(3)(a) and (c) of the VCLT allowed such an interpretation of the Agreement on Agriculture and the GATT 1994. It also analysed whether such other instruments of international law (FTA and ILC Articles 20 and 45) could modify WTO provisions.

As regards the *interpretation* of WTO provisions in light of those other instruments of international law, following the VCLT rules of interpretation, the Appellate Body concluded that the interpretation envisioned by Peru are "beyond the scope of an interpretative exercise as envisaged in Article 3.2 of the DSU and in Article 31 of the Vienna Convention,"[1224] and "amount to arguing that, by means of the FTA, Peru and Guatemala actually modified these WTO provisions between themselves."[1225]

As regards the possibility of these non-WTO law amending WTO provisions, the Appellate Body took a very strict position.

Firstly, according to the Appellate Body, the FTA would have to present very clear language in the sense that it allows WTO-inconsistent measures. In this sense, the Appellate Body stated:

> We further note that the parties to this dispute disagree on whether the provisions of the FTA indeed permit Peru to maintain a WTO-inconsistent PRS.
>
> A reading of these provisions on their face reveals that it is not clear whether paragraph 9 of Annex 2.3, which states that Peru may maintain the PRS, should necessarily be construed as allowing Peru to maintain a WTO-inconsistent PRS, when read together with other provisions of the FTA.

1223 Appellate Body Report, *Peru – Agricultural Products* (2015), para. 5.91.
1224 Appellate Body Report, *Peru – Agricultural Products* (2015), para. 5.96.
1225 Appellate Body Report, *Peru – Agricultural Products* (2015), para. 5.107.

> As we have considered above, modifying or interpreting the obligations in Article 4.2 of the Agreement on Agriculture and Article II:1(b) of the GATT 1994 in the light of the FTA presupposes that the FTA provisions permit the maintenance of a WTO-inconsistent PRS. However, having concluded that, even under the FTA itself, there is ambiguity as to whether the FTA allows Peru to maintain a WTO-inconsistent PRS, we do not consider that it can be argued that, by means of the FTA, the parties have agreed between themselves to modify Article 4.2 and Article II:1(b).[1226]

Secondly, the amendments to WTO law envisaged by the FTA would have to clearly follow WTO provisions addressing amendments, waivers, or exceptions for regional trade agreements.

According to the Appellate Body, even assuming arguendo that the provisions of the FTA allowed Peru to maintain a WTO-inconsistent PRS, it did not believe that such alleged modification as between the FTA parties would be subject to Article 41 of the VCLT as WTO provisions on amendments, waivers and exceptions for regional trade agreements allegedly supersede Article 41 of the VCLT. According to the Appellate Body:

> WTO agreements contain specific provisions addressing amendments, waivers, or exceptions for regional trade agreements, which prevail over the general provisions of the Vienna Convention, such as Article 41. This is particularly true in the case of FTAs considering that Article XXIV of the GATT 1994 specifically permits departures from certain WTO rules in FTAs. However, Article XXIV conditions such departures on the fulfilment of the rule that the level of duties and other regulations of commerce, applicable in each of the FTA members to the trade of non-FTA members, shall not be higher or more restrictive than those applicable prior to the formation of the FTA.
>
> In the light of the above, we consider that the proper routes to assess whether a provision in an FTA that may depart from certain WTO rules is nevertheless consistent with the covered agreements are the WTO provisions that permit the formation of regional trade agreements namely: Article XXIV of the GATT 1994, or the Enabling Clause as far as agreements between developing countries are concerned, in respect of trade in

1226 Appellate Body Report, *Peru – Agricultural Products* (2015), para. 5.108-5.110.

> goods; and Article V of the General Agreement on Trade in Services (GATS) in respect of trade in services (footnotes omitted).[1227]

As argued by Pauwelyn, "it is unclear, however, why WTO provisions on amendment, waiver or exceptions, displace VCLT Article 41 on the altogether different legal act of inter se modification."[1228] These rules should be read in a harmonic manner and not as excluding each other. Nothing in the language of the WTO provisions excludes the application of Article 41 of the VCLT. Furthermore, WTO provisions on amendments, waiver or exceptions are not incompatible with Article 41 of the VCLT and they can coexist in a number of cases. Nevertheless, considering that Article XXIV GATT and Article V GATS are *lex specialis*, it is difficult to argue that VCLT Article 41 is not displaced when it comes to amendments, waivers, or exceptions for regional trade agreements.

It is unclear, however, if other amendments to WTO provisions coming from international norms other than FTAs would also have to follow the WTO rules on amendments and waivers to be enforced under WTO dispute resolution. This has not been clarified so far by WTO jurisprudence.

In any case, the *Peru – Agricultural Products* (2015) disputes severely limits the possibility of WTO Members applying non-WTO law as part of the applicable law in WTO disputes.

IV.3.3.2 Doctrinal opinions on the possibility of application of non-WTO law in WTO disputes

Legal scholars generally agree that WTO law can be interpreted in light of the wider corpus of international law. In contrast, they have diverging opinions on the possibility of application of non-WTO law, including human rights, to WTO disputes.

The reasons behind the non-acceptance of application of non-WTO norms to WTO lie in a particular interpretation of the jurisdiction of panels and the Appellate Body, according to which it would allegedly not include the activity of application of WTO-norms to WTO disputes.

Trachtman, for instance, submits that the WTO dispute resolution system is "clearly not a court of general jurisdiction, competent to apply all applicable international law"[1229] and "does not represent a complete legal answer in multidimensional disputes in the sense

1227 Appellate Body Report, *Peru – Agricultural Products* (2015), 5.112-5.113

1228 Pauwelyn, "Interplay between WTO Treaty and other international legal instruments and tribunals: Evolution after 20 years of WTO jurisprudence " 21.

1229 Joel P. Trachtman, "The Domain of WTO Dispute Resolution," *Harvard International Law Journal* 40, no. 2 (1999): 338.

that it does not include other law that may articulate policies beyond trade policies."[1230] This author understands that the mandate of panels and the Appellate Body involves the application of WTO law, only. This would be supported by several provisions of the DSU, including (i) Article 3(2) providing that the dispute settlement system "serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law"; (ii) Article 3(2) establishing that "[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements"; (iii) the standard panel's terms of reference provided under article 7 providing for reference only to law arising from the WTO agreements; and (iv) Article 11 of the DSU specifying the function of panels to assess the applicability of and conformity with the covered agreements.[1231]

In summary, according to Trachtman, "WTO generally isolates itself from much of the broader institutional setting of public international law", as "panels and the Appellate Body are limited to the application of substantive WTO law and are not authorized to apply general substantive international law or other conventional international law."[1232]

Bartels, in the same line, argues that the application of non-WTO law to WTO disputes is "curtailed by Article 19.2, which prohibits panels and the Appellate Body from adding to or diminishing WTO Members' WTO rights and obligations."[1233] According to this commentator, panels and the Appellate Body could only make a determination on non-WTO if it did not add to or diminish WTO rights. In practice, however, they would probably reduce WTO rights, in Bartel's view.[1234]

Based on similar arguments, Marceau states that "Article XXIII of GATT 1994 and Articles 1.1, 4.2, 4.4, 7 and 11 of the DSU suggest that the WTO adjudicating bodies have only a 'limited' competence."[1235] She argues that panels and the Appellate Body have the capacity to use and take into account general international law including other treaties when interpreting WTO provisions. However, they could not conclude that a WTO provision has been superseded by a non-WTO one, because, according to Articles 3.2 and 19.2 of the DSU, panels and the Appellate Body are prohibited from adding to or diminish-

1230 Trachtman, "The Domain of WTO Dispute Resolution," 338.
1231 Trachtman, "The Domain of WTO Dispute Resolution," 342.
1232 Trachtman, "The Domain of WTO Dispute Resolution," 342. 347-348.
1233 Lorand Bartels, "Jurisdiction and Applicable Law in the WTO" (Fifth Biennial Global Conference University of the Witwatersrand, 2016).
1234 Bartels, "Short Jurisdiction and Applicable Law in the WTO." 9-10, 17.
1235 Gabrielle Marceau, "Conflicts of Norms and Conflicts of Jurisdictions: The Relationship between the WTO Agreement and MEAs and other Treaties," *Journal of World Trade* 35, no. 6 (2001): 1102.

ing the rights or obligations of the Members in their adjudication process and in their conclusions.[1236]

According to Marceau, the WTO adjudicating body has limited jurisdictional domain and WTO applicable law is of limited domain.[1237] By examining articles 1(1), 7(2), 11 and 19(1) of the DSU. Marceau concludes that "the mandate of the Panels and the Appellate Body is defined and limited: to interpret WTO law and determine whether a provision of the covered agreements has been violated."[1238] Consequently, WTO adjudicating bodies do not have the competence to interpret and assess formally whether a WTO measure is compatible with human rights law. This would be supported by Article 19(1) which provides that 'in their findings and recommendations, Panels and the Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements.' To Marceau, enforcing human rights provisions would add to or diminish the rights of WTO Members.[1239] The WTO applicable law, in turn, is constituted by the covered agreements and legal instruments adopted pursuant to the covered agreements.

In agreement with Trachtman, Marceau sees the WTO law as a self-contained regime or a system of *lex specialis* which is intended to exclude the direct application of other treaties and customs, including human rights. In this sense, under Marceau's perspective, WTO adjudicating bodies cannot apply or enforce human rights or determine the legal consequences of rights and obligations that WTO Members may have under other treaties or by custom; these may be examined only when necessary for the interpretation of WTO law and/or as a factual determination.[1240] For this commentator, in reality, there is lack of coherence between the human rights and WTO systems of law and jurisdiction; however, human rights can be respected through good interpretation and application of WTO provisions.

In contrast to the ideas mentioned above, Pauwelyn developed an important work rejecting the opinions that WTO panels and the Appellate Body cannot apply other

1236 Marceau, "Conflicts of Norms and Conflicts of Jurisdictions: The Relationship between the WTO Agreement and MEAs and other Treaties," 1103.

1237 Marceau explains that *"the 'jurisdiction' (or competence) of WTO panels and the Appellate Body and the relevant 'applicable law' between two WTO Members are two legally distinct concepts. The issue of the 'applicable law' is relevant because it points to the set of rights and obligations that binds states, as WTO Members, independently of and in parallel to the capacity of the WTO adjudicating bodies. The applicable law is the law that can be given (direct) 'effect' between WTO Members, as WTO Members, and which can be enforced before WTO adjudicating bodies which have exclusive jurisdiction over WTO matters. Thus, the WTO applicable law is the system of law (rights and obligations) that provides for effective remedies in case of their violation."* Gabrielle Marceau, "WTO Dispute Settlement and Human Rights," *European Journal of International Law* 13, no. 4 (2002): 766, https://doi.org/10.1093/ejil/13.4.753, https://doi.org/10.1093/ejil/13.4.753.

1238 Marceau, "WTO Dispute Settlement and Human Rights," 763.

1239 Marceau, "WTO Dispute Settlement and Human Rights," 764.

1240 Marceau, "WTO Dispute Settlement and Human Rights," 764.

international norms. According to the author, most commentators make confusion between the concepts of "jurisdiction", on one side, and "applicable law", on the other side. According to Pauwelyn, "the jurisdiction of WTO panels is limited to certain claims only, namely claims under WTO covered agreements, according to Articles 1.1, 3.1 and 11 of the DSU."[1241] However, the DSU does not restrict the potentially applicable law before panels and the Appellate Body. According to Pauwelyn, non-WTO law could be used as applicable law to the law that can be invoked in defence of a violation of WTO law. He does not argue, however, that non-WTO law is applicable law in the sense that one can claim before panels or the Appellate Body a violation of such law.

First, according to him, there is no explicit provision on 'applicable law' in the DSU, unlike the UN Convention on the Law of the Sea (UNCLOS)[1242] and the Statute of the ICJ.[1243] As a result, there is no *a priori* limitation to WTO applicable law. In this point, it is important to recall that principles of interpretation "neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended."[1244] Therefore, the DSU could not be interpreted as necessarily excluding the possibility of WTO adjudicating bodies to apply non-WTO law when solving WTO disputes when this exclusion is not explicit or clear in the treaty text.

Second, the exclusion of non-WTO norms from the applicable law before panels and the Appellate Body cannot be presumed as it would violate a major principle in international law, that is, the *pacta sunt servanda*.[1245] If the *pacta sunt servanda* principle is not effectively taken into consideration as well as the obligations resulting therefrom, each international dispute system will create "small isolated pockets of international law, delinked from other branches of the wider corpus of international law. It goes against the unity of international law as well as the principle of pacta sunt servanda." [1246]

Third, the fact that Articles 3.2 and 19.2 of the DSU establishes that WTO adjudicating bodies cannot *'add to or diminish the rights and obligations provided in the covered agreements'* does not make it a conflict rule in the sense that WTO covered agreements should necessarily and always prevail over non-WTO norms. These provisions actually

1241 Pauwelyn, *Conflict of norms in public international law: how WTO law relates to other rules of international law*, 29, 443.
1242 United Nations. UN General Assembly, *Convention on the Law of the Sea*, 10 December 1982.
1243 Pauwelyn, *Conflict of norms in public international law: how WTO law relates to other rules of international law*, 29, 465.
1244 Appellate Body Report, *India — Patents (US)*, para. 45.
1245 Pauwelyn, *Conflict of norms in public international law: how WTO law relates to other rules of international law*, 29, 468.
1246 Pauwelyn, *Conflict of norms in public international law: how WTO law relates to other rules of international law*, 29, 461.

relate to the interpretative function of panels and the Appellate Body, and not to their jurisdiction or applicable law. In other words, they relate to "the inherent limits of a WTO Panel as a judicial organ in interpreting WTO covered agreements." In the exercise of this judicial function of interpretation, WTO panels may clarify and interpret what WTO covered agreements mean, but they may not create new rights and obligations. They must apply those that WTO Members agreed to.[1247]

Fourth, as put by Pauwelyn, absent an inherent hierarchy of rules of international law (other than *jus cogens*), it does not make sense that panels and the Appellate Body apply general international law, but they do not apply non-WTO treaties to the extent that both disputing parties are legally bound by them and as long as this is done in the analysis of WTO claims.[1248]

Fifth, WTO treaty can be affected by explicit amendment as regulated by Article X of the Marrakesh Agreement Establishing the World Trade Organization, but also by the conclusion of other treaties or the existence or emergence of other rules of international law pursuant to, for example, the rules in the Vienna Convention on, inter alia, the application of successive treaties (Art. 30) and inter se modifications (Art. 41).[1249]

Also, according to Pauwelyn, the trade obligations in the WTO treaty are predominantly of the 'reciprocal type', as opposed to 'integral nature'. Most WTO obligations can be seen as bilateral or synallagmatic ones as they reflect 'a compilation of bilateral treaty relations.' They are not of the *erga omnes partes* type to the extent that their binding effect is not collective and the different relationships between WTO Members can be separated into bilateral components.[1250]

1247 Pauwelyn, *Conflict of norms in public international law: how WTO law relates to other rules of international law*, 29, 353.

1248 Pauwelyn, *Conflict of norms in public international law: how WTO law relates to other rules of international law*, 29, 471.

1249 Pauwelyn, *Conflict of norms in public international law: how WTO law relates to other rules of international law*, 29, 475.

1250 Pauwelyn, *Conflict of norms in public international law: how WTO law relates to other rules of international law*, 29, 65-66. Pauwelyn provides additional explanations for its argument that WTO treaty is predominantly bilateral in nature. As a result, it mentions that WTO obligations do not protect values. In fact, trade is an instrument to achieve other goals but not a value itself as "it is not sought after for the achievement of some 'global common that transcends the sum total of individual state interests'." Also, the fact that WTO obligations were negotiated first state-to-state, on a bilateral level and that tariff negotiations reflect a process of reciprocal demands and concessions reiterate the bilateral nature of the WTO treaty. Moreover, the enforcement of WTO obligations is exclusively bilateral as panels and Appellate Body only examine claims made by one WTO Member against one other WTO Member and, in case of violation by one State, the other may be authorised to impose state-to-state countermeasures. See Pauwelyn, *Conflict of norms in public international law: how WTO law relates to other rules of international law*, 29, 52-88.

In this sense, WTO obligations can be subject to *inter se* modifications pursuant to Article 41 of the VCLT to the extent that modifications thereto may not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations. Indeed, when a reciprocal obligation is violated, it is generally so against the one or more states and not among the whole WTO membership. Due to its reciprocal nature, WTO law should mallow for and give way to a number of other rules of international law, including agreements entered into by and between a limited number of WTO Members.

Lastly, not recognising that WTO law can be supplemented or modified by non-WTO norms and insisting on the idea that applicable law before a panel is limited to WTO covered agreement can result in a flawed system of WTO superiority or supremacy, or, as put by Pauwelyn, an "almost imperialistic proclamation of WTO supremacy over all other international law".[1251] This may result in inadequate decisions which do not address human rights' and development concerns.

Despite Pauwelyn's arguments are well-grounded, they have not been widely accepted in the legal literature in the field of international trade law and have not affected WTO practice on the subject. Therefore, the current scenario reflects a major rejection of application of non-WTO law in WTO disputes, which makes it unlikely that ESC rights, the right to development and other human rights belonging to the normative framework for development be raised in WTO disputes as defences for violations of WTO obligations in the sense of "applicable law". Even the right to regulate, as international customary law, may face difficulties in being accepted as an affirmative defence to WTO-inconsistent measures, as it seems to be the case in *China – Raw Materials* (2012).[1252]

Ultimately, Arts 3.2 and 19.2 of the DSU are construed so as to limit the interpretative function of panels and the Appellate Body. As such, it is not feasible to invoke non-WTO law as applicable law. In addition, it is understood that if non-WTO law were to be applied, WTO obligations would differ from WTO Member to WTO Member depending on the other international agreements they would have concluded, which could also undermine the commitments made by WTO Members and the balance of rights and

1251 Pauwelyn, "Interplay between WTO Treaty and other international legal instruments and tribunals: Evolution after 20 years of WTO jurisprudence " 22.

1252 Panel Report, *China – Raw Materials* (2012), para. 7.156. This conclusion was reinforced by the Panel in *China – Rare Earths* (2014). In this case, the Panel argued that: "(…) a State's sovereignty is also expressed in its decision to ratify an international treaty and accept the benefits and obligations that such ratification entails. In becoming a WTO Member, China has of course not forfeited permanent sovereignty over its natural resources, which it enjoys as a natural corollary of its statehood. (…) China has, however, agreed to exercise its rights in conformity with WTO rules, and to respect WTO provisions when developing and implementing policies to conserve exhaustible natural resources" (Panel Report, *China – Rare Earths*, 2014, para. 7.270).

obligations among the WTO membership. Likewise, if *inter se* amendment of WTO obligations by two or more Members were irrestrictively allowed, this would affect the predictability and security of the multilateral trading system and thus the rights of other Members. The idea that WTO treaty is predominantly of the 'reciprocal type' largely ignores its constitutional nature. In this context, *inter se* modifications of the WTO agreements do affect the balance of rights and obligations among WTO Members.

IV.4 CONCLUSION

As seen, from a practical perspective, development 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. Nevertheless, given the development-related objectives set forth in the preamble of the Marrakesh Agreement, it is possible to theorise a development-oriented approach to WTO.

Furthering a development-oriented interpretation of WTO agreements is essential for alleviating some of the burdens of free trade, levelling the playing field between WTO Members at different levels of development; and effectively placing social, economic and human development at the core of the WTO system.

Panels and the Appellate Body have made use of interpretative tools that contribute to advancing the development dimension of WTO law. The VCLT rules of interpretation and the holistic approach proposed by the Appellate Body reject a purely textualist interpretation of WTO agreements, opening space for a more contextualised approach.

Moreover, the fact that the Appellate Body has, in certain instances, made recourse to evolutionary interpretation[1253] shows that it pays due regard to the cooperative and dynamic nature of the WTO Agreement and the need to keep it in line with the development of international law and the values of the international community. This is particularly important for a development-oriented interpretation of the WTO agreements as development is a contemporary concern of present society which is reflected in several international instruments. Additionally, although with some limitations, WTO adjudicating bodies have interpreted WTO law in light of other international rules, which provides room for analysis of WTO norms vis-à-vis the legal framework for development. Systemic interpretation by panels and the Appellate Body allows human rights concerns and

1253 *US – Shrimp* (1998) and *China – Publications and Audiovisual Products* (2010).

other concerns from international community to enter the system of WTO law through the provisions of that regime itself as values.

Therefore, the interpretative techniques used by panels and especially the Appellate Body demonstrate that they have the tools to create more possibilities for furthering the development dimension of WTO agreements.

Nevertheless, there are also some drawbacks which must be overcome so that development can be effectively regarded a relevant element in interpretation of WTO agreements.

First, decisions from panels and the Appellate Body vary greatly. For instance, while the latter have made recourse to evolutionary interpretation in key cases, panels are more hesitant. In addition, more open-minded interpretations applied in one case are not necessarily replicated in others.[1254] Also, it is possible to see that the same interpretation technique is used to different degrees in the same decision.[1255] The composition of panels and the Appellate Body divisions differ from case to case, and the differences between cases (both regarding the facts and the specific claims and defences advanced) are often overlooked. This makes it more difficult to promote a consistent development-oriented approach in WTO jurisprudence.

Additionally, although panels and the Appellate Body follow the holistic approach of the VCLT rules of interpretation, interpreting WTO provisions in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of the object and purpose of the relevant agreement, a more teleological analysis would favor a development-oriented approach to the extent that development concerns can be inferred from the WTO Agreement itself but not necessarily from specific provisions of its agreements. Nevertheless, favoring interpretation of WTO provisions in light of object and purpose to the detriment of treaty text or other context could be deemed as judicial activism.

Moreover, despite recourse to effective interpretation has been made in several cases, there is still space for panels and the Appellate Body to use them more effectively in cases

1254 For instance, the strong reliance of the Appellate Body in teleological interpretation to read into flexibilities that were not apparent in one WTO agreement which is seen in *US – COOL* (2012) was not used in *China – Raw Materials* (2012), where the panel had to verify whether GATT exceptions were available for China to justify export duties under China's accession protocol.

1255 See the level of reliance of the Appellate Body in teleological interpretation in analysing, on one hand, the introductory clause of Article XX of GATT 1994 and, on the other hand, the meaning of 'exhaustible resources' in Article XX(g) of GATT 1994 in *US – Shrimp* (1998).

involving SDT provisions. It is necessary to provide substance and operational value to those open-textured and hortatory obligations (where the language of the provision minimally allows for it) and to analyse the burden of proof in a way that enables a fair allocation considering the condition of development of WTO Members. However, WTO adjudicatory bodies attribute a more moderate role to the principle of effectiveness. Under this principle, panels and the Appellate Body must give meaning and effect to all the terms of the treaty and are not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility. Nevertheless, this principle can also be interpreted as requiring adjudicators to interpret the implied intention of the parties, i.e. having regard to the contract as a whole and to surrounding circumstances, as to what would have been the attitude of the parties if confronted with the issue. This second meaning of the principle of interpretation could lead to more constructive interpretation of certain SDT clauses.

Besides, although the Appellate Body has said early on that the WTO agreements *are not to be read in clinical isolation from public international law*[1256], in practice, there are cases where the panel uses the language of Article 31(3)(c) of the VCLT as if making a systemic interpretation of WTO provisions, but in fact the international norm does not seem to affect its interpretation of WTO obligations.[1257]

In addition, the limited interpretation of the word "relevant" in Article 31.3(c) is prejudicial for the development dimension of WTO law. The Appellate Body has considered that in order to be relevant for the purposes of interpretation, the international rule has to concern the *'same subject matter'* of the treaty terms being interpreted.[1258] From this perspective, it would not be surprising if panels and the Appellate Body did not consider that international norms such as the 1986 UNDRD and the ICESC for the purposes of Article 31.3(c), because they do not specifically concern trade matters. Consequently, their role could be limited to factual evidence of the importance of the value of development in WTO law, but they would not more substantially impact the meaning of WTO provisions.

In addition, the fact that WTO jurisprudence has suggested that the word 'parties' in Article 31.3(c) of the VCLT may comprise all the parties to the agreement being interpreted[1259] may also limit the resort to important development-related norms. For instance, the parties to the ICESCR do not correspond to the WTO membership, which could limit

1256 Appellate Body Report, *US – Gasoline* (1996), para. 43.
1257 Panel Report on *China – Raw Materials* (2012).
1258 *US – Antidumping and Countervailing Duties (China)* (2011); *EC and certain member States — Large Civil Aircraft* (2011); and *Peru – Agricultural Products* (2015).
1259 *Peru – Agricultural Products* (2015).

systemic interpretation of WTO law vis-à-vis this international instrument, unless it is considered customary law.[1260] Furthermore, the right to regulate, as international customary law, has not been properly integrated in the interpretation of WTO agreements.

Also, currently interpretation of Article XX of the GATT 1994 (and, similarly, Article XIV of the GATS) makes it difficult to effectively factor in development issues as justifications for violations of WTO obligations. First of all, while Article XX of the GATT 1994 is interpreted under normal rules of interpretation, predominance of a textual (or restrictive contextual) approach in certain cases may prevent an expansive reading of exceptions into WTO agreements so as to include development concerns. Second, the rigidity of the necessity test carried out by panels and the Appellate Body in the interpretation of subparagraphs "a", "b" and "d" of Article XX of the GATT 1994, which is not followed by a proportionality *stricto sensu* analysis, limits the ability of WTO Members to justify their legitimate public policy measures. In broader terms, the absence of a full proportionality test in the analysis of measures in view of the GATT general exceptions impedes a true balancing of conflicting values and jeopardises the flexibilities that are necessary to deal with complex cases involving non-trade *vs* trade interests. In this context, it is argued that a more interdependent and integrated analysis of the paragraphs and the chapeau of Article XX is necessary to guarantee reasonable and fair results by taking recourse to factors and criteria which are identified in a particular context and brought to mutual bearing and relations. The chapeau of Article XX of the GATT 1994 should ultimately encapsulate a proportionality *stricto sensu* test and mitigate the rigidity of the necessity test.

Finally, WTO jurisprudence is also not open to use of human rights and other non-WTO norms as applicable law in WTO disputes, which may limit the reach of a development-oriented approach to WTO law. In this sense, for instance, not recognising the 'right to regulate' as an autonomous right under WTO law may constrain WTO Members' possibilities to justify certain type of subsidies on public policy grounds considering that the SCM Agreement does not have a general exception clause similarly to Article XX of the GATT 1994.

To sum up, WTO provisions and the rules of interpretation WTO adjudicating bodies use to interpret WTO agreements provide room for a development-oriented approach to WTO law. However, not necessarily the adjudicating bodies seize all the opportunities to further a development-oriented approach. In many instances, the interpretative

1260 Note though that the discipline of ICESC is still developing as customary law. See: Coomans, " Application of the International Convenant on Economic, Social and Cultural Rights in the Framework of International Organisations."

technique chosen by panels or the Appellate Body restricts the advancement of the development dimension of WTO agreements. The options among different interpretation methods can be influenced by institutional and political factors surrounding the adjudicative body. These factors will be analysed in the next chapter.

CHAPTER 5

5

Institutional and political challenges for a development-oriented interpretation of WTO rules applicable to LCRs

V.1INTRODUCTION

In Chapter 3, we argued that the normative framework for development can, in theory, play a role in the interpretation of WTO agreements. In Chapter 4, in turn, we analysed in detail legal mechanisms in WTO law and the rules of interpretation that could be used to advance development in the interpretation of WTO agreements. This chapter will examine if the WTO institutional and political setup allows for a development-oriented interpretation of WTO agreements.

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.[1261]

If one understands interpretation as part of a communicative process, it is easier to comprehend that it is dependent not only on the speaker but also on the audience. [1262] The meaning of what the speaker says will be invariably moulded by how the audience understands it. In other words, the meaning of what the parties to a treaty have communicated through the text will be interpreted by a judge who will also play a role in the attribution of sense to the treaty text. The judge is surrounded by an institutional and a political setup and carries personal and community values. All these elements will influence the process of interpretation.

Certain institutional and political factors surrounding the WTO could potentially discourage a development-oriented approach to WTO law. The political processes surrounding international courts also affect the discretion left to adjudicators in determining the substantive law they are to apply.[1263] For this reason, it is important to discuss the institutional and political factors affecting the WTO dispute settlement system in order to evaluate if they are conducive to the advancement of a development-approach to WTO law.

The paralysis of the Appellate Body, which derives from the US blockage under the Trump Administration to new appointments of Appellate Body members amidst ac-

1261 Abi-Saab. 2010; Maduro, Eur. J. Legal Stud., (2007); Steinberg, American Journal of International Law, (2004); Ginsburg, (2013).

1262 *"Communication is a comprehensive process in which communicators and audiences are both involved. (…) participants usually play two supplementary roles, one that of the initiator of the messages, the other that of the recipient. (...) A sign is most readily classified according to the group whose members are expected to understand it"*. Harold D. Lasswell, James C. Miller & Myres S. McDougal. The Interpretation of International Agreements and World Public Order: Principles of Content and Procedure. p. xii-xiii. Ed., Martinus Nijhoff Publishers. (1994).

1263 Boyle and Chinkin, *The making of international law*, 2008.

cusations that the Appellate Body has engaged in judicial activism and has stepped out of its mandate, cast doubts on the ability of WTO adjudicating bodies to adopt development-oriented interpretations which could be deemed judicially activist. Likewise, the insurmountable stalemate between developed and developing countries as to the role for development in the WTO, which has contributed to the deadlock in WTO negotiations in general, also poses challenges to a development-oriented approach to WTO law especially where the role for development is not well-established in the WTO.

The crisis of the Appellate Body and, more broadly, of the WTO occurs in the background of broader political factors including (i) the demise of multilateralism which is accompanied by the rise of populist leaders and an increasing antiglobalisation sentiment by people; and (ii) the difficulties with dealing with a new balance in geopolitics, especially in view of the role played by China. These political elements also affect a development-oriented approach to WTO as many countries have adopted an inward-looking trade strategy, trampling multilateral options and the development objective as a project of partnership and cooperation among countries. More recently, the coronavirus pandemic, which represents an unprecedented global humanitarian and health crisis with severe economic and social effects, may to a greater or lesser extent impact government policies and attitudes towards multilateral institutions, including the WTO. Two scenarios are possible: one where the COVID-19 pandemic will be a catalyst for protectionist measures and economic nationalism; and another one, where governments will recognise the importance of cooperation and embrace the partnership for mutual solutions. These scenarios provide different backgrounds for advancing development at the WTO.

In view of current institutional and political challenges faced by the WTO and its dispute settlement system, this chapter analyses the feasibility of a development-oriented approach to WTO law. The next and final chapter makes some suggestions on how such approach could be designed in connection with WTO rules applicable to LCRs in order to adapt to the current scenario and the interpretative challenges described in the previous and in this chapter.

V.2WTO INSTITUTIONAL AND POLITICAL SETUP: IMPACT ON A DEVELOPMENT-ORIENTED APPROACH TO WTO LAW

V.2.1 Crisis of the WTO and its dispute settlement system

V.2.1.1 US blockage of Appellate Body Members and underlying justifications

The current crisis of the Appellate Body and the WTO dispute settlement system is a consequence of, among other factors, the US blockage to appointments of new Appellate Body members under the Trump Administration, which led to the paralysis of this organ. Such attitude on the part of the US has several explanations. Mainly, the US makes strong critiques to the Appellate Body for being judicially activist and stepping out of its mandate. These critiques relating to an alleged judicial activism of the Appellate Body could reduce the willingness of WTO adjudicating bodies to adopt a development-oriented approach to WTO law, which requires all but a textual and rigid interpretation of WTO agreements.

Appellate Body members are appointed by consensus by WTO Members. Where consensus is not achieved, composition of the Appellate Body and its functioning can be affected. Indeed, the continuing US blockage to the appointment of Appellate Body members[1264] resulted in the reduction of the organ to one Member by the end of December 2019. Consequently, it could no longer function as it is necessary at least 3 persons to decide on a WTO dispute.[1265] Since 2020, the Appellate Body has remained under paralysis and no solution has been achieved. After the US presidential election in November 2020, which elected Joe Biden, a glimmer of hope for a resolution of the Appellate Body crisis in 2021 emerged but with no precise definition.[1266] However, at the time of this writing, the Biden administration had not taken any initiave to date to resolve the crisis of the Appellate Body (and more broadly the crisis of WTO dispute settlement). The Biden administration has remained completely silent.

The paralysis of the Appellate Body affects the whole WTO dispute settlement system, including the work of the panels. In a scenario where a panel report is appealed, but no

1264 In 2011, Barack Obama's government had already blocked the reappointment of the Appellate Body member Jennifer Hillman, in 2014 that of James Gathii, in May 2016, that of Seung Wha Chang. Since 2017, Trump's government has continuously blocked the appointment process to find successors for AB Members whose mandates have expired.

1265 According to Article 17.1 of the DSU, "[A] standing Appellate Body shall be established by the DSB. The Appellate Body shall hear appeals from panel cases. It shall be composed of seven persons, three of whom shall serve on any one case."

1266 Salem Nasser, *Biden presidente dos Estados Unidos: a volta da hipocrisia, necessária* December 2 (Fundação Getúlio Vargas, 2020), https://portal.fgv.br/en/node/21508.

Appellate Division can be formed to hear that appeal, the adoption of the Panel report has to be suspended pending the appeal.[1267] The reduction of the number of Appellate members to less than three therefore enables the losing party to block the panel decision.[1268] This, as explained by Van den Bossche, has made the WTO dispute settlement system return to pre-1995 GATT dispute:

> What many of us expected to happen, did happen. Losing parties in WTO dispute settlement have systematically appealed panel reports into the void, and have thus prevented these reports from being adopted by the DSB and becoming legally binding. The United States was the first to do so on 18 December 2019 in *US – Carbon Steel (Article 21.5)* (DS436), and has done so again on 28 September 2020 in *US – Softwood Lumber VII* (DS533). It is most likely to do this also in *US – Tariff Measures on Certain Goods from China* (DS543). On 28 July 2020, Saudi Arabia appealed the unfavourable panel report in *Saudi Arabia – Protection of IPRs* (DS567) and on 28 August 2020 the European Union did the same in *EU – Cost Adjustment Methodologies II* (Russia) (DS494). For all practical purposes, we have now returned to pre-1995 GATT dispute settlement, as a losing party can, and does, block the adoption of a panel report by appealing it into the void.[1269]

The main reason presented by the US for blocking the appointment of new Appellate Body members is that Appellate Body judges have been allegedly engaging in judicial activism and have created new WTO obligations to which WTO Members have not agreed to. In other words, the US argue that the Appellate Body has allegedly added to or diminished rights or obligations in varied areas, such as subsidies, antidumping duties, countervailing duties; standards (under the TBT Agreement); and safeguards.[1270] According to Articles 3.2 and 19.2 of the DSU, the panel and Appellate Body cannot add

1267 This is in line with Article 16.4 of the DSU, which reads as follows: *Within 60 days after the date of circulation of a panel report to the Members, the report shall be adopted at a DSB meeting (7) unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report. If a party has notified its decision to appeal, the report by the panel shall not be considered for adoption by the DSB until after completion of the appeal. This adoption procedure is without prejudice to the right of Members to express their views on a panel report.*

1268 As explained by Mr Ujal Singh Bhatia, *such a scenario would entail the de facto demise of the negative consensus rule that has characterized the WTO dispute settlement system since 1995. While the negative consensus rule would remain on the DSU books, any losing party could prevent the adoption of the panel report by appealing it to a paralyzed Appellate Body. The consequences of such a scenario working out are obvious. Circumventing the disciplines of the DSU would not automatically time-warp us back t o the GATT era: the more likely result is the spread of the paralysis to the panel process.* "11th Annual Update on WTO Dispute Settlement - Address of Mr Ujal Singh Bhatia Chair, Appellate Body," Graduate Institute, 2018, accessed 10 Oct, 2019, https://www.wto.org/english/news_e/news18_e/ab_07may18_e.htm.

1269 Peter Van den Bossche, "Back to the Good Old Days of GATT Dispute Settlement?," *SIEL Newsletter*, no. 46 (Autumn 2020): 2.

1270 U.S.T.R., 2018 Trade Policy Agenda and 2017 Annual Report, 24 (2018).

to or diminish the rights and obligations provided in the covered agreement. According to the US, the Appellate Body's case law has particularly disrupted the very balance between liberalisation and trade defence on which the WTO agreements rest.[12711272]

The US expressed the view that "Panels and the Appellate Body are required to apply the rules of the WTO agreements in a manner that adheres *strictly to the text* of those agreements, as negotiated and agreed by its Members."[1273] They believe that the Appellate Body has disregarded the rules as set by WTO Members and has increased judicial activism over time.

The US, differently from other WTO Members, disagrees in terms of the function of the Appellate Body. To this country, this organ should have a deferential and restrained behaviour. To the US, it is inappropriate for Appellate Body members to fill gaps or clarify ambiguities in the text of WTO agreements. This idea is not surprising for a country which is strongly protective of its sovereignty, does not generally give direct effect to treaties, and where perhaps most Americans are not willing to cede authority to an international court or tribunal to engage in judicial law-making that constrains what national government may do.[1274] In this regard, the 2019 US Trade Policy Agenda stressed that "(…) the United States is a sovereign country, and US officials are responsible to the American people for their trade policy. The United States cannot be held responsible for obligations to which its elected officials never agreed. Thus, efforts by the Appellate Body to create new obligations are not legitimate."[1275] The US is of the view that it should have

1271 Elvire Fabry and Erik Tate, "Saving the WTO appellate body or returning to the wild west of trade," *Notre Europe Institut Jacques Delors* 7 (2018). In this sense, the 2019 US Trade Policy Agenda states the following: "Another important reason for the failure of multilateral negotiations is that judicial activism at the WTO's Appellate Body tempted countries to demand special privileges through litigation – rather than seeking to build consensus through negotiation. For many years, the WTO Appellate Body repeatedly seized more power for itself – while undermining and disregarding the very rules under which the dispute settlement system was created. The Appellate Body's actions led to a lack of trust in the decisions that emerged from its process. Years of complaints by prior U.S. Administrations about activism at the Appellate Body were ignored. Furthermore, this activism had the disastrous effect of making it harder for market-based countries like the United States to push back against unfair practices abroad and discouraged them from adjusting their own trade policies in response to growing concerns about globalization. In fact, one of the most striking developments of recent years is that while the United States has long expressed concerns about the Appellate Body, China – an enormous non-market economy – advocates for giving that body even more power over trade policy." U.S.T.R., 2019 Trade Policy Agenda and 2018 Annual Report of the President of the United States on the Trade Agreements Program, 6 (USA 2019).

1272 At this point, it is worth recalling that trade defence measures were designed by the US to protect the country where free trade could be harmful to its interests. Richard Steinberg, "The Impending Dejudicialization of the WTO Dispute Settlement System" (paper presented at the 112th Annual Meeting of the American Society of International Law, 2018).

1273 U.S.T.R., Short 2018 Trade Policy Agenda and 2017 Annual Report, 24, emphasis added.

1274 Steinberg, "The Impending Dejudicialization of the WTO Dispute Settlement System."

1275 U.S.T.R., Short 2019 Trade Policy Agenda and 2018 Annual Report of the President of the United States on the Trade Agreements Program, 26.

proper policy space, potentially by using trade defence measures and applying tariffs or other instruments.[1276]

This self-empowerment of the Appellate Body and its alleged distortion of WTO law is aggravated, under US perspective, by the fact that the Appellate Body strongly rely on their case law as precedents, [1277] which perpetuates existing decisions on controversial issues which the US is not fond of.

Regarding the US concern over judicial activism, it is important to highlight that the Appellate Body has been in an extremely difficult position over the last decades. It is charged with the role of interpreting WTO agreements, which, by nature, are incomplete. At the same time, since the creation of the WTO, new negotiations have been significantly difficult, which has prevented Members from completing existing agreements and creating new ones via negotiation. This left panels and the Appellate Body with an increasing role of developing WTO law to clarify ambiguities, fill gaps and to adapt to the new situations brought to them under the dispute settlement system.

While the US preoccupation that the Appellate Body interpretation has caused an imbalance between trade liberalisation and trade defence may be grounded, the general assertion that the Appellate Body has exceeded its function and disregarded agreed rules is not.

First, as discussed, the VCLT rules of interpretation requires that a treaty be *interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose* (Article 31). This relates to three ways of defining the parties' common intentions. Common intentions can equate to the

1276 U.S.T.R., Short 2019 Trade Policy Agenda and 2018 Annual Report of the President of the United States on the Trade Agreements Program.

1277 The US also expressed concerns on the fact that the Appellate Body has extrapolated the mandatory 90-day deadline for appeals, on review of panel findings on domestic law, on advisory opinions on issues not necessary to resolve a dispute and on the fact that Appellate Body Members have served on appeals after their term had ended. U.S.T.R., Short 2019 Trade Policy Agenda and 2018 Annual Report of the President of the United States on the Trade Agreements Program, 148.

text of the treaty provisions (textual school),[1278] to the subjective intent of the parties (intent-based school)[1279] or to the object and purpose of the agreement (teleological school).[1280] The VCLT rules of interpretation, however, do not give primacy to any of the schools (textual, intent-based or teleological), i.e., there is no *a priori* hierarchical order among them.

The Appellate Body, in this context, has, in many instances, stated that interpretation pursuant to the customary rules codified in Article 31 of the Vienna Convention is ultimately a holistic exercise.[1281] For instance, in *US – Continued Zeroing* (2009), the Appellate Body stated:

> The principles of interpretation that are set out in Articles 31 and 32 are to be followed in a holistic fashion. The interpretative exercise is engaged so as to yield an interpretation that is harmonious and coherent and fits comfortably in the treaty as a whole so as to render the treaty provision legally effective. A word or term may have more than one meaning or shade of meaning, but the identification of such meanings in isolation only commences the process of interpretation, it does not conclude it. (…) Instead, a treaty interpreter is required to have recourse to context and object and purpose to elucidate the relevant meaning of theword or term. This logical progression provides a framework for proper interpretative analysis. At the same time, it should be kept in mind that treaty interpreta-

1278 The textual school is concerned with giving an objective meaning to the parties' common intentions according to fixed rules of interpretation which safeguard stability and predictability in treaty relations Orakhelashvili, *The interpretation of acts and rules in public international law*.. It rejects the alleged subjectivism in the search for the "real intentions" of the parties by arguing that, although subjective reasons may lead States to consent to treaties, when they are concluded, they acquire objective content and existence. As Orakhelashvili, *The interpretation of acts and rules in public international law*, 307. explains, *"[I]n the end what matters is not what the actual intention of States-parties was, but what meaning is inferable from the treaty when it is interpreted according to ordinary methods."* The textual school accommodates the importance of consent in international law by stating that the parties' common intentions are reflected in the text of the agreement. Consequently, the focus of interpretation is on the text of the international agreement (primacy of the text), which must be read based upon the meaning of its terms, without reference to extraneous elements Zarbiyev, "A Genealogy of Textualism in Treaty Interpretation.".

1279 Differently from the textual school, the intent-based school understands that the express terms do not necessarily reflect the real content of the agreement. The "real intent" of the parties must be assessed and this sometimes may result in denying the words of the text. The parties' intentions are to be searched for in the negotiating history and other sources Van Damme, "Treaty interpretation by the WTO appellate body.".

1280 The teleological school *"ascribes an aim and purpose to the treaty and from there is its point of departure. This school is given to attaching great importance to preambles and the statements of purposes in treaties"* Oliver Morse, "Schools of Approach to the Interpretation of Treaties," *Cath. UL Rev.* 9 (1960): 41.. From this point of view, *"the object and purpose of the treaty should be determinative of the meaning of the treaty"* Van Damme, "Treaty interpretation by the WTO appellate body," 618..

1281 See, for instance, Appellate Body Report, *China - Publications and Audiovisual Products* (2010), para. 348; Appellate Body Report, *EC – Chicken Cuts* (2005), para. 176.

> tion is an integrated operation, where interpretative rules or principles must be understood and applied as connected and mutuallyreinforcing components of a holistic exercise.[1282]

Therefore, the Appellate Body is not required under VCLT to follow a textualist approach that would be more in line with the US demand for a more deferential and restrained approach. It should follow a holistic approach that takes into consideration text, context and object and purpose.

Second, agreements are characterised by abstractness, contradictions, ambiguities and incompleteness that need to be clarified by context.[1283] By giving 'primacy' to the express terms, the interpreter is not necessarily in a better position to ascertain the parties' common intentions in comparison with other interpretation methods.

In fact, analysing only one element (text) and disregarding the others (context and object and purpose) because the former is arguably sufficient to clarify a provision may result in a partial reading thereof. Accordingly, the rigor of the literal interpretation may compromise the impartiality of the process of interpretation and favour one part of the transaction.[1284] Manipulating forms and procedures may cause the legal system to lose some of its legitimacy.[1285]

Additionally, overreliance on the need to do justice to the parties' original consent ignores the fact that the notion of 'original consent' is stronger for treaties with a bilateral nature. In multilateral agreements establishing an international organisation, the ideal of mutual and long-term cooperation between the parties to maintain the good functioning of the organisation and to achieve its goals emphasises the role of the object and purpose of the organisation as an important element providing legitimate and commonly agreed responses to complex issues arising from the parties in connection with treaty interpretation, in particular, in case of gaps.

In this context, the VCLT general rule of interpretation, by referring to text, context and object and purpose, carries some level of flexibility. While all these parameters should

1282 Appellate Body, *US – Continued Zeroing* (2009), para. 268.

1283 Myres Smith Macdougal, Harold Dwight Lasswell, and James C. Miller, *The interpretation of international agreements and world public order : principles of content and procedure* (New Haven; Dordrecht; Boston: New Haven Press ; M. Nijhoff, 1994).

1284 Ian McNeil, *The New Social Contract. An Inquiry in to Modern Contractual Relations* (New Haven and London: Yale University, 1980).

1285 Ian Macneil, "Contract Theory after a Neo-classical Seminar," in *Implicit Dimensions of Contract: Discrete, Relational and Network Contracts*, ed. David; Collins Campbell, Hugh; Wightman, John (Oxford: Hart Publishing, 2003).

be considered in the process of interpretation, the interpreter has certain flexibility to give more weight to one or another element depending on the nature or type of the agreement and provision being interpreted. This is one of the reasons why interpretative approaches vary considerably across different international tribunals.

In this sense, by not establishing a pre-determined hierarchical order between the differed elements of interpretation it embeds, Article 31 allows international courts and tribunals to address the needs of interpretation required by different types of treaties in different institutional settings.

Third, because treaties are incomplete, it is inherent to the judicial activity to fill gaps, especially considering that tribunals cannot simply apply the *non liquet* principle.[1286] In case of absence of common intentions of the parties on a certain issue, "it is the right and the duty of international judicial and arbitral agencies to impart an effect to these clauses by reference to the purpose of the treaty as a whole and to other relevant considerations, including the finality of adjudication."[1287]

The role of filling gaps and clarifying ambiguities is closely related to the principle of effectiveness.[1288] This principle requires that the common intentions of the treaty be taken in its entirety, i.e., in the wider context of the agreement as a whole and the circumstances accompanying its adoption (e.g. historical circumstances of its creation), its object and purpose, its spirit, the needs of the community, the requirement of good

1286 According to Lauterpacht, "Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties," 78., *"(…) the treaty is law; it is part of international law. As such it knows no gaps. The completeness of the law when administered by legal tribunals is a fundamental - the most fundamental - rule not only of customary but also of conventional international law."*

1287 Lauterpacht, "Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties," 78.

1288 The principle of effectiveness or the principe *ut res magis valeat quam pereat* finds its utmost relevance in those cases where the common intentions of the parties are not explicit in the agreement. As explained by Lauterpacht, "Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties," 80., it *"arises in relation to matters falling within the general terms of the agreement but not at all present to the minds of the parties when they negotiated it or put their signatures to it. It is in such cases for the judge to act on the implied intention of the parties, i.e. on his understanding, having regard to the contract as a whole and to surrounding circumstances, as to what would have been the attitude of the parties if confronted with the issue."* Although it is not codified in the VCLT, it is understood as part of the general rule of interpretation and as a requirement of the principle of good faith. This principle is also extensively applicable by international courts and tribunals and considered a general principle of law Yasseen, *L'interprétation des traités d'après la Convention de Vienne sur le droit des traités*; Van Damme, *Treaty interpretation by the WTO Appellate Body*; Lauterpacht, "Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties." One of the main reasons why its codification was avoided was the fear that it could entail an extensive interpretation *"in the sense of an interpretation going beyond what is expressed or necessarily to be implied in the terms of the treaty"* International Law Commission, "Draft Articles on the Law of Treaties with commentaries," *Yearbook of the International Law Commission* II (1966)., p. 219.

faith and also against the background of international law - since the treaty is part of the international legal system.[1289]

Of course, the application of the principle of effectiveness requires circumspection at the risk of giving the judge unlimited discretion and substituting the will of the parties for that of the judge. Indeed, the principle, according to its generally accepted design, does not allow the judge to impart an effect to the treaty that is not of its own.[1290]

The common intention of the parties is a paramount factor in treaty interpretation and the principle of effectiveness cannot be undertaken to justify an element that is independent of the parties' intentions. However, the fact that judges attribute a meaning to a provision based on the treaty as a whole, and considering the principle of the completeness and rational development of the law, does not mean that they have derived an extraneous element to the parties' common intentions or that they have adopted a political solution of the case. It is their legitimate duty to do so under the principle of good faith.

Consequently, under the principle of effectiveness, which is a general rule of interpretation under international law, judges are entitled to develop the law and give effect to obligations by reference to the purpose of the treaty as a whole and to other relevant considerations, especially in a context where *non liquet* is not applicable.

Therefore, it does not seem reasonable to state that the Appellate Body has engaged in judicial activism especially in a scenario where WTO Members have not developed WTO law by themselves through the negotiation forum, bringing to the WTO dispute settlement system a wide variety of issues that were not crystal clear in WTO agreements. In any case, it is daunting that, under allegations of judicial activism, the US has succeeded in collapsing the WTO Appellate Body by interfering politically in the appointment of its judges.

While the future of the WTO dispute settlement as it worked from 1995 to 2019 remains unknown, it is necessary to bear in mind that it should foresee methods for preventing such an undue interference in its functioning. Where Members can have such a strong interference in the system to the point of causing its destruction, this can also result in undue interference in the reasoning and in the decisions issued by its adjudicative body. Where judges are at the constant pressure of seeing their court or body dismantled, they

1289 Lauterpacht, "Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties."
1290 Yasseen, *L'interprétation des traités d'après la Convention de Vienne sur le droit des traités*.

may probably cede to the criticisms made to their decisions no matter how adequate or inadequate the former may be.

Amendments to the DSU have been suggested to increase the independence of the Appellate Body, in particular, the provision for one single but longer term for its members.[1291] Currently, Appellate Body members can serve for a four-year term and be reappointed another one, according to Article 17.2 of the DSU.

In a context of political pressure over adjudicative bodies and criticisms over alleged judicial activism, it is likely that judges may not feel free to advance interpretations that are more dynamic, evolutionary or take into account the *telos* of the agreement as a whole. Under this scenario, an interpretation that takes into account the development dimension of the WTO Agreement may also be considered activist, as it requires vigorous efforts from the adjudicative bodies in the sense of performing a holistic interpretation of WTO agreements considering the objectives set forth in the Marrakesh Agreement and taking into account non-WTO norms, especially human rights which sometimes may not be deemed hard law and could have their normative force questioned.

In the existing scenario of crisis of the Appellate Body and undue interference on the part of the US, a development-oriented interpretation of the WTO agreements would most likely not find sufficient space. WTO adjudicating bodies would not risk leaving the system under more stress to further the development dimension of the WTO agreements.

V.2.1.2 Disagreements between WTO Members as to the role for development

Another important factor that contributes to the deepening of the WTO crisis is the divergent views among WTO Members. Particularly impacting the advancement of a development-oriented approach to WTO law is the different views of WTO Members about the role for development in WTO law and practice, the role for SDT rules and the definition of developing country.

These tensions among developed and developing country Members as to the definition of development and how it should be reflected in WTO law prevent advancements in WTO negotiations and a clearer understanding on the role of development in WTO agreements. Without a clear definition on the role of development in WTO rules, it is also difficult for WTO adjudicating bodies to interpret WTO in light of the development

1291 WTO. *Communication from the European Union, China and India to the General Council*. WT/GC/W/753. 12-13 December 2018.

objective or interpret SDT provisions so as to make them more operational without being accused of judicial activism.

WTO agreements do not bring a definition of "developed" and "developing" members. Members can make a self-declaration on whether they are "developed" or "developing", though other members can challenge the decision of a Member that makes use of SDT provisions available to developing members.[1292] As mentioned before, SDT gives developing countries some alleged benefits such as longer transitional periods before implementing an agreement, or a temporary use of a policy instrument with a view to fully implementing an agreement and integrating the multilateral trading system. As mentioned by Hu, SDT provisions are "designed to accomplish two objectives: (a) to enhance market access conditions in the face of the divergent interests and priorities between developing and developed beneficiary members, and (b) to exempt developing members from certain multilateral trade disciplines and thus offer them some flexibility in the use of various trade and trade-related measures. Developing members can receive technical assistance, too."[1293]Most of SDT provisions, however, have expired or are not truly operational as they reflect best-endeavour clauses.[1294]

The main problem expressed by developed WTO Members over a decade and, more recently, strongly voiced by the US under the Trump Administration is the fact that there is no differentiation between levels of development among developing countries. As such, Brazil and Bolivia are viewed as birds of a feather flock together, when their levels of development and characteristics are different.

In February 2020, the Trump Administration eliminated preferences for a list of self-declared developing countries including Colombia, Brazil, China, India, Indonesia, Malaysia, South Africa, Thailand, Vietnam, among others. The measure is intended to reduce the threshold for triggering a US investigation into whether nations are harming

1292 Weinian Hu, *China as a WTO developing member, is it a problem*, CEPS Papers (Centre for European Policy Studies, 2019), 3.

1293 Hu, *China as a WTO developing member, is it a problem,* 3-4.

1294 The 'developing' status "does not automatically qualify a developing member, self-declared or not, an access to all SDT provisions. Consequently, the use of SDTs is defined by obligations, usually in the forms of time limits and thresholds. The manner in which a developing member may benefit from an SDT provision depends, in the first place, on how its WTO accession is negotiated and certainly the *status quo* of its trade practices at the time of accession. Apart from negotiations, a developing member may also choose to opt in or out of the SDTsprovided by a specific WTO agreement. On the other hand, currently many SDT provisions are 'best endeavour' type of clauses that lack precision, operationality and enforceability, so their actual impact on a member's (weaker) commitment may therefore not be attainable after all." Hu, *China as a WTO developing member, is it a problem,* 4.

US industries with unfairly subsidised exports.[1295] According to Trump, "[T]he WTO is BROKEN when the world's RICHEST countries claim to be developing countries to avoid WTO rules and get special treatment."[1296] His administration has also exerted pressure on certain countries to drop their developing country status or they would face punitive trade actions.[1297] This aversion from development concerns from an important Member of the WTO may also adversely affect a development-oriented approach by the Appellate Body. Of course, it is not possible to foresee if this approach will continue and at which degree under Joe Biden's Administration. However, criticism as to the lack of a more precise definition of developing country at the WTO may remain as this is an old claim from the US and other WTO developed Members.

In contrast, developing countries complain that they have been rule takers of the WTO system and have been disadvantaged in several aspects. Inequality between developed and developing WTO Members is also significant and should be addressed by the WTO regime in the view of the developing Members. Particularly for China, but also for other developing countries, maintaining their 'developing country' status has political motives. China seeks a strategy of cooperation with other developing countries. In addition, rather than being a follower of existing trade rules dictated by the developed Members, China most certainly wishes "to carve out a multilateral trade policy space for itself and on behalf of developing countries in order to promote mutual development to 'further expand South-South cooperation'."[1298]

As explained by Bacchus and Manak, "these long-standing divisions over how developing countries should be treated under WTO rules have deepened over time", especially as now developing countries represent the large majority of WTO membership and and emerging economies, in particular China, but also BRICS countries, are now rivals and competitors of the US and other traditional developed Western countries.[1299] Old divides on traditional themes such as subsidies, agriculture, investment measures have

1295 Bryce Baschuk. U.S. Revokes WTO Subsidy Preferences for Some Developing Nations. Bloomberg. 10 Feb 2020. Available at: https://www.bloomberg.com/news/articles/2020-02-10/u-s-revokes-wto-subsidy-preferences-for-some-developing-nations. Access on: 14 March 2020.

1296 Donald Trump's tweet. @realDonaldTrump. 26 July 2019. Available at: <blockquote class="twitter-tweet"> The WTO is BROKEN when the world's RICHEST countries claim to be developing countries to avoid WTO rules and get special treatment. NO more!!! Today I directed the U.S. Trade Representative to take action so that countries stop CHEATING the system at the expense of the USA! — Donald J. Trump (@realDonaldTrump) July 26, 2019</blockquote> <script async src="https://platform.twitter.com/widgets.js" charset="utf-8"></script> Accessed on: March 14, 2020.

1297 As a result of the US pressure, South Korea, Singapore, Brazil and Taiwan have declared that they will not seek developing nation status in the WTO. Taisei Hoyama. Nikkei Asian Review. 31 Oct 2019. Available at: https://asia.nikkei.com/Politics/International-relations/Trump-set-to-take-WTO-developing-nation-battle-to-next-level. Access on: 14 March 2020.

1298 Hu, *China as a WTO developing member, is it a problem,* 22.

1299 Bacchus and Manak, *The Development Dimension: What to Do About Differential Treatment in Trade*, 2.

not been resolved and have deepened in some cases. Also, there are new divides among them on new areas such as digital and technological markets.

At the same time, no substantial progress has been made to achieve a consensus on the theme of development since the Doha Development Round in 2001. As described by Bacchus and Manak, "in 2013, an SDT monitoring mechanism was established at the Bali Ministerial Conference to operate as a special session within the WTO Committee on Trade and Development; but, as of the 10th session of this monitoring mechanism, held in January 2019, not a single written submission had been put forward by any WTO member, including developing countries."[1300]

Where no consensus can be achieved as to the role of development in WTO law and practice, it is more difficult for WTO adjudicating bodies to sustain development-led interpretations of WTO law, in particular, SDT clauses. Being WTO a Member-driven organisation and where Members are not sure where development stands at the institution, any interpretation of WTO agreements furthering the development objective may be deemed as stepping out of the adjudicative function and ultimately be criticised for being judicially activist. In the 25 years of existence of WTO dispute settlement system, there has been limited case law involving development issues. In addition, in a paradigm dispute involving the Enabling Clause, the Appellate Body recognised a graduation among developing countries. In this sense, it submitted that the relevant provision was read as "authorizing preference-granting countries to 'respond positively' to 'needs' that are not necessarily common or shared by all developing countries. Responding to the 'needs of developing countries' may thus entail treating different developing country beneficiaries differently."[1301] Ultimately, however, developmental issues are politically sensitive at the WTO and WTO adjudicating bodies may be reticent to enter into such type of discussion especially considering the stalemate in negotiations and the current political scenario.

V.2.2 Broad political factors

It is important to note that the crisis of the WTO and, in particular, of its dispute settlement system does not derive exclusively from the US blockage of new Appellate Body Members. It is part of a broader scenario that has been described as the crisis of liberal order.

1300 Bacchus and Manak, *The Development Dimension: What to Do About Differential Treatment in Trade*, 7.
1301 Apellate Body Report, *EC – Tariff Preferences*, para. 161-162.

While it is not the goal of this thesis to discuss such a broader picture relating to the crisis of liberal order, it is important to highlight that there is a growing body of literature in international relations and political science debating the potential rupture of the so-called liberal order based on the "liberal vision" of Western democracies, which includes "open markets, international institutions, cooperative security democratic community, progressive change, collective problem solving, shared sovereignty, and the rule of law."[1302]

Factors which are common to explaining both the crisis in WTO multilateralism, WTO Appellate Body as well as the crisis of the liberal order include the rise of populist governments as a result of increasing inequality and an increasingly anti-globalisation sentiment; and the rise of emerging powers, especially the rise of China as a contesting hegemon to US power. As legal interpretation is also influenced by political factors, this subsection details these events and how they could impact the case for a development-oriented approach to WTO law.

V.2.2.1 The rise of populist leaders: inequality and antiglobalisation sentiment

In recent years, the world has seen an unprecedented rise of populist leaders. This has taken place concomitantly with mass mobilisations against the current system of party politics and parliamentary democracy under the slogan 'they don't represent us'. Pervading corruption within countries' political systems also contributes to a generalised sense of mistrust in institutions.[1303]

1302 G. John Ikenberry, *Liberal Leviathan: The Origins, Crisis, and Transformation of the American World Order* (Princeton: Princeton University Press, 2011), 2.

1303 Castells further observes that Trump, Le Pen, Macron, Spain's Podemos, Greece's Syriza, Italy's Cinque Stelle Movement, in their ideological diversity, are all expressions of a liberal order – or chaos. So, too, is the total disintegration of the political system of Brazil; Mexico as a victim to the narco-state; post-Chavez Venezuela in a state of quasi-civil war; South Korea and the corrupt president Park Geun-hye; the Philippine president and his summary executions as a way of dealing with security issues; South Africa's crisis of legitimacy leading to the forced resignation of President Zuma; popular revolutions arising from institutional crisis in Bolivia and Equador; authoritarian regimes in China and Russia; theocratic governments and dictatorships in the Middle East; neofacist movements in Poland, Hungary, Romenia, Bulgaria and Germany; xenophobic nationalist parties in Finland and Norway, and parliamentary support of xenophobes in Denmark. Manuel Castells, *Rupture: the crisis of liberal democracy* (Cambridge: Polity Press, 2018).see chapter 'Our lives, our world'.

A greater number of people feel stagnation in their living standards which makes them prone to vote for populist leaders. Also, the increasing levels of inequality[1304] make them feel there is something wrong with the current system and fuel their desire for radical changes. While the rapid economic progress in the post-war period supported liberal democracy and gave it the benefit of the doubt, now the fear for the future increases the propensity of the rise of populist governments.[1305] Further, a relevant part of society feels that they have been left behind by globalisation. They have been devalued by industrial off-shoring and relocation, displaced by technological advancements and left vulnerable given labour deregulation and flexibilisation of labour laws. This fear from globalisation makes them seek protection in the notion of the State. This increases nationalism and xenophobia. The distrust of people in current parties and institutions makes them turn to new actors that could allegedly "save" them and in whom they should put their faith.[1306]

The populist leaders exploit all these fears and anxiety of people, adopting a Manichaean struggle between two entities: the "others", represented by the corrupt, insensitive and alienated elites, and the "us", the people who are suffering with all the world´s problems.

1304 In recent decades, income inequality has increased in nearly all countries, although at different speeds. In 2016, the share of total national income accounted for by just that nation's top 10% earners (top 10% income share) was 37% in Europe, 41% in China, 46% in Russia, 47% in US-Canada, and around 55% in sub-Saharan Africa, Brazil, and India. In the Middle East, the world's most unequal region, the top 10% capture 61% of national income. Since 1980, income inequality has increased rapidly in North America, China, India, and Russia; and moderately in Europe. Brazil, Sub-Saharan Africa and Middle East, which are traditionally very unequal, have more or less maintained their levels of inequality over the last decade. At the global level, inequality has risen sharply since 1980. The poorest half of the global population has seen its income grow significantly due to high growth in Asia (particularly in China and India). However, because of high and rising inequality within countries, the top 1% richest individuals in the world captured twice as much growth as the bottom 50% individuals since 1980. Income growth has been sluggish or even zero for individuals with incomes between the global bottom 50% and top 1% groups. This includes all North American and European lower- and middle-income groups. See Facundo Alvaredo et al., "World Inequality Report - Executive Summary," (2018): 5-7. In addition to increasing inequality within countries and worldwide, poverty affects a considerable part of the world population despite the enormous advancements in China in terms of poverty reduction. According to data from the World Bank, in 2015, 736 million people lived on less than $1.90 a day, down from 1.85 billion in 1990. In the 25 years from 1990 to 2015, the extreme poverty rate dropped an average of a percentage point per year – from nearly 36% to 10%. But the rate dropped only one percentage point in the two years from 2013 to 2015. In certain regions, poverty reduction has lagged, as it is the case of Sub-Saharan Africa, North Africa and Middle East. See "Decline of Global Extreme Poverty Continues but Has Slowed: World Bank," 2018, accessed 22 March, 2020, https://www.worldbank.org/en/news/press-release/2018/09/19/decline-of-global-extreme-poverty-continues-but-has-slowed-world-bank. Although officially the poverty line is established at US$ 1.90 a day, it is undeniable that people living with double of this value may also be considered poor and deprived of many opportunities and ESC rights (food, housing, education, to say the least). For instance, in Brazil, minimum wage is around US$ 200,00 (US$ 1 = BR$ 5.06 on March 21, 2020) and a family cannot support basic needs with such an amount living in Sao Paulo, where rental of a basic apartment can cost the same as the minimum wage (typically more than that). Therefore, world poverty under this low parameter may be underestimated and the number of people deprived of basic rights and needs may be much more than current World Bank figures.

1305 Mounk, *The people vs. democracy: Why our freedom is in danger and how to save it*, 155.

1306 Castells, *Rupture: the crisis of liberal democracy*.see chapter 'Globalization, anti-globalization and nationalism: rebellion of the masses'.

In addition, they offer easy and compact solutions to complicated problems.[1307] One of these solutions is a strong aversion to globalisation and multilateral organisations. Their posture is generally connected to strong defence of sovereignty, the nation, their own values and interests, and they tend to adopt unilateral actions.

In the trade area, the effects of current populism are felt in the behaviour of the US towards the WTO, by blocking the appointment of Appellate Body members and causing the demise of this organ, and by adopting several unilateral measures regardless of the WTO discipline. Brexit is also a consequence of popular dissatisfaction with economic integration and populist movement. The escalation of trade wars between China and the US is also a result of the countries' unilateralism. Covid-19 pandemic could worsen world polarisation between the nationalist and protectionist far-right and the more socialist and progressive left.

Populists see complex problems under very simplistic lens and have this discourse that the country should be great again. This encourages protectionism and unilateralism in foreign trade policy and a disregard of development issues together with a decrease in human rights protection and international solidarity and cooperation [1308]

As relates the development debate, populist leaders do not analyse systemic causes for developmental problems. They simplistically identify a problem, a guilty persona for it and provide a simplistic solution, reducing the role of human rights. [1309] As in the case of Trump, the discourse is that American workers and business are being harmed ("the problem"). The guilty ones are, apart from China (main villain of America's problems), other developing country Members at the WTO which continue to "enjoy benefits that come with that status and seek weaker commitments".[1310] The simple solution is to make

1307 Angelos-Stylianos Chryssogelos, "Undermining the West from Within: European Populists, the US and Russia. European View," *European View* 9, no. 2 (2010): 269, https://doi.org/

1308 Mounk recognises three probable causes for the rise of populists. First, people are frustrated because they feel that they do not enjoy the same rapid increase in their living standards as before or they feel that economy is stagnated. This has an intrinsic relation to the growth of inequality in the world. The economic anxiety generated by the stagnation of living standards makes people more prone to vote for populist candidates. While the rapid economic progress in the post-war period supported liberal democracy and gave it the benefit of doubt, now the fear for the future increases the propensity of the rise of populist governments. Second, during the time of democratic stability, most countries were functioning under the domain of one racial or ethnic group. They are not used to heterogeneity. Third, the evolution of mass communication took out from the political and financial elites the monopoly over information. Over the past decade, the rise of the internet, and particularly of social media, *"has rapidly shifted the power balance between political insiders and political outsiders"*, allowing people not only to share their views but also spread viral information, which also gave space to the dissemination of extremist views. Mounk, *The people vs. democracy: Why our freedom is in danger and how to save it*, 16.

1309 Benjamin Moffitt, *The Global Rise of Populism: Performance, Political Style, and Representation* (Stanford: Stanford University Press, 2016). http://www.sup.org/books/title/?id=25175.

1310 U.S.T.R., Memorandum on Reforming Developing-Country Status in the World Trade Organization, (2019).

developing countries give up their developing status at the WTO. Lack of solidarity and cooperation also accompany populist governments, as in the example of the construction of the wall between US and Mexico in the US attempt to deal with illegal immigrants from the Latin country. Disregard to human rights is also a constant.

Populist leaders follow the mantra that their own countries' interests should come first and adopt isolationist policies. This comes at the cost of disengagement from aid programmes for developing countries and from multilateral instruments in general. The problems of development in other countries are seen as a "security issue" for populist leaders in developed nations. For instance, in Le Pen's manifesto, when dealing with Africa, the concern is with France's security, as, according to the document, challenges raised by poverty in the region involves security troubles, religious radicalisation and terrorism.[1311]

Even developing countries, which could benefit from multilateral action in comparison with bilateral negotiation, contribute to the deterioration of the development debate when headed by populist and far-right leaders. For instance, Brazil, which had a prominent role at the WTO articulating developing countries' interests, has completely lost its role under President Bolsonaro's administration. Brazil even gave up its developing country status in the WTO, ceding to US pressures on negotiations relating to a possible entry of Brazil in the OECD. In addition, the Brazilian government under Bolsonaro's administration passes the message that it is "antiglobalist." The former Brazilian Minister of Foreign relations indicated by Bolsonaro asserted in his political discourse that "globalism is destroying nations". He praised countries such as Israel, US, Italy, Hungary and Poland for their nationalist and patriotic attitude.[1312]

Therefore, with far-right populist leaders rising everywhere, current political timing is not favourable for the development debate and the global partnership for development praised in UN instruments, and less, for a development-oriented approach to international trade law. With the Covid-19 world pandemic, it is possible that the world becomes more polarised and "the established conflict between a more nationalist and protectionist right and a more socialist and 'progressive' left seems likely to be exacerbated."[1313]

1311 Raphaelle Faure, *Macron vs Le Pen: how the next French president will tackle international development* 22 March (ODI, 2017), https://www.odi.org/blogs/10510-macron-vs-le-pen-how-next-french-president-will-tackle-international-development.

1312 "Ernesto Araújo critica globalismo na política externa do Brasil," Agência Brasil, 2019, accessed 22 March, 2020, https://agenciabrasil.ebc.com.br/politica/noticia/2019-01/ernesto-araujo-critica-globalismo-na-politica-externa-do-brasil.

1313 Martin Wolf, "How Covid-19 will change the world," *Financial Times*, 16 June 2020. Available at: https://www.ft.com/content/9b8223bb-c5e4-4c11-944d-94ff5d33a909. Accessed on: 29 June 2020.

Nevertheless, hopefully, in the long-run, the far-right populist movement may be contained, and actions will be taken against leaders who have been seriously undermining liberal institutions. The election of Joe Biden as US president in November 2020 may be a sign, if not of decline of populism, of a movement for reversing this process. However, the consequences of the American election for populism are ambiguous. As stated in a recent New York Times' article:

> Mr. Trump, after all, won more votes than any American presidential candidate in history aside from Mr. Biden, which attests to the enduring appeal of his message. The economic, social and political grievances that fed populist and xenophobic movements in many countries are still alive, and indeed, may be reinforced by the ravages of the coronavirus pandemic. Social media continues to spread populist ideas, often cloaked in conspiracy theories designed to sow doubt about the scientific facts behind the virus or the legitimacy of the electoral process that brought about Mr. Trump's defeat.[1314]

As noted by Mounk, addressing populism and the crisis of liberal democracy presupposes reforming "economic policy, both domestically and internationally, to temper inequality and live up to the promise of rapidly rising living standards. A more equitable distribution of economic growth, in this vision, is not just a question of distributive justice; it is a question of political stability."[1315]

V.2.2.2 The rise of emerging powers: a new balance in world geopolitics

Currently, the international order faces what has been termed as the "rise of the rest". This phenomenon is related to the decline of the United States and certain Western countries as the main world hegemons, and the rise of emerging powers especially from the Global South, with China having a predominant role. The multilateral system, the WTO included, as the world knows today has been largely articulated by the United States to promote its interests. As the allegedly most competitive country, the US benefitted from multilateralism insofar as it provided the legal and political infrastructure through which its firms could exploit their competitiveness at a global level.[1316]

1314 Mark Landler and Melissa Eddy, "Does Trump's Defeat Signal the Start of Populism's Decline?," *The New York Times*, 10 November 2020, https://www.nytimes.com/2020/11/10/world/europe/trump-populism.html.

1315 Mounk, *The people vs. democracy: Why our freedom is in danger and how to save it*, 16-17.

1316 Chris Brummer, *Minilateralism: How Trade Alliances, Soft Law and Financial Engineering are Redefining Economic Statecraft*. (Cambridge: Cambridge University Press., 2014), 11.

Nevertheless, other countries have also benefitted from the multilateral system, especially in terms of trade, and have emerged as powers which, if they do not necessarily directly contest the US and Western authority, no longer accept having a passive role in international relations. This is the case of Latin American countries such as Brazil, Chile, and Asian economies such as India, South Korea and Singapore. In the particular case of China, it has become a strong contestant of US hegemony as well as a contestant of EU and Japan. Consequently, whereas in the past the world was dominated by US hegemony and by a few Western countries, nowadays power is more diffuse.[1317] World geopolitics faces a new balance.

Today, for instance, the BRICS countries see the grouping as an instrument to strengthen North–South relations and a way to adapt to a more multipolar order. They seek a larger role in the existing framework and are not willing to be in a rule-taker position. Together with other Global-South countries, the BRICS countries look for a future global order beyond the dominant Western-centric perspective.[1318] Key to the world multipolarisation is the rise of China, whose economy has grown almost 10 percent per year on average in the thirty-five years since its transition to a market economy began. Even considering the abrupt slowdown in 2016 and beyond, its economic performance is still astonishing. [1319]

In this world where the "rest" has been rising, the WTO is feeling the consequences. As clarified by Smeets, the shift of balance from the West to the East has also impacted the balance of powers and decision-making in the WTO, "with a broader range of countries deciding on the trade agenda, a task no longer predominantly performed by the main Western powers, including the United States, the European Union and a few other main traders."[1320]

1317 As explained by Brummer, "even hegemons rarely captured all of the gains from multilateral agreements. No country is universally competitive across all sectors. Plus, multilateral economic arrangements are frequently so complex that even the most powerful, thoughtful leaders are unable to predict and manipulate the full economic impact of liberalized trading arrangements. Thus even relatively weak trading partners have periodically been able to muster and deploy whatever competitive advantages they do enjoy, whether they be abundant natural resources or cheaper labor costs, and over time not only adapted but prospered. All the while, hegemons routinely remain responsible for underwriting systems they create, even as their own power erodes – if not in absolute terms, then at least in relative ones – as other states make gains in the international economy. Economic wealth and power become more diffuse" *Minilateralism: How Trade Alliances, Soft Law and Financial Engineering are Redefining Economic Statecraft.* , 15.

1318 Oliver Stuenkel, *Post-Western World. How Emerging Powers are remaking Global Order* (Cambridge: Polity Press, 2016), 22, 26.

1319 Stuenkel, *Post-Western World. How Emerging Powers are remaking Global Order*, 66-67.

1320 Maarten Smeets, *The WTO Multilateral Trading System in a Globalizing World : Challenges and Opportunities* (Oisterwijk: Wolf Legal Publishers, 2017), 337.

The current crisis of the WTO Appellate Body can in part be explained by the rise of China and the US dissatisfaction with how the WTO has been handling (or not handling) China issues affecting US interests. Trade wars between the US and China have deteriorated international trade, affecting $350 billion of Chinese goods and $110 billion of US goods,[1321] and are likely to become worse with the Covid-19 world pandemic.[1322] In addition, the stalemate of the Doha Development Round is a result of the world multipolarisation. Developing countries exert pressure on the system so that rules are more equitable to all Members. It is not new that rules on agriculture, investment, subsidies and intellectual property have in general privileged developed countries and have produced negative outcomes for developing ones. The Doha Development Round, launched in Qatar in 2001, is the longest ever trade round in the history of multilateral negotiations, reflecting strong divergent views among Members from developing and developed countries.

Despite divergent views, the emerging powers such as BRICS countries recognise the centrality of the WTO and the fact that they have themselves gained from an open market. In this sense, they want neither the end of the WTO nor of its dispute settlement system. A brief look at the 2015 Ufa Declaration, signed at the Seventh BRICS Summit, shows how the BRICS countries are committed to maintaining and strengthening the WTO.[1323] The Declaration sets forth the following:

> We join in the celebration of the twentieth anniversary of the World Trade Organization (WTO) and reaffirm our support for working together to strengthen an open, transparent, non-discriminatory, and rules-based multilateral trading system as embodied in the WTO. (…)
>
> We stress the centrality of the WTO as the institution that sets multilateral trade rules. We note the importance of bilateral, regional and plurilateral trade agreements and encourage the parties to negotiations thereon to comply with the principles of transparency, inclusiveness and compatibility with WTO rules to ensure that they contribute to strengthening the multilateral trading system.[1324]

China, in particular, has been adopting a proactive diplomatic posture towards the maintenance of multilateralism (although adopting unilateral measures in the context

1321 Peter Van den Bossche, *The WTO Before, During and After Corona*, presentation made at the Spring Meeting of the Royal Netherlands Society of International Law, 24 June 2020 (2020).
1322 Wolf, "How Covid-19 will change the world."
1323 Stuenkel, *Post-Western World. How Emerging Powers are remaking Global Order*, 178.
1324 VII BRICS Summit, *2015 Ufa Declaration*, Ufa, Russia, July 9, 2015.

of the trade war with the US). Since its entrance in the WTO, it has been an active defender of multilateralism. In this context, China sees itself as an earnest builder of world peace, an important contributor to global development, and a staunch defender of international order. China advocates a vision of "Shared Prosperity" focused on addressing global development challenges. It calls for an open, inclusive and clean world, "a sovereign equality-based world where disputes are settled through dialogue, and peace is built upon partnerships rather than enforced through military alliances or political coercion."[1325]

China, in a recent document on the reform of the WTO, acknowledged that the development issue is at the centre of WTO work and that "[D]evelopment remains an important theme of the times. It is crucial for the WTO to safeguard the rights of developing Members to S&D and make S&D provisions more precise, effective and operational. This will be conducive to reducing development deficit in trade rules and contributing to the achievement of the Sustainable Development Goals of the United Nations 2030 Agenda."[1326]

Still, it is important to mention that while China actively supports multilateralism and the WTO, it also devoted much energy to boosting bilateral forms of international economic governance and its actions based on "a loosely structured network of arrangements whose content and reach depend very heavily on China's bilateral relationships with the countries involved and in which bilateral lending mechanisms dominate."[1327]

In this scenario, if, on one side, a development-oriented approach to WTO law may find resistance from developed countries as it may be seen as a mechanism that gives advantages to developing over developed countries; on the other side, developing countries have achieved a certain level of power and influence in the context of WTO so that development concerns cannot be ignored, including a development-oriented interpretation of certain WTO provisions. Ultimately, a development-oriented approach to WTO law is about interpreting the WTO agreements in light of WTO objectives of bringing economic and social prosperity for all WTO Members, taking into account their different needs and concerns at different levels of economic development. This involves having in consideration WTO Members' economic and social specificities in applying WTO rules to them.

1325 Zhao Xiaochun, "In Pursuit of a Community of Shared Future: China's Global Activism in Perspective," *China Quarterly of International Strategic Studies* 4, no. 01 (2018): 27.

1326 WTO. China's Proposal on WTO Reform. 13 May 2019. Available at: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?CatalogueIdList=254127&CurrentCatalogueIdIndex=0#. Accessed on: 26 June 2020.

1327 Helleiner, "The life and times of embedded liberalism: legacies and innovations since Bretton Woods " 19.

V.2.3 Coronavirus pandemic

Although a discussion about the coronavius world pandemic and its humanitarian, social and economic effects is outside the scope of this thesis, its major impacts on several areas including global heath, trade, services, etc., is unprecedented and should be mentioned as a major event in the international scene affecting not only international trade itself but also trade institutions, including the multilateral trade system. This last point is relevant for the purposes of this work as COVID-19 has been changing countries' attitudes towards international trade, multilateral rules and their own economic policies.

Even before the outbreak of COVID-19, global trade had been severely affected since the 2008-2009 financial crisis. As shown in a report issued by the Economic Commission for Latin America and the Caribbean (ECLAC), "[W]hile the volume of trade in goods grew at an average rate of 6.2% per year between 1990 and 2007, it expanded by only 2.3% per year between 2012 and 2019. Likewise, the share of exports of goods and services in global GDP, which reached a historic high of 31% in 2008, has been around 28% since 2015."[1328]

The report highlights that the rapid spread of COVID-19 and the governmental measures taken to deal with it had strong impact on the world's major economies. In this context:

> Many productive activities have been disrupted, first in Asia and then in Europe, North America and the rest of the world, and there have been widespread border closures. This has resulted in a steep rise in unemployment and a reduction in demand for goods and services. In this situation, the volume of global trade in goods fell by 17.7% in May 2020 compared with the same month in 2019. Global value chains were the main channel for transmitting the effects of COVID-19 to global trade. The measures adopted by China in January (the temporary closure of Hubei Province and national borders) meant that exports of inputs for industries such as the automotive, electronics, pharmaceutical and medical supplies industries, were suspended. This forced factories in North America, Europe and the rest of Asia to shut down for several weeks because they had no alternative suppliers, as China is the world's leading exporter of parts and components, accounting for 15% of global shipments by 2018.[1329]

1328 CEPAL, *The effects of the coronavirus disease (COVID-19) pandemic on international trade and logistics* (ECLAC, August 2020), 1.

1329 CEPAL, *The effects of the coronavirus disease (COVID-19) pandemic on international trade and logistics*, 2-3.

WTO's World Trade Statistical Review 2021 shows that "the COVID-19 pandemic led to merchandise trade declining by 8 per cent and trade in commercial services contracting by 21 per cent year-on-year in 2020. The effect of COVID-19 on goods and services differed, with services more severely affected. Services declined by 30 per cent in the second quarter of 2020 compared with a fall of 23 per cent for goods in the same period. While lockdowns led to the cancellation of flights, holidays abroad, restaurant meals, and cultural/recreational activities, the demand for essential goods held up in all major economies.[1330]

WTO's Revised Trade Forecast of October 2021 shows that global merchandise trade volume may grow 10.8% in 2021, followed by a 4.7% rise in 2022. Growth should moderate as merchandise trade approaches its pre-pandemic long-run trend. Supply-side issues such as semiconductor scarcity and port backlogs may strain supply chains and weigh on trade in particular areas, but they are unlikely to have large impacts on global aggregates. The main downside risks come from the pandemic itself and risks of new waves.

The forecast also shows that "behind the strong overall trade increase, however, there is significant divergence across countries, with some developing regions falling well short of the global average."[1331] As pointed out by Director-General Ngozi Okonjo-Iweala, "inequitable access to vaccines is exacerbating economic divergence across regions. The longer vaccine inequity is allowed to persist, the greater the chance that even more dangerous variants of COVID-19 will emerge, setting back the health and economic progress we have made to date."[1332]

As explained in the WTO 2021 Report on G20 Trade Measures:

> Despite these relatively positive developments, COVID-19 continues to pose a serious threat to the global economy and to public health. Production of vaccines has been slow and distribution uneven, contributing to significant disparities in access across countries. This is especially true for low-income developing economies, which are struggling to obtain enough doses to inoculate more than a small fraction of their populations. Failure of the international community to ensure wider access to vaccines, including in the poorest countries, could lead to a resurgence

1330 "World Trade Statistical Review 2021 ", 2021, accessed Oct 17, 2021, https://www.wto.org/english/res_e/statis_e/wts2021_e/wts2021chapter02_e.pdf.
1331 WTO, "Global trade rebound beats expectations but marked by regional divergences," news release, Oct 4, 2021, 2021, https://www.wto.org/english/news_e/pres21_e/pr889_e.htm#.
1332 WTO, "Global trade rebound beats expectations but marked by regional divergences."

> of the pandemic, which would set back the global economic recovery significantly.[1333]

One of the several uncertainties resulting from the COVID-19 pandemic, at least from the perspective of international trade, is whether it will drive protectionist policies around the globe. Ikenson and Lester submitted that protectionists and nationalists have seized upon the pandemic as an opportunity to criticise globalisation and trade and to recycle arguments against the world trading system.[1334]

As global value chains have been severely affected by the pandemic, causing damages to domestic industrial activities dependent on the global value chains (GVCs) as a result of lockdowns and closure of national borders, it is possible that governments adopt protectionist measures on industries and sectors of strategic importance. According to WTO former Deputy Director-General Yi Xiaozhun, "trade has played a critical role in responding to the pandemic, allowing countries to secure access to vital food and medical supplies. Trade has also facilitated new ways of working during the crisis through the provision of traded IT products and services"; however, "one of the greatest risks for the global economy in the aftermath of the pandemic would be a descent into protectionism. International cooperation is essential as we move forward, and the WTO is the ideal forum to resolve any outstanding trade issues stemming from the crisis."[1335]

Although it is difficult to affirm for sure that the global pandemic will accelerate the push towards protectionism, it is possible to see now some measures that denote an inward-looking from many governments around the globe. In the US, for instance, it is said that economic nationalism is bipartisan. The recently elected Joe Biden may likely continue Trump's policies, incentivising American companies to bring offshore jobs back to the States by offering them tax incentives and adopting other domestic industry support measures. The "Buy American" program, which reflects a local content policy, continues in place in Joe Biden's administration as well as the use of rules of origin to drive back investments into the U.S.[1336]

1333 WTO, *Report on G20 Trade Measures* (28 June 2021), 3, https://www.wto.org/english/news_e/news21_e/report_trdev_jun21_e.pdf.

1334 Ikenson and Lester, *The Pandemic Does Not Justify Protectionism or Deglobalization*.

1335 WTO, "Trade shows signs of rebound from COVID-19, recovery still uncertain," news release, 6 October, 2020, https://www.wto.org/english/news_e/pres20_e/pr862_e.htm.

1336 Cato Institute. "Trade Policy in a Biden Administration: Back to Normal, or into the Great Unknown?" Live Online Policy Forum. Simon Lester (moderator); Nasim Fussell; Michael Smart; Halie Craig (speakers), 12 November 2020. Available at https://www.cato.org/events/trade-policy-biden-administration-back-normal-or-great-unknown. Accessed on 19 November 2020.

If predictions that COVID-19 will drive more protectionism effectively materialise, the scenario will not be a favourable one to discuss new approaches to multilateral rules, as countries may be willing to adopt protectionist policies regardless of WTO discipline. Governments and politicians may be more willing to show to their citizens that they are doing everything they can to save the economy and people's jobs than showing that they are WTO-compliant. This can lead to isolationist behaviour and weakening of multilateralism. At the same time, increasing concerns with domestic economic indicators, domestic employment and societal issues may trigger new discussions by WTO Members on the necessary policy space they should have under WTO rules to face times of crisis. This can provide some room for discussions on WTO Members' policy space in view of WTO rules and disciplines.

At the same time, COVID-19 may create opportunities for countries to engage in multilateral conversations in new areas such as e-commerce. The coronavirus pandemic has intensified opportunities for services offered through the internet such as distant learning, online medical care, communications technologies, among other solutions. This global crisis has demonstrated the importance of cooperation in the search of solutions for common problems, such as the international efforts to share information, research, insights, and technology to combat the virus.[1337] Therefore, from an optimistic perspective, this crisis could also be seen as an opportunity for countries to reengage in multilateral conversations.

COVID-19 also sheds light on the continuing importance of developmental issues and the need to address them not only from a domestic but also from the international perspective. Low-income developing countries have been severely impacted by the pandemic with high levels of mortality, worse health and educational outcomes, high public debt levels and firm closures with irrecoverable production disruptions. Such countries are not able to sustain severe containment measures for long as large segments of the population live at near subsistence levels and work in informal sectors. Weak institutional capacity and limited fiscal resources make it difficult for governments to support their population. In view of the above, "absent a sustained international effort

1337 See, for instance, the COVAX Initiative. According to a WHO press release, "172 economies are now engaged in discussions to potentially participate in COVAX, a global initiative aimed at working with vaccine manufacturers to provide countries worldwide equitable access to safe and effective vaccines, once they are licensed and approved. COVAX currently has the world's largest and most diverse COVID-19 vaccine portfolio - including nine candidate vaccines, with a further nine under evaluation and conversations underway with other mayor producers" WHO, "172 countries and multiple candidate vaccines engaged in COVID-19 vaccine Global Access Facility," news release, 24 August, 2020, https://www.who.int/news/item/24-08-2020-172-countries-and-multiple-candidate-vaccines-engaged-in-covid-19-vaccine-global-access-facility.

to support them, permanent scars are likely to harm development prospects, exacerbate inequality, and threaten to wipe out a decade of progress reducing poverty."[1338]

Only time, however, will show whether countries may deepen multilateral efforts to tackle global problems such as the global health, humanitarian and economic crisis generated by the pandemic and to make international efforts to deal with development issues or work on these matters in isolation. If the latter path is taken, the relevance of the multilateral system will be at risk as well as any efforts to address development concerns at a multilateral institution.

More recently, however, Asia-Pacific countries, confronted with the COVID-19 downturn, concluded the RCEP, an unprecedented mega regional trading arrangement, signalling some hope to a rules-based trade system in an era of unilateralism and trade wars. According to the signatories, the agreement signals their commitment to inclusive and sustainable development, job creation and strengthening regional supply chains. The agreement therefore represents a positive step forward for multilateralism in the Asia-Pacific region, particularly given the uncertainty and economic crisis resulting from the COVID-19 pandemic and the retreat to protectionism by many countries.[1339] In addition, the African Continental Free Trade Area (AfCFTA), although signed in 2018, actually started activities on January 2021 after a six-month delay following the COVID-19 outbreak with the first shipments made in that month. As at 5 February 2021, 36 countries had deposited their instruments of ratification and 36 countries had ratified the AfCFTA agreement. AfCFTA represents a decisive step toward the continent's long-held regional integration aspiration and is expected to assist African countries in the post-pandemic recovery.

1338 Daniel Gurara, Stefania Fabrizio, and Johannes Wiegand, *COVID-19: Without Help, Low-Income Developing Countries Risk a Lost Decade* December 2 (IMF Blog, 2020), https://blogs.imf.org/2020/08/27/covid-19-without-help-low-income-developing-countries-risk-a-lost-decade/.

1339 "15 Asia-Pacific Countries Sign World's Largest FTA; A Closer Look at RCEP's Key Outcomes and Implications," White&Case, updated November 25, 2020, accessed November 25, 2020, https://www.whitecase.com/publications/alert/15-asia-pacific-countries-sign-worlds-largest-fta-closer-look-rceps-key-outcomes.

V.3 CONCLUDING REMARKS ON THE INSTITUTIONAL AND POLITICAL ASPECTS AFFECTING A DEVELOPMENT-ORIENTED INTERPRETATION OF WTO LAW

As shown, the institutional and political environment matter for the process of interpretation. Judges, when taking decisions, are inevitably influenced by the institution where they are located, its purpose and values, its functioning and established procedures, and also by the political environment and relevant events of the time. It has been argued that these factors may to a greater or lesser extent impact the advancement of a development-approach to WTO law in WTO disputes.

First, 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. A development-approach requires an alleged active role of the judge in the sense of conducting a teleological analysis of the WTO agreements in view of its non-economic objectives (sustainable development, full-employment, improvement of peoples' well-being, consideration of different levels of development) and of carrying out a systemic interpretation of WTO agreements in light of the normative framework for development, largely comprised by soft law. This type of interpretation of WTO rules may be viewed as judicial activism and strongly criticised by a powerful and key Member of the WTO such as the US. Other developed-country Members may also not be particularly fond of the idea of furthering development in interpretation of the WTO law in the context of the dispute settlement system as they may not have control over the outcome of such interpretation and they could allegedly only benefit WTO developing-country Members.

Even though the Biden administration may take a more conciliatory, engaging and constructive approach towards the WTO than the Trump's administration (which at the time of this writing had not been taken yet), it is likely that past critiques on judicial activism may remain on the part of the US as far as they may be beneficial for its interests, especially on matters involving trade remedies and other issues that could be used against China.

Second, the current impasse on the role for development in WTO agreements and on the need for differentiating among developing countries also poses challenges to a development-oriented approach, as WTO adjudicating bodies may be reticent about advancing a development-oriented approach where the role of development in the

WTO itself is not clear and WTO Members could not agree on trade and development issues over the last decades. As WTO is supposed to be a Member-driven organisation, WTO adjudicating bodies may not be willing to risk stepping out of their mandate by ruling on sensitive development themes.

Third, while the increasing levels of inequality and high levels of worldwide poverty show the need for a continuing focus on development and demonstrate that this is not a discussion that shall terminate in the near future, the rise of populist governments worldwide has weakened the development debate and deteriorated multilateralism and the partnership for development project. The rise of far-right populist leaders has made major powers such as the US to adopt a unilateral behaviour contrary to international cooperation and multilateralism, propagating an antiglobalisation discourse. Even developing countries such as Brazil, which had a prominent role in WTO, now adopts an "antiglobalist" posture under the administration of the far-right populist Bolsonaro. The country even abandoned its developing country status as the Brazilian president acritically emulates Donald Trump's discourse and actions. The development debate in this context has deteriorated, and the idea of advancing a development-oriented approach of WTO law becomes more challenging as there is not enough political will to advance this issue at the WTO.

Even though Donald Trump has lost the 2020 US presidential election, this does not necessarily mean the end of populism in the world as the causes that gave rise to it – inequality, corruption, economic stagnation, among others – continue to exist. Therefore, the populist threat to liberal democracy and multilateral institutions such as the WTO is still there.

Fourth, current COVID-19 world pandemic can be seized upon as a political opportunity to criticise globalisation and the multilateral trading system. Governments can also use it as an excuse to strengthen protectionist measures. In this context, the development debate at a multilateral forum may lose strength. The WTO 2021 Report on G20 Trade Measures suggests that governments, although having adopted trade restrictions since

the outbreak of the COVID-19 pandemic, are, to some extent, terminating those restrictive measures.[1340]

The pandemic can also shed light on the need to address global problems from a multilateral standpoint and the permanent need to tackle development issues from an international perspective especially considering the situation of low-income developing countries amid the pandemic. It can also be seen as an opportunity for countries to rediscuss the level of policy space they should have under WTO law to protect their economies in times of crisis, opening space for a development-oriented approach of certain disciplines in WTO. However, in a scenario of unilateralism and crisis of the multilateral system, the rediscussion of policy space could also lead to the weakening of cooperation and the multilateral trade system as countries may be prone to adopt nationalist and protectionist views. Ideally, such broader rediscussion should not take place in periods of turmoil. Ultimately, the more policy space left to WTO Members, the lesser multilateral disciplines and cooperation and the weaker the multilateral trading system are as it will not serve the purpose of effectively dealing with "beggar-thy-neighbour" types of policy, as countries will also have more space for unilateral action.

Despite some recent advancements in specific multilateral negotiations on global corporate taxation, with more than 130 jurisdictions joining a new two-pillar plan to reform international taxation rules to establish a global minimum corporate tax of

1340 According to the Report, "since the outbreak of the COVID-19 pandemic, 140 trade and trade-related measures in the area of goods have been implemented by G2O economies, of which 101 (72%) were of a trade facilitating nature and 39 (28%) could be considered trade restrictive. Several of these measures, originally introduced in immediate response to the pandemic, have been extended during the review period. Export bans accounted for more than 90% of all restrictive measures recorded. The reduction or elimination of import tariffs and import taxes make up 60% of trade-facilitating measures taken, and several G2O economies reduced their tariffs on a variety of goods such as PPE, sanitizers, disinfectants, medical equipment and medicine/drugs.(…). G20 economies continued to repeal measures implemented in response to the pandemic and, as at mid-May 2021, around 22% of COVID-19 trade facilitating measures by G20 economies and 49% of the COVID-19 trade restrictive measures have been terminated. (…) According to preliminary estimates by the WTO Secretariat, the trade coverage of the trade-restrictive measures still in force (USD 98.8 billion) is slightly higher than that of trade-facilitating (USD 96.5 billion), suggesting that, in terms of trade coverage, the roll-back of the trade-facilitating measures has been swifter than the roll-back of trade-restrictive measures. (…) In the services sector, many of the measures affecting trade in services put in place by G20 economies in response to the pandemic were extended and several terminated during the review period. The downward trend in introducing new COVID-19 trade in services measures by G20 economies, already observed since the third quarter of 2020, was confirmed. (..) The estimated trade coverage of the import-facilitating measures introduced during the review period (USD 438 billion) significantly exceeds the trade coverage of import-restrictive measures (USD 123.89 billion), suggesting a return to the trend identified since the beginning of the trade monitoring exercise in 2009." See: WTO, *Report on G20 Trade Measures*, 3.

15%,[1341] and the revival of efforts regarding the implementation of the Paris Agreement on Climate Change,[1342] present times are overall not sympathetic to multilateral action, development concerns and much less to advancing development in the interpretation of WTO agreements. In the long run, however, the development debate may maintain its relevance together with multilateral actions to deal with global problems. The high levels of inequality and poverty in the world show that development concerns continue to be present in today's society and a lot of work has to be done by countries individually and in cooperation through multilateral institutions. Additionally, developing countries have achieved a certain level of power and influence in world geopolitics and in the WTO, and therefore the development dimension of trade cannot be ignored. Cooperative efforts, although in the context of regional free trade agreements – being the conclusion of RCEP and the initiation of the activities of the AfCFTA good examples - may also be a reminder of the relevance of cooperation in multilateral negotiations, and ultimately countries may take a more constructive approach towards the development debate in the context of the WTO, paving a clearer way for a development-oriented approach of WTO rules.

1341 OECD, *130 countries and jurisdictions join bold new framework for international tax reform* (2021), https://www.oecd.org/newsroom/130-countries-and-jurisdictions-join-bold-new-framework-for-international-tax-reform.htm. See also: OECD. Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy, 1 July 2021, available at: https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-july-2021.pdf.

1342 The US, under the Biden administration, formally rejoined the Paris Agreement on 19 February 2021 after having withdrawn from the agreement in the previous year under the Trump Administration. In October 2021, Turkey ratified the Paris climate change agreement as last G20 country one month before the UN Climate Change Conference in Glasgow.

CHAPTER 6

6

Possible alternatives for a development-oriented interpretation of WTO rules applicable to LCRs considering current constraints

VI.1 INITIAL CONSIDERATIONS

As it was possible to apprehend in Chapters 3 and 4, from a legal perspective, the idea of a development-oriented interpretation of WTO agreements requires a more connected dialogue between WTO agreements and the societal values established in the Marrakesh Agreement and the normative framework for development, which is comprised of several instruments of hard law and soft law nature. A development-oriented approach to WTO rules aims at facilitating those aspects of the development objective that are enshrined in the WTO agreements or that are established in the normative framework for development; alleviating some of the burdens that accompany trade liberalisation and facilitating a fair play between WTO Members at different levels of development

In more detail, a development-oriented approach is grounded on the telos of the Marrakesh Agreement, which shows broader concerns to non-trade issues such as raising standards of living, full-employment, sustainable development and the special needs of Members at different levels of development. In this sense, the spirit of the WTO Agreement recognises the need to pursue an effective balance between economic liberalisation and other societal values, crystallising the idea of embedded liberalism. In this context, such societal values intrinsically linked to the development debate could in theory be used as a "lens through which to interpret the WTO rules, to allow that body to engage fully and effectively with non-economic interests. To do so would reinforce an interpretation of existing rules whereby, rather than giving automatic precedence to trade liberalization, a proportionate balancing of the pillars of sustainable development would be required."[1343] Panels and the Appellate Body follow the VCLT rules of interpretation which require a "holistic approach" that takes into consideration text, context and object and purpose.[1344] In particular, the Appellate Body has demonstrated that it is open to a contextual and teleological interpretation of WTO provisions, especially in cases involving sensitive issues, such as *EC – Tariff Preferences* (2004), which dealt with the needs of developing countries, and *US – Clove Cigarettes* (2012), *US – Tuna II (Mexico)* (2012) and *US – COOL* (2012), which involved regulatory issues affecting Members' policy space. However, in some cases, a more textual or limited contextual approach has also been adopted.

In addition, a development-oriented interpretation of WTO agreements requires systemic interpretation, which is an acknowledged technique in the VCLT rules of interpretation

1343 Reid, "The WTO's purpose, regulatory autonomy and the future of the embedded liberalism compromise," 229.

1344 Appellate Body, *US – Continued Zeroing* (2009), para. 268.

(article 31.3(c)) that has been used by WTO adjudicating bodies in different cases and enables them to interpret agreements in light of the wider corpus of international law.

Article 31.3(c) of the VCLT requires that *any relevant rules of international law applicable in the relations between the parties* be taken into account together with context in the interpretation of treaties. This permits the interpretation of WTO agreements in light of the several instruments pertaining to the normative framework for development. The normative framework for development carries important rights and principles, including the right to development, the right to regulate, the principle of sustainable development, ESC rights, among others, that could inform the interpretation of WTO agreements so as to achieve a more balanced outcome between trade values and the right to development.

It has been shown, however, in Chapter 4 (subsection IV.3.2.1(iii)), that current interpretation of Article 31.3(c) of the VCLT by WTO adjudicating bodies does not provide a wide scope for systemic interpretation. Article 31(3)(c) of the VCLT imposes conditions on taking a rule of international law into account with the context in treaty interpretation and these conditions are interpreted strictly.[1345] In this sense, in order to provide more room for a development-oriented approach, it would be necessary to adopt a more flexible interpretation of the conditions set forth in Article 31.3(c) of the VCLT, so that the normative framework for development could actually be considered in the interpretation of WTO agreements. In any case, WTO adjudicating bodies have, in certain cases, made recourse to non-trade values and non-trade norms outside the context of Article 31.3(c) of the VCLT and have taken them into account in the interpretation of WTO provisions.

Further, strenghening the role of the right to regulate in the interpretation and application of WTO law would facilitate a development-oriented approach, as it could enable the justification of WTO-inconsistent measures on public interest grounds even in the context of WTO agreements that do not have explicit exception clauses as it is the case of the SCM Agreement. However, as seen in subsection IV.3.2.2, WTO jurisprudence generally does not allow non-WTO rules as applicable law in WTO disputes in substantial (as opposed to procedural) matters.

From an institutional and political perspective, it has been suggested in the previous chapter that current times are difficult ones for embracing a development-oriented approach to WTO law. First, the WTO Appellate Body has been strongly criticised for

1345 Holger P Hestermeyer, "Economic, Social and Cultural Rights in the World Trade Organization: Legal Aspects and Practice," in *Economic, Social, and Cultural Rights in International Law: Contemporary Issues and Challenges*, ed. Eibe; Riedel, Gilles; Giacca, and Christofe Gollay (Oxford: Oxford University Press, 2014).

alleged judicial activism by the US under the Trump administration. So far, the Biden's administration has not made any concrete action to solve the Appellate Body's paralysis. Even if in the medium or long-term, a more conciliatory approach towards the WTO is adopted by the US, resolving issues regarding the functioning of the Appellate Body and allowing the appointment of Appellate Body Members, the US critique over alleged judicial activism will continue to be a concern for WTO adjudicating bodies. In this scenario, the Appellate Body may not be willing to strongly engage in purposive, systemic and dynamic interpretations of the WTO agreements - which are key to a development-oriented approach of WTO law, given that such techniques may be considered as a sign of judicial activism.

Second, political factors involving nationalism, populism, antiglobalisation sentiment and lack of consensus among different actors deteriorate multilateralism and weaken the idea of accomplishing a global partnership for development. Although the WTO may survive amid this scenario, as important international players recognise that international rules are necessary to limit beggar-thy-neighbour trade policies and are interested in enhancing mutual commitments to deepen trade ties,[1346] there are still many challenges to multilateralism in trade politics. As mentioned by Charnovitz, "the isolationist impulse in American politics (…) will not be cleansed away by the 2020 US elections."[1347] Therefore, there is a long road to reaching an agreement among Members at the WTO on necessary reforms and on important and controversial topics such as development. Also, where the role for development is not well defined within the WTO, WTO adjudicating bodies may also not feel comfortable to adopt a development-oriented approach. In addition, as seen in chapter 1, developed countries prefer to condemn LCRs in the international forum despite the implementation of LCRs at the domestic level. There is a disconnection between discourse and action as it is the case of the US that adopts the "Keynes at home, Smith abroad" approach.

In view of the above, one would question if it is still possible to think of a development-oriented approach to WTO law applicable to LCRs. Whereas it must be more difficult to defend a broad development-oriented interpretation of WTO rules due to concerns over judicial activism on the part of panels and the Appellate Body, some suggestions will

1346 Steve Charnovitz, *Solving the Challenges to World Trade (November 2020)*, GWU Legal Studies Research Paper No. 2020-78 (GWU Law School, 2020), 2, https://ssrn.com/abstract=3736069. The remaining importance of trade commitments can be exemplified by the recent signing of the Regional Comprehensive Economic Partnership (RCEP) by 10 members of the Association of Southeast Asian Nations (Asean), in addition to China, Japan, South Korea, Australia and New Zealand. The members represent a third of the world's population and account for 29% of global gross domestic product. The agreement intends to eliminate a range of tariffs on imports within 20 years. It also includes provisions on intellectual property, telecommunications, financial services, e-commerce and professional services.

1347 Charnovitz, *Solving the Challenges to World Trade (November 2020),* 29.

be made in the following sections on different interpretative approaches that could be adopted by the Appellate Body to maximise the consideration of development concerns in the interpretation of LCRs, but also other measures involving societal concerns. These suggestions, however, are analysed in view of current institutional and political concerns that the WTO adjudicatory bodies face.

Ultimately, however, because LCRs are largely prohibited under WTO law and because the the Appelate Body has in many instances stretched the agreements (TBT, SPS, SCM Agrements) as far as one could (without rewriting these agreements), it may be necessary to amend WTO agreements to reflect a new compromise of WTO members on this issue. Considering current political and economic scenario, 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.

This is the case, for instance, of the US with the "Buy American" program and the Paycheck Protection Program (PPP). India also announced that it is strengthening LCRs. The Indian Ministry of Defence "has issued new guidelines that support its efforts to maximise the local defence industrial base's involvement in defence production programmes. The measures, published in a notification in late August [2020], are aligned with an earlier revision of an Indian public procurement order that seeks to ensure preference is given to goods and services that have more than 50% local content."[1348] In African countries, there are signs of a wave of local content regulation in the mining sector. The most recent examples of African countries implementing LCRs in this industry include the Democratic Republic of the Congo (DRC), Guinea and Tanzania.[1349] Of course, WTO Members do not want their LCRs questioned in the context of the DSU and therefore would need to change current rules to avoid this risk.

In addition, with the supply chain disruptions caused by COVID-19, countries may be more encouraged to adopt self-sufficient economic systems, at least in strategic sectors such as medical equipment and drugs, or the production of inputs for assembling sophisticated machines or, at least, they may be more willing to focus on more regional value chains.[1350] All these strategies could involve the use of instruments such as LCRs as a response to increasing political and competitive pressures to raise domestic production,

1348 Hon Grevatt, *India strengthens 'local content' requirements* December 2 (Janes, 2020), https://www.janes.com/defence-news/news-detail/india-strengthens-local-content-requirements.

1349 Akshai Fofaria, *The emerging wave of local content regulations in the African mining sector*, Out-law analysis (Pinsent Masons, 2020), https://www.pinsentmasons.com/out-law/analysis/the-emerging-wave-of-local-content-regulations-in-the-african-mining-sector.

1350 Fortunato, "How COVID-19 is changing global value chains?."

grow employment in their home countries, reduce or even eliminate their dependence on sources that are perceived as risky.

While developed countries have expressed views against LCRs and for their WTO-inconsistency, in current times of crisis – deepened by the COVID-19 pandemic - where both developed and developing countries are facing severe problems, all of them may be equally resorting to local content measures. Eventually, both developed and developing Members may agree that they need some form of support to their domestic industries and local jobs to guarantee their social arrangements especially during times of difficulty and uncertainty.

As a result, developed and developing countries may be interested in ways to justify their LCRs in view of WTO law. Propositions to amend WTO law on this issue may therefore be welcome, rather than strongly criticised. In view of the above, this chapter also discusses which aspects of WTO agreements would need to be amended to deal with the regulation of LCRs.

As explained in Chapter 1, economic studies on LCRs show ambiguous results as to their economic and social effects on the countries implementing them. Mainstream economic literature generally condemns local content policies, stating that they are inefficient and generate market distortions. However, a growing body of literature shows that, depending on how they are implemented, LCRs can produce important outcomes in terms of increased employment opportunities, enhanced development of professional skills and capacities, promotion of vertically integrated domestic industries; inducement of inward FDI in intermediate goods production, among others.

Considering existing economic literature on LCRs, it is not possible to uncritically rely on the idea that local content measures are ineficient and protectionist policies that should be outlawed by WTO law. This rationale that motivated the restrictions on LCRs in WTO law has been strongly questioned and cannot be reproduced without proper consideration for the purposes of defending continuing restrictions on these policy instruments under WTO rules. In other words, prohibiting or restricting LCRs under the argument that all of them are absolute ineficient policies does not make sense anymore and is not compelling enough for sustaining an entire framework of rules that limit their use. Current concept of development, as seen in Chapter 3, discards one-size-fits-all solutions for development problems and recognises the diversity of policy instruments that can be used to attain development.

Therefore, local content policies should be carefully analysed in the WTO context in view of their underlying societal objective. At the same time, the new findings on the possible economic and social benefits of LCRs may require WTO Members to change current rules affecting LCRs, which are very restrictive.

A very important lesson learnt from the crisis of the Appellate Body and that of the WTO system as a whole is that there must be a balance between the normative function of the WTO (through continuing negotiations among its Members) and its judicial function. WTO adjudicatory bodies cannot be solely responsible for resolving new and complex matters that arise between WTO Members, which are not clear in WTO agreements, and over which the Members themselves cannot reach an agreement through negotiations. Judicial function will always involve some incremental development of law; however, where the imbalance between the normative function and the judicial function of the organisation becomes more severe and critical, that normal incremental development of law, which is inherent of the interpretative process, can be misunderstood and confused with judicial activism, which can impact the legimitimacy of the judicial function of the organisation.

For this reason, ultimately, in addition to discussing interpretative methods for a development-oriented approach to WTO rules affecting LCRs, this chapter had to deal with possible amendments that could be made to WTO law to address the issue of local content measures. As already mentioned elsewhere in this thesis, interpretation has limits, and the WTO adjudicatory bodies cannot rewrite WTO agreements to deal with any flaws in the system.

Finally, we stress the need for disputing parties to raise development-oriented arguments before panels. We cannot expect *ex officio* development-oriented interpretations from WTO adjudicating bodies. The advancement of development-oriented approach to WTO rules applicable to LCRs depends on the engagement of disputing parties.

VI.2 WTO RULES AFFECTING LCRS: WHERE IT IS POSSIBLE TO INTERPRET THEM IN LIGHT OF THE DEVELOPMENT OBJECTIVE AND WHERE IT IS NECESSARY TO MAKE AMENDMENTS

As seen in Chapter 2, WTO rules affecting LCRs largely restrict this type of policy. Where the LCR indeed promote societal and development goals, this can be a problem because, under current WTO rules, it may be very difficult to justify these measures. At

the same time, it is important to recognise that while LCRs may be beneficial to the country implementing it, it could be harmful to other countries that need market access to the country implementing the LCRs or that may be hurt by a shift in production to the country implementing LCRs. For instance, while the US program Buy American could allegedly bring some benefits to the US economy, it could hurt US trading partners that desperately need market access to the US market to deal with their own economic problems. In this scenario, development concerns can be raised from both sides (the country implementing the LCRs and its trading partners). WTO adjudicatory bodies remain in a very difficult position as they are ultimately called to define what should prevail, the right to one's country to development or the right of other Members to trade. The right of other Members to trade is also linked to their right to development.

In addition, while this thesis has strongly focused on the potential development dimension of LCRs, it is important to recall that, as stated in Chapter 2, LCRs can also have very adverse economic and societal effects. They can be a result of the politically powerful lobby of inefficient companies that thrive on the imperative of local content for self-protection only and no benefits for society as a whole. As known, lobbying can lead to undue influence, unfair competition and regulatory capture to the detriment of the public interest and effective public policies. Where LCRs is a result of lobby with no contribution to societal concerns, it is important that they are indeed outlawed under WTO law.

The difficult task, however, is how to separate the wheat from the chaff and where to draw a line in WTO law and practice to adequately balance the societal concerns underlying the measure and the trade interests involved. Below, we address relevant WTO rules affecting LCRs and how the development objective could be integrated in their interpretation. In addition, where a development-oriented approach to WTO rules faces restrictions by the text itself of WTO agreements, amendments are proposed.

Reform of WTO rules affecting LCRs may be inevitable as there are limits to interpretation. A number of studies has been defending that the WTO crisis is an opportunity to revisit and reform the WTO agreements.[1351] Also, the issue of WTO reform has been raised by the organisation's members in various WTO bodies in recent years, with many recognising the need to update rules written more than a quarter of a century ago.[1352]

1351 Gabrielle Marceau, "Never Waste a Good Crisis: The End of the WTO Dream, or the Beginning of Something Greater?," *International Organizations Law Review* 17, no. 2 (05 Jun 2020); Bernard Hoekman and Petros C. Mavroidis, "WTO Reform: Back to the Past to Build for the Future," *Global Policy* 12, no. S3 (2021).

1352 WTO Public Forum 2021. Climate, pandemic, e-commerce, inclusivity — Public Forum addresses priorities for reform. 29 Sept 2021. Available at: https://www.wto.org/english/news_e/news21_e/pf21_29sep21_e.htm.

The WTO rules in the areas negotiated in the Uruguay Round contain a balance of rights and obligations that permit some level of regulatory diversity which was considered sufficient in a post war system. However, several factors have changed since the end of World War II, either in geopolitics, global economy and societal issues. Nowadays, the US is not seen anymore as the main hegemonic power as it was in the post-war period. The US now faces the phenomenon of the rise of the rest, in particular, China. While the US has been the great driver of multilateral cooperation in the post-World War II, now its decisions largely contribute to the deterioration of the institutional structure in international trade as a result of the trade war with China; the various unilateral actions the United States has taken with other partners; and the paralyis of the WTO Appellate Body. In addition, world trade faces slow growth since the North Atlantic financial crisis. The global economy was already experiencing a major slowdown before it was hit in 2020 by the worst collapse of economic activity since the Great Depression of the 1930s and a major contraction of international trade due to the effects of the COVID-19 pandemic.[1353] Current challenges also include the revolution of digital economy, major environmental themes and the rise of inequality.

The new challenges of 21st century and the economic, geopolitical and social context may require WTO Members to amend the WTO agreements to reflect a new compromise that better addresses the different circumstances of today's world in comparison to that existing in the post-war period when most of the WTO agreements were drafted.

As regards specifically LCRs, although the focus of this thesis is on interpretation of existing WTO rules applicable to LCRs, it is important to note that the development dimension of local content measures and the strong criticism voiced by the US on the alleged judicial activism of the Appellate Body cast light on the increasing need to clarify and amend WTO rules on LCRs through negotiations.

As seen in Chapter 1, LCRs have been under discussion in WTO committees year after year. No year passes without WTO Members questioning other Members' local content measures in multiple areas at the Committee on Trade-Related Investment Measures (TRIMs). Studies show that LCRs have exponentially increased since the 2008 world financial crisis. With the COVID-19 pandemic, countries are also resorting to these measures to encourage the development of the domestic industry and the creation of jobs. To sum up, there is no perspective that WTO Members will give up LCRs despite prohibi-

1353 José Antonio Ocampo, "Uncertainties surrounding the global economy and their implications for the global development agenda," in *Recovering better: economic and social challenges and opportunities: A compilation of the High-level Advisory Board on Economic and Social Affairs Published by the United Nations,* (New York: United Nations, 2020), 16-17.

tive WTO disciplines. Consequently, it may be appropriate for WTO Members to engage in negotiations with the aim of clarifying and amending WTO rules applicable to LCRs.

These negotiations should be supported by a larger body of economic analysis on LCRs. There is a robust number of studies that make common points on specific features associated to local content policies that would enable them to have a more successful outcome. These features include realistic targets, phasing-out plans, transparency and accountability in the process of designing and implementing such measures, participation of different stakeholders in the policy formulation, among other factors. In particular, procedural checks on local content policies involving the level of participation of stakeholders in the design of the measure, transparency and accountability measures are very important as there are some studies linking local content measures to corruption schemes, nepotism and lobby made by interest groups who seek to maintain their privileges.[1354]

As mentioned in Chapter 3, under the right to development, it is not only important 'what' is achieved, but also on 'how' it is achieved."[1355] Therefore, elements of accountability, transparency and participation are essential in the process of development. As LCRs are "long journeys" in the sense that their effects may only be felt 10 years or more after their implementation,[1356] analysing such measures from a development-oriented perspective also requires assessing whether they comply with these procedural standards in human rights.

As mentioned by Hoekman and Mavroids, WTO needs to improve transparency by collecting and reporting information on relevant (contested) policies and complementing this with analysis of the spillover effects of policies so that the negotiation of new rules can be supported by substantial evidence. It could also benefit from cooperating with other organizations such as the IMF, World Bank, UNCTAD, ITC and OECD. [1357] The collection and analysis of information on local content policies and their effects on the countries adopting them would facilitate the discussion on amending WTO rules affecting LCRs at the WTO and enable evidence-based deliberations on the subject.

Considering the current global economic and political scenario, where countries seem more willing to adopt measures to support domestic industries in a time of crisis and of

1354 See section I.2.5.
1355 United Nations. Human Rights Council. Working Group on the Right to Development. *Draft convention on the right to development, with commentaries.* UN Doc. A/HRC/WG.2/21/2/Add.1, 20 January 2020, p. 8.
1356 Sutton, "In Focus: Local Content Policy." Interview available at: https://www.youtube.com/watch?v=dU8LNd2fGLk. Accessed on: May 24, 2020.
1357 Hoekman and Mavroidis, "WTO Reform: Back to the Past to Build for the Future."

rethinking of GVCs due to disruptions caused by the coronavirus pandemic, it may be an appropriate moment to rediscuss parameters for industrial policies such as local content measures so that they do not result in arbitrary and unreasonable protectionist tools, leading to more resentment and trade wars among countries and the undermining of multilateralism. Negotiations on new rules on LCRs would also 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.

Below we discuss how interpretation of current WTO rules affecting LCRs could further the development dimension of the WTO Agreement and which aspects of current rules could be amended to address the question of local content policies more adequately.

VI.2.1 GATT and GATS exceptions

VI.2.1.1 Expansive reading of policy objectives in the general exceptions

As discriminatory policies, LCRs are prohibited under the non-discrimination rules contained in the GATT 1994 and the GATS (where commitments have been made in the relevant sector). As a result, one of the only ways to justify LCRs is through the general exceptions set forth in these agreements. Nevertheless, GATT and GATS general exceptions involve a closed list of policy objectives.

In order to guarantee broader justifications for LCRs in light of their development dimension, it would be important to read that closed list in an expansive way, so that other policy goals that are not strictly established in the text of those exceptions could be inferred. Indeed, panels and the Appellate Body have interpreted the closed list broadly. For instance, the Appellate Body in *US – Shrimp* (1998) has interpreted paragraph (g) of Article XX of the GATT 1994 to comprise both living and non-living (e.g. mineral) resources. The interpretation of "public morals" is also comprehensive. The Panel in *US – Gambling* (2005) asserted that "the term 'public morals' denotes 'standards of right and wrong conduct maintained by or on behalf of a community or nation'"[1358] and that the content of "public order" "refers to the preservation of the fundamental interests of a society, as reflected in public policy and law."[1359] It also observed that the content of public morals and public order can be characterised by a degree of variation, and that, for this reason, Members are given, considering WTO jurisprudence, some scope to define and apply for themselves the concept of 'public morals' and 'public order' according to their own systems and scales of values.[1360]

1358 Panel Report, *US – Gambling* (2005), para. 6.465
1359 Appellate Body Report, *US – Gambling* (2005), para. 296.
1360 Panel Report, *US – Gambling* (2005), para. 6.461

If interpreted in light of instruments pertaining to the normative framework for development, public morals and public order could also encompass certain notions relating to the right to development and human rights such as the right to take part in cultural life and the rights of indigenous people. These concepts are related to values and interests that are of fundamental importance for the Members and their societies. This type of interpretation could represent an important step to justify LCRs on broader developmental grounds under Article XX of the GATT 1994 or Article XIV of the GATS.

However, the closed list of policy objectives stated in the general exceptions, even if read in an expansive way, may not be sufficient to address the underlying goals of LCRs.

For instance, while "protect public morals", "protect human, animal or plant life or health" and "secure compliance with laws and regulations" are relevant policy objectives for justifying LCRs, other paragraphs/policy objectives in the general exceptions clauses may not be useful to justify local content measures. One could imagine, for instance, that paragraph (g) of Article XX of the GATT 1994 could be important for justifying local content policies in the green industries. However, under this provision, the relevant measure must be *made effective in conjunction with restrictions on domestic production or consumption*. Local content instruments do not restrict domestic production. Quite the opposite, they are intended to encourage domestic production. Therefore, paragraph (g) of Article XX of the GATT 1994 may not be useful for justifying LCRs. In addition, paragraph (j) requires that the measure be "essential to the acquisition or distribution of products in general or local short supply." LCRs are commonly imposed to incentivise the development of the domestic industry. For instance, local content policies have been implemented in the pharmaceutical industry in certain developing countries to encourage the domestic production of certain drugs which those countries are highly dependent on imports. However, in interpreting paragraph (j), both Panel and the Appellate Body agreed that the short supply has to be analysed taking into consideration the quantity of available supply of a product from all sources – national and international. Accordingly, WTO Members may no longer resort to Article XX(j) to justify LCRs when only domestic capacity is insufficient, and the product is available from international sources. Although the Appellate Body did leave open the possibility that, while a product is available on the international market, a Member does not have access to that market, i.e., cannot rely on imports, this paragraph may be of limited applicability for justifying LCRs.

As a result, WTO Members may have to agree on new policy objectives that better address the societal and economic goals relating to local content programs (ex. job maintenance, protection of the right to work, protection of infant industry, right to enjoy the benefits of scientific progress and its applications, addressing regional disparities, etc.).

In this context, they would have to negotiate other policy objectives in the context of GATT and GATS' general exceptions.

VI.2.1.2 Analysing necessity in view of development objectives

As seen in chapter 4, there are some challenges the WTO adjudicatory bodies face in applying the necessity test when interpreting certain paragraphs of the policy exceptions clauses. In particular, it is not an easy task to determine whether there are less-restrictive alternative measures that provide the same level of contribution to the defendant's stated policy objective.

It is important to recall that each Member decides for itself whether, and to what extent, it will protect the interests identified in this provision.[1361] In this sense, in interpreting Article XX(b), the Appellate Body submitted in *EC - Asbestos* that "WTO Members have the right to determine the level of protection of health that they consider appropriate in a given situation."[1362] It also stated in the same case that "in justifying a measure under Article XX(b) of the GATT 1994, a Member may also rely, in good faith, on scientific sources which, at that time, may represent a divergent, but qualified and respected, opinion. A Member is not obliged, in setting health policy, automatically to follow what, at a given time, may constitute a majority scientific opinion." [1363]

In the specific case of local content programs that could allegedly be justified under paragraphs (a), (b) or (d) of Article XX of the GATT 1994 (or equivalent provisions of Article XIV of the GATS), certain aspects should be taken into consideration by panels and the Appellate Body in analysing (i) the contribution a LCR would make to the achievement of the development objective and (ii) less-trade restrictive measures under the necessity test.

First, as seen in Chapter 4, the necessity analysis involves a 'weighing and balancing' test[1364], which is followed by the 'less-trade restrictive alternative' (LTRA) test. It is a sequential analysis. Under the 'weighting and balancing' test, the Appellate Body analyse different factors, including: (i) the contribution of the measure to the realisation of the ends pursued by it; and (ii) the restrictive effect of the measure on international commerce. Additional factors may be relevant in specific cases.[1365] In this context, WTO

1361 Jan Bohanes and Nicolas Lockhart, "Standard of review in WTO law," in *The Oxford Handbook of International Trade Law*, ed. Daniel Bethlehem et al. (Oxford University Press, 2009), 35.
1362 Appellate Body Report, *EC-Asbestos*, para 168.
1363 Appellate Body Report, *EC-Asbestos*, para 178.
1364
1365 Appellate Body Report, *US – Gambling* (2005), paras. 306-308. In paragraph 305, the Appellate Body quoted from paragraph 166 of Appellate Body Report, *Korea – Various Measures on Beef*.

adjudicating bodies need to look – under the necessity test – at the contribution an LCR would make to the achievement of the development objective.

In making this assessment, the WTO adjudicatory bodies could analyse those aspects in economic literature that make local content policies more suitable for achieving success. After an extensive review of the economic literature on LCRs in Chapter 1, it has been suggested that several factors may contribute to maximising the chances that LCRs fulfil their economic and social objectives. In particular, (i) LCRs should be set in the context of a wider strategy of value-added creation and competitiveness; (ii) countries introducing LCRs should have sufficient market size and political stability; (iii) countries adopting LCRs should have adequate local capabilities and infrastructure or be able to develop them; (iv) LCRs should be linked to additional mechanisms, such as training and promotion of business linkages and measures to support other stages of the value chain and wider services; (v) the process of local content policy formulation should be open and transparent, backed by strong and accountable institutions and allowing for cooperation between government and the market; (vi) local content targets should be set realistically and should be modified as conditions change; and (vi) LCRs should be gradually phased out. Of course, this is not a mandatory list of elements that should be assessed, but it is an important guide that illustrates possible factors which, if present, may help the relevant LCR to contribute to its objective.

Likewise, it would be very important for the defendant to bring this type of argument to justify its local content measures before the WTO dispute settlement system. Ultimately, the idea is that WTO Members in a dispute involving LCRs demonstrate more concretely how their local content measure can reasonably contribute to the policy objectives established in the WTO general exceptions so that the WTO adjudicating bodies have more elements to assess it under the necessity test. Those factors analysed in economic literature on local content policies could be used as parameters for the analysis of the adequacy of the measure to achieve its stated objective, but naturally other elements could be raised by the disputing parties as part of their argumentation.

In chapter 3, it has been said that a rights-based approach to development is concerned with developing tools to concretely assess the realisation of the right to development. As a result, a series of parameters and indicators have been discussed to evaluate State performance. Likewike, under a development-oriented interpretation of Article XX of the GATT 1994 (or Article XIV of the GATS), it is necessary to evaluate more concretely how the relevant measure contributes to its stated objective, considering clearer and more precise parameters and indicators. It is important to demonstrate evidence-based policy which is coherent with its underlying goals.

Second, considering the potential development dimension of LCRs, where development issues are raised by defendants, WTO adjudicatory bodies should consider the broader factors pertaining to the development process, which is a holistic concept. For instance, certain government may give tax incentives to pharmaceutical companies that buy pharmaceutial inputs produced in Brazil. Brazil could allegedly justify this GATT-inconsistent measures based on paragraph "b" of Article XX ("protection of health"). The COVID-19 has shown that countries cannot entirely rely on imports for essential goods such as vaccine and medical goods, as supply chains may be adversely affected by different types of disasters. In this context, Brazil, by adopting LCRs may wish to strengthen local pharmaceutical industry to reduce dependency on imports and ultimately not put its population in danger in times of unforeseen events such as that involving the coronavirus pandemic. Alongside with the goal of protecting the health of its population, there may be other secondary goals such as creating jobs, stimulating technology transfer, among others.

In view of the above, WTO adjudicatory bodies may be carefull to take into consideration all these factors when analysing alternative less trade-restrictive measures. These alternative measures should equally contribute to achieving these objectives and these broader factors pertaining to a country's development process.

The analysis of less-trade restrictive measures also contributes for the assessment of the transparency of the objectives of the measure. Where government implements LCRs without a clear goal and without prospects and estimates of the intended economic and social impacts of the measure (e.g. creation of *x* jobs within *n* years; development of a competitive domestic industry within *n* years; improvement of local supply chain by increasing in *x*% the number of domestic companies able to participate in public bids, etc.), the WTO adjudicatory bodies will not have clear parameters to analyse less-trade restrictive measures and could more easily second-guess an alternative measure that allegedly contributes to a policy objective that is broadly stated. In contrast, where a WTO Member has a clear picture of the goal of the measure and its intended economic and social effects, it can provide more elements to the WTO adjudicatory body to make a proper comparison between the measure at issue and its alternatives. The more details a WTO Member gives about the measure, its goal and intended effects on development, the more difficult it will be for WTO adjudicatory bodies to establish the existence of an adequate alternative measure.

However, WTO Members, when implementing LCRs, need to have a precise picture about what exactly they want by adopting local content measures. General arguments

relating to policy considerations will not be (and are not) sufficient to justify LCRs under the necessity test.

In the WTO disputes involving LCRs analysed in Chapter 2, it was possible to verify that disputing parties seeking to justify their local content measures present very generic arguments relating to the measure's policy objective, and do not provide precise information as to how these measures could reasonably contribute to the desired objective especially considering the elements above, found in the economic literature on local content policies.

For instance, in *Brazil – Taxation* (2019), Brazil, in providing justifications for the LCRs contained in its Support Program for the Technological Development of the Digital TV Equipment Industry – PATVD, under Article XX(a) of the GATT 1994 ("necessary to protect public morals"), argued that the digital television is an important means to bridge the digital gap in Brazilian population and it is considered a predominant source of information in the country. It submitted that PATVD would enable a universal network of distance learning, encourage R&D, [and] foster the expansion of Brazilian technologies so as to guarantee access to information at costs compatible with viewers' income. It also mentioned that the PATVD was created to facilitate the integration and operation of the digital technology in the country and that there had been an interest in fomenting the local capacity to develop and manufacture this equipment, so as to ensure that there would be no risk of discontinuity in the supply of the transmitting equipment required to carry out the transition as planned.[1366] While these explanations are important, they lack more substantial detail on how the relevant local content policy could potentially and more concretely fulfil the objective of bridging the digital gap in Brazilian population. It was not clear why LCRs would be more effective for the realisation of the stated objective than, for instance, stimulating imports of low price/high quality IT products.

VI.2.1.3 Full proportionality analysis under the general exceptions

It has been argued in Chapter 4 that the rigidity of the necessity test used by panels and the Appellate Body in interpreting paragraphs (a), (b) and (d) of the GATT 1994 and paragraphs (a), (b) and (c) of the GATS prevents that they make a more balanced analysis of the measure in light of its underlying societal goals and its trade restrictiveness. In particular, it prevents that WTO adjudicatory bodies justify WTO-inconsistent LCRs where an alternative is found, even if the LCR is not disproportionate to its legitimate goals. It this context, it has been suggested that panels and the Appellate Body should

1366 Panel Reports, *Brazil – Taxation* (2019), paras. 7.544-7.547.

follow a full proportionality analysis when examining a measure in iight of the general public exceptions.

The proportionality analysis is an ideal typus of a balancing test where an adjudicator needs to first identify the pursuit of a legitimate objective by the measure at issue. Subsequently, under the suitability step, it examines whether the chosen legitimate objective is furthered by the measure. The following step, necessity, asks whether an alternative measure exists that is able to further the legitimate goal to the same extent, but has less of a negative impact. The last step – the strict proportionality or proportionality stricto sensu - an adjudicator freely weighs the competing principles based on the circumstances of the case to decide which one should prevail.[1367]

By adopting the proportionality *stricto sensu*, it is argued that panels and the Appelate Body could consider broader factors in the balancing exercise required under the general exceptions. It does not necessarily need to stop the analysis in the finding of less-trade restrictive alternatives. Even where alternatives are found, it could more freely weigh the different factors and circumnstances of the case. Ultimately, the language of the chapeau of Article XX of the GATT 1994 and of Article XIV of the GATS allows, in theory, panels and the Appellate Body to complete the last step of the proportionality analysis. As the WTO adjudicatory bodies have stated, the chapeau of the general expections is there to prevent abuses from the Members invoking them. [1368]

The abuse of rights refers to a State exercising a right either in a way which impedes the enjoyment by other States of their own rights or for an end different from that for which the right was created.[1369] At least under the first aspect, it also involves a balancing exercise between the right of one State and the right of the other States. In the case of LCRs, it involves balancing the right of the WTO Member implementing the local content measures and the right to trade of other WTO Members.

One could argue, however, that this gives too much power for WTO adjudicatory bodies and could question their legitimacy to conduct this type of analysis specially in a scenario where WTO Appellate Body is accused of judicial activism. Indeed, in practice,

1367 Benedikt Pirker, "Proportionality analysis and international commercial arbitration – the example of public policy and domestic courts," in *Establishing Judicial Authority in International Economic Law*, ed. Henrik Palmer Olsen, Joanna Jemielniak, and Laura Nielsen, Cambridge International Trade and Economic Law (Cambridge: Cambridge University Press, 2016), 292. Pirker was explaining the work of Robert Alexy. See: Robert Alexy, "On Balancing and Subsumption. A Structural Comparison," *Ratio Juris* 16, no. 4 (2003).

1368 Appellate Body Report, *US – Gasoline* (1996), p. 22.

1369 Alexandre Kiss†, *Abuse of Rights*, Max Planck Encyclopedia of Public International Law (Oxford University Press, 2006), https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1371.

courts and tribunals do not apply the proportionality test uniformly. They choose the type of analysis that is best suited for their institutional context. As explained by Pirker:

> While it may be possible that differences are at least partially shaped by the historical legal background of a particular legal regime, there are arguably more substantive contextual reasons for the shaping of a particular balancing test, too.
>
> In that regard, a central question is the legitimacy of choosing a particular balancing test. The ability of courts and tribunals to exercise their judicial review functions may be specified in advance, for example within an international treaty. Nonetheless, a minimum level of legitimation while exercising this function appears indispensable for the proper long-term functioning of a legal regime. Consequently, it is necessary to question the basis on which courts and tribunals can exercise their function of judicial review.[1370]

In defining which balancing test to use, adjudicators must establish which one is the most helpful to impede severe violations of the central values they are legally bound to protect. However, as the texts of treaties are generally open-ended, this is not a task that depends solely on the interpretation of treaty text. It involves considering contextual, institutional elements such as history, political economy or institutional features of treaty regimes, all of which can sharpen the analysis that is undertaken for the development of a balancing test.[1371]

As explained by Guzman, in the WTO context, the DSU establishes the standard of review in WTO disputes in Article 11. According to this provision, "a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements.'" This standard of review applies generally to all WTO disputes unless a more specific rule exists such as in the case of antidumping disputes.[1372] On its face, however, Article 11 does not clarify whether a panel or the Appellate Body should engage in

1370 Pirker, "Proportionality analysis and international commercial arbitration – the example of public policy and domestic courts," 294.

1371 Pirker, "Proportionality analysis and international commercial arbitration – the example of public policy and domestic courts," 297.

1372 The Anti-Dumping Agreement sets out a special standard of review (Article 17.6 of the Anti-Dumping Agreement). This special provision is intended to give a greater margin of deference to the Member's anti-dumping determination than would Article 11 of the DSU.

de novo review[1373] or the extent to which they should defer to the determinations of national authorities.[1374]

In fact, the level of the deference in the panel or the Appellate Body's review will depend on the relevant provision at stake and the subject matter. According to Guzman, "existing WTO jurisprudence has implicitly acknowledged that the standard of review must vary depending on the agreement at issue and the matter being decided. Indeed, even within single agreement different standards of review are applied depending on the issue in question."[1375] Ultimately, Article 11 of the DSU does not prescribe a single standard of review for all cases.[1376] It may vary according to the context and specific circumstances of the case. In this sense, panels and the Appellate Body enjoy a good level of flexibility in determining the appropriate standard of review in each case.

Considering the current shadow of accusations of "judicial activism" that the Appellate Body faces, it is difficult to imagine that its analysis of general exceptions could evolve to a full-scale proportionality analysis as it apparently gives more power to the adjudicating body in freely weighting the competing values and ultimately "judging" the level of protection of a societal value chosen by a WTO Member.

Under the current necessity test, WTO adjudicatory bodies may feel more comfortable to deal with accusations of judicial activism because ultimately, they are undertaking a more limited exercise. Rather than freely weighing the competing values, WTO adjudicatory bodies are merely asking whether there are less restrictive alternatives that could provide an equivalent contribution to the achievement of the objective. In theory, this does not require WTO adjudicatory bodies to judge the level of protection chosen by a WTO Member. However, at the same time, as explained, the LTRA test may also involve some lelvel of second-guessing by adjudicators in the evaluation of the alternative measures and may not allow a consideration of broader factors.

One could still question whether it would be reasonable to conduct a full proportionality analysis where a less trade-restrictive alternative is found to exist. Even in this case, it

1373 Under *de novo* review, a WTO panel review all such questions de novo, substituting its own judgment for that of the relevant WTO member.

1374 Andrew T. Guzman, "Determining the Appropriate Standard of Review in WTO Disputes," *Cornell International Law Journal* 42, no. 1 (2009): 48.

1375 For instance, in *EC – Hormones*, the Appellate Body stated that "[T]he standard of review appropriately applicable in proceedings under the *SPS Agreement,* of course, must reflect the balance established in that Agreement between the jurisdictional competences conceded by the Members to the WTO and the jurisdictional competences retained by the Members for themselves" (Appellate Body Report, *EC – Hormones*, para. 115). Guzman, "Determining the Appropriate Standard of Review in WTO Disputes," 51.

1376 See Claus-Dieter Ehlermann and Nicolas Lockhart, "Standard of review in WTO law," *Journal of International Economic Law* 7, no. 3 (2004): 491.

could still be adequate to conduct a proportionality *stricto sensu* analysis because there are costs that the country implementing the measure, e.g. a local content program, will have to incur to change its current measure and adopt the relevant alternative measure. These costs may be high and affect the predictability of the domestic market and impact the economic agents that were already relying on the original measure (e.g. LCRs). Furthermore, the alternative measure may not be *considerably* less trade-restrictive, it may only be *slightly* less-trade restrictive. In this sense, WTO adjudicatory bodies could evaluate, based on a broader context, if the original measure is disproportionate to achieve the desired goals. Additionally, it is difficult to claim, *beyond any reasonable doubt*, that an alternative measure can offer the same level of protection to the stated policy objective. It is one thing to theorise about the level of protection intented by a WTO Member and the alternative measures, it is a different thing to guarantee that the application of the alternative measure will actually achieve the same level of protection of the original measure.

The main advantadge of the full proportionality analysis is that it gives adjudicators the possibility of setting out the reasons for their decision in greater detail, rendering decisions easier to understand for both the concerned parties and observers more generally.[1377] Ultimately, the principle of proportionality as a legal methodology,"does not entail a mechanical application of norms and rules, but seeks reasonable and fair results by taking recourse to factors and criteria which are identified in a particular context and brought to mutual bearing and relations."[1378] A full proportionality analysis allows adjudicators to articulate the factors and criteria more clearly, giving more transparency to the decision. As put by Andenas and Zleptnig:

> The more structured and rational a test, the more the courts will have to engage in a transparent judicial discourse with regard to trade-offs they are constantly required to make. Such discourse needs to take the arguments advanced by the parties more seriously. As the experience in other legal systems shows, this is no guarantee for elaborate and sophisticated judgments. Yet, it may contribute to reducing the vagueness and unpredictability of judicial reasoning in the WTO. By limiting discretion, one central purpose of the rule of law is served.[1379]

1377 Pirker, "Proportionality analysis and international commercial arbitration – the example of public policy and domestic courts," 293.
1378 Cottier et al., *The Principle of Proportionality in International Law,* 33.
1379 Andenas and Zleptnig, "Proportionality and balancing in WTO law: a comparative perspective."

A full-proportionality analysis also does not necessarily involve judging the level of protection chosen by a WTO Member. It has more to do with judging the appropriatedness of ends and means. It involves analysing whether the instruments chosen to achieve the chosen level of protection are adequate and whether they unduly prevent the enjoyment by other States of their own rights and unduly break the delicate balance of the WTO Agreement.

In the case of LCRs, however, even if a full proportionality is taken, local content policies may not be justified under WTO law because the policy objectives some LCRs entail are not foreseen in WTO general exceptions. In this case, as discussed above, it would be necessary to reform WTO general exceptions to include more policy objectives in its paragraphs so that more forms of local content measures can be justified under WTO law.

VI.2.1.4 Possible reform of general exceptions' clauses

In view of the above, in order to make LCRs more justifiable from the perspective of the GATT 1994 and the GATS, it would be necessary to reform the general exceptions to include more policy objectives that would be in line with those of local content measures, including, for instance, protection of employment levels, protection of the rights of indigenous people, development of industries connected to essential goods (e.g. vaccines, health products), among others. Specifically, as regards essential goods, "[O]n both the right and the left, lessons are being drawn about the need to ensure domestic manufacturing capacity in essential goods, such as pharmaceuticals and medical equipment, with strong support among progressives for using activist industrial policy to achieve these goals."[1380]

At the same time, in order to avoid the rigidness of the necessity test, it is important that the language of the new paragraphs establishing new policy objectives of the general exceptions does not reflect that of paragraphs (a), (b) and (d) of the GATT 1994 ("necessary to"), but rather incorporates a language that may involve less strict tests such as "relating to".

As mentioned by the Appellate Body in *US – Gasoline* (1996), "it is not reasonable to suppose that Members intended to require, in respect of each and every category listed in these paragraphs, the same kind or degree of connection or relationship between the measure under appraisal and the state interest or policy sought to be promoted or

1380 Robert Howse, "Making the WTO (Not So) Great Again: The Case Against Responding to the Trump Trade Agenda Through Reform of WTO Rules on Subsidies and State Enterprises," *Journal of International Economic Law* 23, no. 2 (2020): 374.

realized."[1381] The Appellate Body in *Korea – Various Beef* (2001) recalled that the requirement "relating to" in Article XX(g) "is more flexible textually than the necessity" requirement found in Article XX(d); under the more flexible "relating to" standard of Article XX(g), the Appellate Body accepted in *US – Gasoline* a measure because it presented a "substantial relationship", i.e., a close and genuine relationship of ends and means, with the conservation of clean air; in *US – Shrimp*, the Appellate Body accepted a measure because it was "reasonably related" to the protection and conservation of sea turtles.[1382]

Finally, Members ideally should clarify which type of proportionality test they intend WTO adjudicatory bodied to make in connection with the general exception clauses. At least, the treaty text should provide them with more parameters for assessing whether the measure are "applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade."

VI.2.2 Article III.8(a) of the GATT 1994

VI.2.2.1 Interpreting Article III.8(a) of the GATT 1994 harmoniously with the GPA non-discrimination rules

A development-oriented approach to WTO law affecting LCRs would also involve interpreting Article III:8(a) of the GATT 1994 so as to allow local content measures in public procurement policies for industrial development where Members have not made specific commitments under the GPA.

Such provision, as seen in Chapter 2, entails a derogation to the national treatment principle established in Article III of the GATT 1994 in cases of public procurement, provided that certain conditions are met. Despite this derogation, according to WTO jurisprudence, GATT national treatment rule still applies to domestic content requirements applied in the context of government procurement.[1383] This is because the Appellate Body in *Canada – Renewable Energy / Canada – Feed-in Tariff Program* framed the applicability of Article III:8(a) "according to whether the particular products subject to discrimination are in a 'competitive relationship' with the products purchased under the measures in question".[1384]

1381 Appellate Body Report, *US – Gasoline* (1996), para. 45.
1382 Appellate Body Report, *Korea – Various Measures on Beef* (2001), fn 104.
1383 See subsection II.2.3.1(i) of this thesis.
1384 Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.63.

This understanding, however, may not be consistent with the object and purpose of the WTO Agreement viewed from an interdependent and holistic perspective. Reliance on the "competitive relationship" test would unduly restrict the scope of Article III:8(a). This provision should not be interpreted to envisage direct acquisition of products purchased, in all cases.

The word "governing" in Article III.8(a) of the GATT 1994 has a wide-compassing meaning. All laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale are outside the scope of the national treatment obligation set forth in Article III of the GATT 1994. This could also include local content requirements applicable to the procurement of certain products purchased for governmental purposes. It is a reasonable interpretation to this provision.

It is important to recall that government procurement has traditionally been used as a mechanism to achieve non-economic goals. It has been used as a tool to, among others: "stimulating national economic activity in particular sectors of the economy; protecting national industry against foreign competition; improving the competitiveness of key industrial sectors; remedying regional disparities within the state", including "tackling long-term unemployment, (…) promoting the use of local labour in economically deprived areas, prohibiting discrimination against minority groups, encouraging equality of opportunity between men and women, and promoting the increased use of the disabled in employment."[1385] Therefore, WTO Members should have more freedom to establish the mechanisms and rules that will regulate their public procurements so that the underlying objectives can be achieved.

National treatment obligation should only apply under the GPA. Otherwise, obligations which only some WTO Members have agreed to under the GPA will become multilateralised.[1386] This is important from the perspective of effective interpretation. Appellate Body has stated that, under the principle of effectiveness, "interpretation must give meaning and effect to all the terms of the treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redun-

1385 McCrudden, "International economic law and the pursuit of human rights: A framework for discussion of the legality of'selective purchasing'laws under the WTO Government procurement agreement," 7-8.
1386 Davies, "The GATT Article III:8(a) Procurement Derogation and Canada - Renewable Energy," 549.

dancy or inutility".[1387] WTO adjudicating bodies have advocated that, according to this principle, "a treaty interpreter must read all applicable provisions of a treaty in a way that gives meaning to all of them, harmoniously."[1388] In this context, the interpretation of Article III.8(a) of the GATT 1994 cannot result in mitigating or rendering inutile the provisions of the GPA. Both Article III.8(a) of the GATT 1994 and the provisions of GPA, in particular, the non-discrimination principles set forth in paragraphs (1) and (2) of Article IV, should be read harmoniously.

VI.2.2.2 Possible reform of Article III.8(a) of the GATT 1994

Considering that the current interpretation of the Appellate Body on Article III.8(a) of the GATT 1994 prevents WTO Members from applying LCRs in public procurement where the LCR relates to the inputs of the final products acquired by the government, if Members wish to retain policy space to apply local content measures in their public procurement, it is necessary to make amendments to this provision in order to amplify its scope and make it clear that LCRs are permitted in that context. Alternatively, the Ministerial Conference and the General Council could use their exclusive authority to adopt multilateral interpretations of the Article III.8(a) of the GATT 1994, in line with the parameters of Article IX:2. I of the Marrakesh Agreement.

VI.2.3 Article III.8(b) of the GATT 1994

The Appellate Body in *Brazil – Taxation* clarified that the "worded opening clause of Article III:8(b), which is similar to the text of the chapeau of Article XX, suggests to us that the provision is akin to an exception to the national treatment obligation and serves as a justification or affirmative defence for measures that would otherwise be in consistent with that obligation."[1389] As a result, Article III:8(b) of the GATT 1994 allows for the payment of subsidies exclusively to domestic producers as an exception to the national treatment rule.

As explained in section II.2.3.1(ii), the majority of the Appellate Body adopted a narrow reading of this provision. In *Brazil – Taxation*, it concluded that the term "payment of subsidies" in Article III:8(b) does not include within its scope the exemption or reduction of internal taxes applied, directly or indirectly, on domestic products. Instead, Article

1387 Appellate Body Report, *US — Gasoline* (1996), p. 23. See also: Appellate Body Report, *Canada — Dairy* (1999), para. 133; *Korea — Dairy*, para. 81; Appellate Body Report, *US — Section 211 Appropriations Act* (2002), para. 338; Appellate Body Report, *US — Offset Act (Byrd Amendment)* (2003), para. 271; *US — Upland Cotton* (2005), para. 549; *US — Softwood Lumber V (Article 21.5 — Canada)* (2006), para. 99.

1388 Appellate Body Report, *Argentina — Footwear (EC)* (2000), para. 81. See also *Canada — Renewable Energy / Canada — Feed-in Tariff Program* (2013), para. 5.26.

1389 Appellate Body Report, *Brazil – Taxation* (2018), para. 5.84.

III:8(b) was intended to exempt from the obligations of Article III only the payment of subsidies which involves the expenditure of revenue by a government.[1390]

However, a more adequate interpretation of this provision was indicated in a dissenting opinion of an Appellate Body member, which disagreed with the interpretation given to the term *payment of subsidies*.

The dissenting member of the Appellate Body explained that a definition of *subsidy* is not found either in Article III:8(b) or in any other provision of the GATT 1994. The only "detailed definition" of subsidies is found in Article 1.1 of the SCM Agreement.[1391] He further clarified:

> Moreover, the main object of the SCM Agreement, taken as a whole, is "to increase and improve GATT disciplines relating to the use of both subsidies and countervailing measures". Indeed, I do not consider that, for the regulation of subsidies, the provisions of the GATT 1994 and the SCM Agreement operate in isolation; instead, the relevant provisions of the GATT 1994 and the SCM Agreement together define and reflect the whole package of rights and obligations of WTO Members with respect to subsidies. [1392]

The dissenting member also noted that dictionary definitions suggest that the scope of the word "payment" is not limited to direct monetary transfers, but may also include other transfers having an "*equivalent*" value or effect. [1393]

By interpreting the expression "payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of [Article III] …", the dissenting member noted that it served as the lynchpin of both the Panel's analysis as well as his fellow Division Members' interpretation of Article III:8(b). In this sense, the dissenting member noted the following:

> Essentially, they reason that "if … Article III:8(b) exempts tax discrimination from the scope of Article III, the reference in Article III:8(b) itself to 'taxes and charges applied consistently with the provisions of [Article III]' would be meaningless." I note, however, that the reference in Article II:8(b)

1390 Appellate Body Report, *Brazil – Taxation* (2018), paras. 5.85-5.92, 5.108, 5.119-5.122, 5.124.
1391 Appellate Body Report, *Brazil – Taxation*, para. 5.126.
1392 Appellate Body Report, *Brazil – Taxation*, para. 5.127.
1393 Appellate Body Report, *Brazil – Taxation*, para. 5.129.

> to "taxes or charges applied consistently with the provisions of [Article III]" is not an independent or express requirement for all measures falling within the scope of Article III:8(b). Instead, this reference is made in the context of the first of the two examples of the "payment of subsidies" contained in that provision, which reads, in relevant part: "the payment of subsidies exclusively to domestic producers, including payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of [Article III] and subsidies effected through governmental purchases of domestic products". As my distinguished colleagues forming the majority note, the use of the word "including" makes clear that these examples are "not an exhaustive list" of the kind of programmes that would qualify as "payment of subsidies exclusively to domestic producers". The treaty text relied on by the Panel, namely, "taxes or charges applied consistently with the provisions of [Article III]", is, by the terms of that provision, a requirement only in the case of "payments to domestic producers derived from the proceeds of internal taxes or charges". Given the non-exhaustive nature of the list, I do not consider that this text can be divorced from the context of one specific example in Article III:8(b) and be regarded as an independent and stand-alone requirement that definitively delimits the scope of Article III:8(b) and applies to all instances of "payment of subsidies" that could possibly fall within the scope of that provision. In particular, subsidies provided through the foregoing of government revenue that is otherwise due, such as tax exemptions, are, by definition, not "derived from the proceeds of internal taxes or charges", thereby rendering the first example of limited relevance in such cases. [1394]

In this context, the dissenting member argued that instead of regarding the textual reference in the first example set out in Article III:8(b) as controlling under all circumstances, a proper understanding of the scope of Article III:8(b) should be grounded in the interpretation of the term "payment of subsidies" in accordance with the customary international rules of treaty interpretation. [1395] In his view:

> An interpretation of "payment of subsidies" in Article III:8(b) as excluding revenue foregone would undermine, inconsistently with Article 3.2 of the DSU as well as the fundamental principle of effectiveness in treaty

1394 Appellate Body Report, *Brazil – Taxation*, para. 5.130.
1395 Appellate Body Report, *Brazil – Taxation*, para. 5.131.

> interpretation, the careful balance of rights and obligations under the SCM Agreement with respect to an entire category of measures that are expressly included within the definition of a subsidy in Article 1.1, namely, the foregoing of government revenue that is otherwise due. In other words, the majority's interpretation of the term "payment of subsidies" in Article III:8(b) would fundamentally alter the carefully constructed balance of rights and obligations under the SCM Agreement and the GATT 1994 with respect to subsidies and would risk rendering redundant the actionable subsidies disciplines of the SCM Agreement insofar as subsidies in the form of the foregoing of revenue are concerned. [1396]

Apart from providing very reasonable legal arguments for defending a broader interpretation of the exception set forth in Article III.8(b), the reasoning of the dissenting member of the Appellate Body also provides more policy space to WTO Members planning to implement domestic production subsidies, as, under this reading, more types of domestic production subsidies and not only those involving expenditure of revenue by a government could be justified in view of Article III of the GATT 1994. Of course, they could still be subject to other rules such as those applicable to actionable subsidies under the SCM Agreement.

The reasoning of the dissenting member is also consistent with the Appellate Body's rationale when interpreting Article 3.1(b) of the SCM Agreement in *US – Tax Incentives* and *Brazil – Taxation*. In these cases, the Appellate Body attempts to make a clearer distinction between permitted domestic production subsidies and prohibited import-substitution subsidies, preventing that the former category be confounded with the latter in a reckless way.

In *US – Tax Incentives*, the Appellate Body noted that Article 3.1(b) does not prohibit the subsidization of domestic 'production' per se but rather the granting of subsidies contingent upon the 'use', by the subsidy recipient, of domestic over imported goods". It added that "[s]ubsidies that relate to domestic production are therefore not, for that reason alone, prohibited under Article 3 of the SCM Agreement".[1397] It is clear that the Appellate Body is concerned in preserving the space of certain domestic production subsidies. Also, by establishing rigorous tests for a finding of subsidies contingent upon the use of domestic over imported goods, the Appellate Body makes it more difficult that domestic production subsidies that merely encourage the use of domestic inputs

1396 Appellate Body Report, *Brazil – Taxation*, para. 5.137.
1397 Appellate Body Report, *US – Tax Incentives*, para. 5.15.

(but not requires its use) be classified as prohibited subisidies,[1398] also giving Members more room to implement localisation subsidies. Of course, they can still be questioned as actionable subsidies. However, this is a more difficult task in comparison to a claim of prohibited subsidy, as the the complainant needs to prove adverse effects.

In any case, the idea to expand the types of domestic production subsidies by making a broader interpretation of Article III.8(b) is consistent with the reality of the choice of the WTO membership which uses these policies widely and on a very large scale in order to attract investments to their jurisdictions and also for developmental purposes. Therefore, it is desirable that future cases dealing with the interpretation of Article III.8(b) of the GATT 1994 reconsider the arguments brought by the dissenting opinion of the Appellate Body member in *Brazil – Taxation*.

VI.2.4 The SCM Agreement

VI.2.4.1 Reading flexibilities into the SCM Agreement?

As seen, LCRs can take the form of subsidies and the SCM Agreement does not have a general exception clause like the GATT 1994 or the GATS. Therefore, a development-oriented approach to WTO rules affecting LCRs would also have to involve reading into flexibilities of the SCM Agreement so that local content subsidies could also be justified under the SCM Agreement where they entail important policy objectives.

Arguably, the the 'right to regulate' as international customary could be used as an affirmative defence for WTO-inconsistent LCRs. This is particularly important for local content subsidies which are implemented for developmental purposes. As the SCM Agreement does not contain exception clauses, local content subsidies are automatically prohibited under Article 3.1(b). This means that even when such subsidies reflect legitimate public interests, they may be outlawed by WTO adjudicating bodies. Allowing the use of the right to regulate as an affirmative defence may allow Members to justify their local content subsidies, considering the parameters established in the police powers doctrine in investment law discussed in Chapter 3. Teleological interpretation of the SCM Agreement in light of the broad objectives of the WTO as reflected in the Marrakesh

1398 As explained in *Brazil – Taxation*, "the relevant question in determining the existence of contingency under Article 3.1(b) is not whether the eligibility requirements under a subsidy may *result* in the use of more domestic and fewer imported goods. Rather, the question is whether *a condition requiring* the use of domestic over imported goods can be discerned from the terms of the measure itself or inferred from its design, structure, modalities of operation, and the relevant factual circumstances constituting and surrounding the granting of the subsidy that provide context for understanding the operation of these factors. Appellate Body Report, Brazil – Taxation, para. 5.248, making reference to Appellate Body Report, *US – Tax Incentives*, para. 5.18.

Agreement could also help in the construction of flexibilities which are not apparent in the SCM Agreement.

As explained in Chapter 3, WTO law does not seem to have contracted out from the right to regulate. The presence of general exception clauses in certain WTO agreements do not displace the right to regulate as an international customary law. There is no clear language in WTO law indicating such displacement or derogation. Had WTO Members intended to derogate the right to regulate as a State's inherent right, they should have made it explicitly in the legal texts. As seen, principles of interpretation "neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended."[1399] Also, there is a presumption against conflict normative conflict in international law,[1400] so that WTO law and the right to regulate should coexist harmoniously under the WTO system. As such, WTO Members should be able to resort to the right to regulate when the WTO general exceptions are not sufficient to accommodate their policy objectives.

However, again reading flexibilities in the SCM Agreement which are not explicit in the text of this treary or using the right to regulate as affirmative defence may be seen as judicial activism and may, more broadly, undermine the legitimacy of the WTO adjudicatory body. In this sense, it is necessary to reform the SCM Agreement to include policy exceptions as it is the case for the GATT 1994 and the GATS. Alternatively, it could be possible to revisit and renew the rules on non-actionable subsidies which are currently not enforceable.

VI.2.4.2 Possible reform of the SCM Agreement to include a policy exceptions clause or to recreate a category of non-actionable subsidies and to review the list of prohibited subsidies

The debate on the adequacy of existing WTO rules that constrain Member's capacity to undertake industrial policies is not new. As explained by Howse, "(…) when the WTO rules were written and put into place in 1995, activist industrial policy had gone out of fashion in mainstream economics. Such efforts were regarded as mostly inefficient and ineffective. In the 21st century, a range of economic literature, much of it empirically based, has challenged this general negative view."[1401]

1399 Appellate Body Report, *India — Patents (US)*, para. 45.
1400 International Law Commission, *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law. Conclusions of the work of the Study Group.*, 25.
1401 Howse, "Making the WTO (Not So) Great Again: The Case Against Responding to the Trump Trade Agenda Through Reform of WTO Rules on Subsidies and State Enterprises," 374.

Article 8 of the SCM Agreement originally contained a short list of subsidies to be deemed 'non-actionable', that is, subsidies immunised from challenge in WTO dispute settlement as well as countervailing duty action. This list included certain subsidies for research and development and environmental protection, and to disadvantaged regions. Nevertheless, this provision on non-actionable subsidies applied provisionally, for only the first 5 years that the SCM Agreement was in force. Since its effective expiration, WTO members have been unable to agree to either continue with the list as it now stands or create a different list. Currently, no subsidy programs are explicitly protected as nonactionable. In addition, the the SCM Agreement contains no general public exceptions like the GATT 1994 and the GATS. Therefore, it does not allow a case-by-case assessment of whether a particular policy instrument can be used to achieve a legitimate objective.

However, there is a growing debate on the need to reform the SCM Agreement to re-create non-actionable subsidies (i) to address climate change and similar environmental issues; (ii) to deal with regional disparities within a country; (iii) to promote research and development (R&D); and (iv) to deal with natural and other disasters, including pandemic-related subsidies.[1402] All these subject matters are closely linked to the adoption of LCRs.

The adoption of LCRs has been questioned in the main cases involving green subsidies in the WTO dispute settlement system: *Canada – Renewable Energy / Canada – Feed-in Tariff Program* (2013), *India – Solar Cells* (2016) and *US – Renwable Energy* (2019). Other five cases which have not passed the phase of consultations also concerned LCRs in the context of renewable energy subsidies.[1403] In addition, it is not unusual for countries to adopt LCRs to address internal regional disparities. This is the case for instance of Brazil which created the free zone of Manaus together with a local content policy to stimulate the industrialisation of North Brazil which is one of the poorest regions in the country. Also, tax preferences for research and development (R&D) spending and income earned from patented innovations are common among OECD countries. Many countries increasingly see the development and adoption of advanced technologies as critical for growth in productivity and employment. As a result, they may wish to preserve policy space for

1402 Gary N. Horlick and Peggy A. Clarke, "Rethinking Subsidy Disciplines for the Future: Policy Options for Reform," *Journal of International Economic Law* 20, no. 3 (2017): 679-81. See also: Chloé Papazian, "Climate change mitigation subsidies and the WTO agreement on subsidies and countervailing measures : a case for reform using the EU state aid discipline as blueprint to green the WTO subsidy rulebook?" (EUI PhD theses European University Institute,, 2021); Howse, "Making the WTO (Not So) Great Again: The Case Against Responding to the Trump Trade Agenda Through Reform of WTO Rules on Subsidies and State Enterprises."

1403 United States — Certain Measures Related to Renewable Energy (DS 563); EU – Biodiesel (DS459); EU — Renewable Energy Generation Sector (DS452); European Union and a Member State — Importation of Biodiesels (DS443); China — Measures concerning wind power equipment (DS419).

R&D subsidies, hoping that their use will encourage higher-value industrialisation.[1404] In addition, the COVID-19 pandemic stressed the importance and role of the State in ensuring domestic manufacturing capacity in essential goods, such as pharmaceuticals and medical equipment. All these factors reinforce the question of reforming the SCM Agreement to revisit, reinstate and create new forms of non-actionable subsidies which also touch upon the discipline of LCRs.

In addition to revisiting the list of non-actionable subsidies, WTO Members could review the list of prohibited subsidies, in which local content subsidies are included. As stated, nowadays subsidies "are not viewed anymore as intrinsically trade-distorting or welfare-reducing, and many are skeptical of any approach that attempts to use general rules to distinguish between subsidies that are harmful in this sense from others that may in fact enhance welfare ."[1405]

As explained by Spadano, "as it turns out, in a world of highly fragmented production – certainly different than the world of the late 1980s and early 1990s when the SCM Agreement was negotiated – a per se prohibition of subsidies conditioned upon the use of domestic inputs becomes apparently incompatible with localisation (domestic production) policies that various Members clearly want to keep within the realm of their respective policy spaces."[1406]

In practice, however, there is strong divergence among WTO Members on the topic of reforming the SCM Agreement. For instance, the Trilateral Initiave of the US, EU and Japan on proposals to reform the SCM Agreement foresees ways to strengthen existing WTO rules on industrial subsidies. In this sense, it proposes to increase the list of prohibited subsidies provided for in Article 3.1 and no discussion on possible carve-outs or rediscussing the list of non-actionable subsidies is advanced.[1407] This is in contrast with the interests of developing countries (in particular, China), which see subsidisation as an important part of their economic policies and seek more policy space to adopt them. In addition, as mentioned, developed countries tend to adopt a disconnected behaviour, as in the international forum they condemn LCRs and defend stricter disciplines to prohibit them while at the domestic level they do adopt local content policies. As in the US case, there is a "Keynes at home, Smith abroad" approach.

1404 Keith Maskus, *Research and Development Subsidies: A Need for WTO Disciplines?*, E15 Task Force on Rethinking International Subsidies Disciplines (ICTSD | World Economic Forum, 2015).

1405 Howse, "Making the WTO (Not So) Great Again: The Case Against Responding to the Trump Trade Agenda Through Reform of WTO Rules on Subsidies and State Enterprises," 378.

1406 Spadano, "Local content requirements: perspectives under WTO law and other international norms," 396.

1407 Joint Statement of the Trilateral Meeting of the Trade Ministers of Japan, the United States and the European Union, 14 January, 2020, available at: https://trade.ec.europa.eu/doclib/docs/2020/january/tradoc_158567.pdf.

VI.2.5 The TRIPS Agreement

VI.2.5.1 Legality of local working requirements

Another aspect which may be relevant for a development-oriented interpretation of WTO rules is construing the TRIPS Agreement to allow local working requirements coupled with compulsory licensing.

As seen, Article 27.1 of the TRIPS Agreement and Article 5(A)(2) of the Paris Convention embodies apparent conflicting norms to the extent that the former reflects a non-discrimination principle according to which "patents shall be available and patent rights enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced" and the latter allows Contracting Parties to "(…) take legislative measures providing for the grant of compulsory licenses to prevent the abuses which might result from the exercise of the exclusive rights conferred by the patent, for example, failure to work'.

However, as seen in Chapter 4, Article 2(1) of the TRIPS incorporates Article 5(A)(2) of the Paris Convention and therefore failure to work can be recognised as an abuse of the patent right subject to Article 31 of the TRIPS Agreement. This is further supported by text of the Declaration on the TRIPS Agreement and Public Health.

As seen, in many national legislations, compulsory license may be granted where the patented technology is not produced ("worked") domestically. This compulsory licensing may be particularly important in situations where the patent affects public health, the right to food, among other human rights and societal values enshrined in the normative framework for development. The Declaration on the TRIPS Agreement and Public Health[1408] embodies a development-oriented approach to the TRIPS Agreement, recognising that it has flexibilities which include the notion that "each provision of the TRIPS Agreement shall be read in the light of the object and purpose of the Agreement as expressed, in particular, in its objectives and principles" and "each member has the right to grant compulsory licences and the freedom to determine the grounds upon which such licences are granted."

In this context, it is feasible to admit that compulsory licences can be granted where the patentee holder could not produce the technology locally, subject to the conditions of Article 31 of the TRIPS Agreement.

1408 World Trade Organisation. Declaration on the TRIPS Agreement and Public Health of 20 November 2001, WTO Doc. WT/MIN(01)/DEC/2.

This interpretation is consistent with the objectives of the TRIPS Agreement, as stated in Article 7, which include the "promotion of technological innovation" and "the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations." It is important to recall that, at the core of local working requirements, is technological transfer to estimulate domestic innovation. These transfers may serve other policy goals such as employment creation, industrial and technological capacity building, national balance of payments, among others.[1409]

A development-oriented interpretation of the TRIPS Agreement allows for a reconciliation between Article 27.1 of this treaty and Article 5(2) of the Paris Convention to the extent that local working requirements may be relevant for domestic innovation and also for the promotion of the public interest in sectors of vital importance to WTO Members' socio-economic and technological development, in line with the principles of the TRIPS Agreement, established in Article 8 and reinforced in the Declaration on the TRIPS Agreement and Public Health.

The discipline of local working requirements conveys the different broader objectives of the TRIPS Agreement, as stated in its preamble. On one side, restricting, to some extent, local working requirements may be important to "reduce distortions and impediments to international trade; on the other side, allowing them in certain circumstances may be important to promote the underlying public policy objectives of national systems for the protection of intellectual property, including developmental and technological objectives Allowing local working requirements subject to the conditions of Article 31 of the TRIPS Agreement also sheds light to the special needs of developing countries with respect to flexibilities in the domestic implementation of laws and regulations in order to enable them to create a sound and viable technological base.

However, as noted by Cottier et al, "the calculation of costs and benefits of a working requirement on the local community depend on a number of factors, including whether the local demand for a patented invention can be met in a more efficient and economic manner through importation. The results of the calculation are, therefore, likely to vary among regions and technology sectors."[1410] In addition, the authors observe that the

1409 Thaddeus Manu, "The Complexity of Using the Patent Standards Under TRIPS for the Promotion of Domestic Industrial Development in Developing Countries in the Absence of Local Working Requirements: Rethinking the Role of the World Intellectual Property Organization in Intellectual Property Standard-Setting," *Journal of World Trade* 51, no. 3 (2017): 519.

1410 Thomas Cottier, Shaheeza Lalani, and Michelangelo Temmerman, "Use it or lose it: Assessing the compatibility of the paris convention and TRIPS agreement with respect to local working requirements," *Journal of International Economic Law* 17, no. 2 (2014): 438.

"economic impact and welfare effects of requiring local working will vary depending on a States level of economic development and the patented technology in question." [1411] In this context, it is important to hightlight that local working requirement is not a final solution for a country's problems relating to innovative capacity or demand for technology transfer. Nevertheless, it can be relevant depending on specific circumstances and the technology segment.

VI.2.5.2 Facilitating technology transfer

As seen above, the adoption of local working requirements could be used as a strategy for a country to enhance domestic firms' innovative capacity. However, not all scenarios make the use of these instruments feasible. In particular, the nature of globalisation means that not all patented inventions can be practicably or economically manufactured locally.[1412]

In particular, it is necessary to look at the global value chains (GVCs). Nowadays, global economy is characterised by companies engaging in different types of activies in the process of converting inputs into outputs. As explained by Manu, "intermediate goods are traded in fragmented and internationally dispersed production processes. They are part of a new global economy in which connectedness matters more, and have become important end-markets, where trade in components as opposed to trade in finished goods is the commercial norm." [1413] Participation of developed and developing countries in GVCs have a direct effect on their economy, employment levels and income.

In this sense, it is for policymakers to evaluate whether it makes sense to adopt local working requirements or how the relevant country could fit into the GVCs, which can also present opportunities for shared learning and technology transfer. This is explained by the fact that while technology transfer may be the main goal of patent working requirements, local working is not the only means to achieving technology transfer. As observed by Manu:

> Technology transfer can be achieved through market channels other than local working through foreign direct investment, which may be expected generally to transfer technological information that is newer or more

1411 Cottier, Lalani, and Temmerman, "Use it or lose it: Assessing the compatibility of the paris convention and TRIPS agreement with respect to local working requirements," 439.

1412 Manu, "The Complexity of Using the Patent Standards Under TRIPS for the Promotion of Domestic Industrial Development in Developing Countries in the Absence of Local Working Requirements: Rethinking the Role of the World Intellectual Property Organization in Intellectual Property Standard-Setting," 532.

1413 Manu, "The Complexity of Using the Patent Standards Under TRIPS for the Promotion of Domestic Industrial Development in Developing Countries in the Absence of Local Working Requirements: Rethinking the Role of the World Intellectual Property Organization in Intellectual Property Standard-Setting," 533.

> productive than that of local firms. It can be achieved through non-market channels, including reverse engineering and imitation. A third major channel is technology licensing, or joint ventures, which may be done either within firms or between unrelated firms at arm's-length. [1414]

In this context, it is important that the TRIPS Agreement and potentially other WTO agreements such as the SCM Agreement and the TRIMS Agreement facilitate and do not hinder technology transfer mechanisms.

As explained by Sellin and Coomans.

> Technology transfer is a crosscutting issue that is addressed by different regimes of international law. There is no comprehensive international framework for technology transfer. In relation to access to medicines, local production and technology transfer, international trade and IP law are of particular importance. The strongest provisions on technology transfer can be found in the realm of environmental law, particularly the UN Framework Convention on Climate Change and Technology Transfer, which clearly sets out the obligations of developed states towards developing states. The shared objective between these different fields of law, human rights and technology transfer is sustainable development. As a development issue technology transfer has been a subject of international importance since the 1960s and also a source of friction between the global North-South.[1415]

During the Doha Round, a Working Group on Transfer of Technology was established to examine the relationship between trade and the transfer of technology from developed to developing countries, and ways to increase the flow of technology to developing countries. Provisions in the WTO agreements mention the need for a transfer of technology to take place between developed and developing countries. However, it is not clear how such a transfer takes place in practice and if specific measures might be taken within the WTO to encourage such flows of technology.

A group of developing countries has suggested focusing on points such as (i) examining WTO provisions related to technology transfer with a view to making them operational

1414 Manu, "The Complexity of Using the Patent Standards Under TRIPS for the Promotion of Domestic Industrial Development in Developing Countries in the Absence of Local Working Requirements: Rethinking the Role of the World Intellectual Property Organization in Intellectual Property Standard-Setting," 536.

1415 Sellin and Coomans, *Extraterritorial Human Rights Obligations and the Transfer of Technology for Local Production and Research & Development for Essential Medicines,* 15, footnotes ommitted.

and meaningful; (ii) looking at WTO provisions which have the effect of hindering transfer of technology to developing countries (including intellectual property); among others. The underlying idea is that existing WTO provisions are not sufficiently facilitative of technology transfer. The TRIPS Agreement, for instance, has a very limited provision in operational terms, mandating developed country Members provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed country Members in order to enable them to create a sound and viable technological base (Article 66.2).

However, the issue on technology transfer generates a large divide between developing and developed-country Members at the WTO. Repeatedly, developed countries have argued that there is a danger in coercing the private sector into giving away its technology, as, according to their view, this would reduce the appeal for foreign direct investment. More recently, the US, EU and Japan have proposed that "forced technology" be deemed prohibited under WTO law. In this context, they stated that:

> The Ministers discussed possible elements of core disciplines that aim to prevent forced technology transfer practices of third countries, the need to reach out to and build consensus with other WTO Members on the need to address forced technology transfer issues and their commitment to effective means to stop harmful forced technology transfer policies and practices, including through export controls, investment review for national security purposes, their respective enforcement tools, and the development of new rules.[1416]

As a result, there is currently an impasse among WTO Members on how to regulate technology transfer in the WTO context and this subject may remain a point of controversy in future negotiations.

From a human rights' perspective, the issue of technology transfer is closely related to the the rights to health[1417] and to enjoy the benefits of scientific progress and

1416 Joint Statement of the Trilateral Meeting of the Trade Ministers of Japan, the United States and the European Union, 14 January, 2020, available at: https://trade.ec.europa.eu/doclib/docs/2020/january/tradoc_158567.pdf.

1417 Article 25.1 of the UDHR sets forth that "everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control." Article 12 of the ICESCR states that "the States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."

applications,[1418] which are incorporated in the UDHR and the ICESCR. First, the right to health, which involves the right of access to essential medicine, can also be approached from the perspective of the knowledge required to produce such drugs.[1419] Second, the right to enjoy the benefits of scientific progress may refer to the sharing of the concrete benefits of scientific progress among people but also the development of science as such.[1420]

Chapman, in analysing the right to enjoy the benefits of scientific progress and Its applications explains that:

> The requirements of article 15 (4) should be interpreted in conjunction with other obligations enumerated in ICESCR, particularly the language of article 2 that directs each state party to undertake "steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized." Several general comments of the Committee on Economic, Social and Cultural Rights note the important role of international assistance in the total pool of resources and expertise available to poor countries in order to enable them to realize their human rights obligations. The general comment on the right to the highest attainable standard of health, for example, has several paragraphs on international obligations directing states parties to facilitate access to essential health facilities, goods, and services in other countries and to provide humanitarian assistance (Committee on Economic, Social and Cultural Rights 1999: para. 38–40). Presumably then there is a comparable obligation on the part of the developed countries to furnish assistance in the fields of science and technology and to enable access to essential knowledge and technologies. What that assistance

1418 Article 27.1 of the UDHR sets forth that "everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits." Article 15.(b) of the ICESCR establishes that "The States Parties to the present Covenant recognize the right of everyone to enjoy the benefits of scientific progress and its applications." In addition, Article 15 of UNESCO's Universal Declaration on Bioethics and Human Rights states that "benefits resulting from any scientific research and its applications should be shared with society as a whole and within the international community, in particular with developing countries."

1419 Sellin and Coomans, *Extraterritorial Human Rights Obligations and the Transfer of Technology for Local Production and Research & Development for Essential Medicines,* 7.

1420 Sellin and Coomans explains that the right to enjoy the benefits of scientific progress as a human right has remained rather obscure and unexplored for a long time in the human rights discourse. They suggest, however, that the right to enjoy the benefits of scientific progress may refer to both the sharing of the concrete benefits of scientific progress among people and the development of science as such. Sellin and Coomans, *Extraterritorial Human Rights Obligations and the Transfer of Technology for Local Production and Research & Development for Essential Medicines,* 7-8.

> should entail and what those products should be though needs to be specified. Going one step further, are there specific technologies that are so essential to the welfare of the inhabitants of particular countries that their people should be considered to have a collective right of access from the international community? (…) "Should it not be axiomatic that there is a human right to knowledge and technology that can benefit all?" (Lerner-Lam et al. 2005). The corollary of recognizing such a collective human right is the demands it would place on the international community and multilateral institutions, like the UN Development Program and the World Bank both to transfer vital knowledge and technologies to countries where they are needed and to make preemptive investments in critical and long-lasting infrastructure, such as water and sanitations systems, transport and telecommunications networks, and healthcare systems. [1421]

In analysing the issue of the sharing of benefits and the transfer of scientific knowledge and technologies that the need to promote everyone's access to science and its applications raises, the UN e Special Rapporteur in the field of cultural rights stated:

> Two declarations made by UNESCO that address the issue in the field of biomedical research, its conduct, outcomes and applications are a useful starting point. The Universal Declaration on Bioethics and Human Rights states that "benefits resulting from any scientific research and its applications should be shared with society as a whole and within the international community, in particular with developing countries". In article 15, it recognizes multiple forms of benefit-sharing, including "special and sustainable assistance to, and acknowledgement of, the persons and groups that have taken part in the research; access to quality health care; provision of new diagnostic and therapeutic modalities or products stemming from research; support for health services; access to scientific and technological knowledge; and capacity-building facilities for research purposes". The International Declaration on Human Genetic Data, in its article 19, addresses benefitsharing in almost identical terms. Important provisions may also be found in part IV of the International Treaty on Plant Genetic Resources for Food and Agriculture. Numerous United Nations documents, including some relating to the environment, biological diversity and climate change, emphasize the need to strengthen international

1421 Audrey R. Chapman, "Towards an Understanding of the Right to Enjoy the Benefits of Scientific Progress and Its Applications," *Journal of Human Rights* 8, no. 1 (2009): 29-30.

> cooperation in the area of science, develop the scientific and technological capacity of developing countries, ensure the international dissemination of scientific knowledge and research, particularly among industrialized and developing countries, and call for transfers of technologies, practices and procedures. A number of regional texts should also be recalled.
>
> The implied obligation for developing countries is the prioritization of the development, importation and dissemination of simple and inexpensive technologies that can improve the life of marginalized populations, rather than innovations that disproportionately favour educated and economically affluent individuals and regions. The corresponding obligation for industrialized States is to comply with their international legal obligations through the provision of direct aid, financial and material, as well as the development of international collaborative models of research and development for the benefit of developing countries and their populations.[1422]

As summarised by Sellin and Coomans,

> (…) Articles 7, 8, 66.2 TRIPS, WHO's GSPA-PHI Strategy [Global Strategy and Plan of Action on Public Health, Innovation and Intellectual Property] and developments within WIPO entail important clues for relating the transfer of technology for access to essential medicines to the human rights framework, in particular from the perspective of the REBSP [right to enjoy the benefits of scientific progress and Its applications] and the notion of ETO's [extraterritoriall obligations]. This is important from a normative point of view, however needs implementation in practice. This requires political will among all stake-holders. Taking into account the plurality and diversity of actors in the domain of technology transfer (States, intergovernmental organisations, corporations, research institutes, civil society) one of the key issues in this respect is assigning and dividing obligations and responsibilities to protect and fulfil among those actors. This should preferably be done on a case-by-case basis. In this regard the Maastricht Principles refer, by way of general guidance, to the technical and technological capacities of countries, available resources and influence in international decision-making processes.[1423]

1422 United Nations, *The right to enjoy the benefits of scientific progress and its applications*, Human Rights Council (2012), 18.

1423 Sellin and Coomans, *Extraterritorial Human Rights Obligations and the Transfer of Technology for Local Production and Research & Development for Essential Medicines,* 21.

From a human rights' view, instruments of hard and soft nature point towards the obligation of States to share scientific knowledge, in particular, in contexts related to essential knowledge and technologies. Nevertheless, the precise scope of such obligations and what constitutes *essential* knowledge and technologies remain rather unclear. In any case, there is a common understanding among human rights specialists that developed countries should provide assistance to improve the capacity of developing countries both directly and through networking among national academies of sciences, engineering, and medicine, collaboration among companies, research institutes and universities, especially in the form of joint ventures, and other collaborative forms of research and development.[1424]

Efforts from human rights specialists to better define the scope of the right to health and the right to enjoy the benefits of scientific progress and its applications, and the corresponding States' obligations as duty bearers remain very important to the extent that they strengthen the international discourse on the need for implementation of these human rights and progressively influence State practice. A good example is the Doha Declaration on the TRIPS Agreement and Public Health which explicitly recognises that the TRIPS Agreement "can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health", and reaffirmed the right to use the flexibilities included in the Agreement for this purpose.

The international dimension of the right to health and the right to enjoy the benefits of scientific progress and their scope, as discussed in the field of human rights, are important issues to be brough by WTO Members, in particular, developing countries in the context of WTO negotiations in support of more concrete actions for the issue of technology transfer. Specific areas/products and specific forms of assistance and collaboration should be discussed and defined to make Article 66.2 of the TRIPS Agreement[1425] more effective and not a "best effort provision" as well as the extent of Members' technical and technological capacities to contribute to initiatives aiming at facilitating technology transfer.

1424 Chapman, "Towards an Understanding of the Right to Enjoy the Benefits of Scientific Progress and Its Applications."; United Nations, *The right to enjoy the benefits of scientific progress and its applications*.

1425 Article 66.2 of the TRIPS Agreement: "Developed country Members shall provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed country Members in order to enable them to create a sound and viable technological base."

VI.3 DEVELOPMENT-ORIENTED ARGUMENTS SHOULD BE MORE ACTIVELY RAISED BY DISPUTING PARTIES IN WTO DISPUTE SETTLEMENT PROCEEDINGS

So far, this thesis has analysed the viability of a development-oriented approach to WTO applicable to LCRs and has made some suggestion on how to operationalise such approach considering legal, institutional and political constraints in the interpretation of WTO agreements. As a final observation, it is important to note that the advancement of a development-oriented approach to WTO disciplines is also highly dependent on the respondents. They need to more actively raise development-oriented interpretations of WTO law in the context of WTO disputes. The WTO adjudicating bodies will only consider development-oriented approaches to WTO law if these matters are raised before them.

A study conducted by Hestermeyer on the ICESCR in the WTO dispute settlement concluded that "despite the fact that the ICESCR is a legitimate source to turn to when interpreting WTO obligations, there is no dispute settlement practice in this regard. Economic, social and cultural rights were only brought up as an aside and in passing"[1426] and the parties have not conducted a thorough interpretative exercise of WTO law in view of ESC rights. The author mentions Nicaragua's reference to the ICESCR in a third-party submission in 2001, in a case where the core issue was the question of ownership of the Havana Club trademark taken over by the Cuban government.[1427] It also cites that Cuba, which, in a discussion of the case in the Dispute Settlement Body in 2009, relied on the right to self-determination to argue the illegality of the Cuba embargo of the United States.[1428] In addition, in *EU and a Member State—Seizure of Generic Drugs in Transit*, a case involving generic drugs and the TRIPS Agreement, India argued in its 2010 request for consultations that the TRIPS Agreement provisions cited should be read in the light of the ICESCR's right to health.[1429]

In the context of LCRs, despite their relevance as developmental strategies, WTO Members have not advanced development-oriented arguments to justify their WTO-inconsistent LCRs measures. In only 3 cases, it is possible to see arguments relating to development issues, but they are at times generic and not fully developed. In *Indonesia – Autos* (1998), Indonesia asserted that that the condition of developing country should influence the interpretation of certain provisions of WTO Agreement so as to give due regard to the development dimension of WTO law. More specifically, Indonesia claimed

1426 Hestermeyer, "Economic, Social and Cultural Rights in the World Trade Organization: Legal Aspects and Practice," 274.
1427 Panel Report, *US—Section 211 Appropriations Act*, WT/DS176/R, paras. 5.5–5.6
1428 WT/DSB/M/271 of 25 September 2009, para. 7.
1429 WT/DS408/1, 3.

that "[T]he numerous developing country carve-outs in the Subsidies Agreement (e.g., Article 27) reveal the WTO Members' recognition and acceptance of the necessity of subsidy measures to promote critical development programmes in such countries. In other words, the universe of benefits extended to developing countries under the Subsidies Agreement includes the right (albeit conditional) to provide subsidies. Therefore, because an affirmative finding of the threat of serious prejudice to a "like product" would operate to deprive a developing country Member of this generally available right, "like product" must be narrowly construed"[1430] In *India – Autos* (2002), India argued that it maintained LCRs for balance-of-payments reasons and that, although they could be inconsistent with the general prohibition of quantitative restrictions set out in Article XI of the GATT, they were justified under Article XVIII:B of the GATT.[1431] In *China – Auto Parts* (2009), China argued that its LCRs were necessary to prevent tariff circumvention. In China's view, the collection of taxes and the enforcement of tariff scheduled commitments are important especially for developing countries.[1432]

This suggests that the lack of a development-oriented interpretation by WTO adjudicating Members, at least in the context of LCRs, is also strongly linked to the absence of arguments in this regard by disputing parties. WTO adjudicating bodies therefore should be more incited so they can actually conduct the interpretation of WTO agreements in light of the normative framework for development.

By making development-oriented arguments in WTO disputes, disputing parties may not only be raising arguments that could favor them in the dispute itself but may also be building a rhetoric that can contribute to the advancement of WTO law from a development perspective. For instance, when the US challenged the Brazilian patent policy in the context of its program for universal access to AIDS treatment,[1433] Brazil adopted a multi-track strategy that not only allowed the resolution of its situation before the WTO, but also contributed to additional flexibilities in the TRIPS Agreement

As noted by Badin:

> the Brazilian government combined a multi-track strategy to its developmental concerns. Such strategy resulted in the following developmental legal tools: (i) the deliberate option by the Brazilian diplomacy to articulate the agenda in a way that could promote Brazil as a player in the IP

1430 Panel Report, *Indonesia – Autos* (1998), para. 8.210.
1431 Panel Report, *India – Autos* (2002), para. 1.132-39.
1432 Panel Reports, *China – Auto Parts* (2009), para. 4.534-40.
1433 WT/DS199 – *Brazil – Patent Protection*

> debate (on this sense, the reform Itamaraty's departments favored the actions); (ii) the promotion of international alliances among developing countries with similar concerns (such as the joint proposals to the WIPO/DA); (iii) the revival of the word "development" in legal instruments as a useful terminology to push for political changes and sympathy; (iv) the revision of IP hegemonic debate and its concepts, under the framework of public interest and public goods; (iv) the simultaneous action before the most relevant international organizations, playing with the forum shifting strategies; and (v) the approval of numerous legal acts in a set of relevant international organizations working on connected fields to IP and public health (such as the WTO, the WIPO, and the WHO)[1434]

Therefore, by furthering development-oriented arguments in LCR disputes, disputing parties may also be articulating arguments that contribute to the development of WTO law in this field.

As seen in Chapter 3, the concept of development has changed as a result of a long process of revindications of developing countries beginning with the decolonisation process in the 50's and 60's, doctrinal work and efforts to internalise the ideology of development within the UN. The notion of development has more recently expanded 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. In this context, by raising development-oriented arguments in LCRs disputes, WTO Members may be contributing for establishing a clearer definition of what development should entail in the WTO context and how a rights-based perspective could be used to further the interpretation of WTO agreements and possibly support a reform of WTO norms.

VI.4 CONCLUSIONS

As seen in Chapter 2, WTO discipline is very restrictive on LCRs affecting trade in goods and on local content subsidies. Because LCRs are discriminatory by nature, they are frequently found to be inconsistent with the national treatment principle embodied in Article III of the GATT 1994 and Article 2 of the TRIMs Agreement.

1434 Michelle Ratton Sanchez Badin, "Developmental Responses to the International Trade Legal Game-Examples of Intellectual Property and Export Credit Law Reforms in Brazil," *Available at SSRN 2207891* (2011): 42.

In addition, although the Appellate Body has defined a strict conditionality test[1435] according to which it may be harder to classify measures as local content subsidies prohibited under Article 3.1(b) of the SCM Agreement, such treaty does not have any explicit general exceptions through which Members could justify their LCRs. Therefore, where subsidies meet the requirement of conditionality, they may be considered WTO-inconsistent regardless of their underlying policy justifications.

For LCRs affecting services, the general picture is less severe as WTO Members have more room for manoeuvre. They have to be careful not to make specific commitments to grant market access and national treatment to service providers and natural persons in strategic sectors or sectors which may be protected for public policy reasons. Where commitments are made, however, LCRs may be easily found inconsistent with GATS rules on market access and national treatment.

As relates to public procurements, where countries have not made commitments to the GPA, it may be possible to establish preferential treatment of domestic companies in government procurements. Nevertheless, even if a WTO Member is not signatory to the GPA, it may not be able to impose LCRs mandating the procured entities to acquire a certain percentage of domestic inputs, as this may be considered inconsistent with Article III of the GATT 1994 and not exempted by the public procurement derogation set forth in Article III:8(a) of the same agreement, as explained in subsection II.2.3.1.

As to patent local working requirements, although up to date the WTO adjudicatory bodies have not interpreted the relevant rules in the TRIPS Agreement relating to this type of measure, it is possible to state that WTO Members are not allowed to enact general laws or regulations mandating that a patent holder produces the patented technology domestically. However, there is some room to allow local working requirements in individual cases in the context of compulsory licensing, subject to the conditions of Article 31 of the TRIPS Agreement.

In view of WTO rules prohibiting or restricting LCRs and also the institutional and political challenges discussed in Chapter 5, there is limited space to furthering 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

1435 In *US – Tax Incentives* (2017), the Appellate Body ruled that "(…) the relevant question in determining the existence of contingency under Article 3.1(b) is not whether the eligibility requirements under a subsidy may result in the use of more domestic and fewer imported goods, but whether the measure, by its terms or by necessary implication therefrom, sets out a condition requiring the use of domestic over imported goods." Appellate Body Report, *US – Tax Incentives* (2017), para. 5.40.

of the DSU. Some opportunities, however, can still be seized by the WTO adjudicatory bodies.

It is possible to further the development objective in the interpretation of the general exceptions in the GATT 1994 and the GATS. The WTO adjudicatory bodies already give space for this by broadly interpreting the term "public morals", providing Members more policy space to justify otherwise WTO-inconsistent measures. In addition, under the necessity test, panels and the Appellate Body are careful not to judge the level of protection of a policy objective chosen by the WTO Member. They simply assess whether less trade-restrictive alternative measures which can achieve the same level of contribution to the policy objective are available.

Nevertheless, there is room for improvement of the necessity test. In the context of LCRs, WTO adjudicatory bodies can, in analysing whether the measure contributes to the achievement of the policy goal, analyse those factors identified in empirical economic studies which, if present, may more likely bring success to the measure or, in other words, may make the measure contribute more effectively to its stated objective. In addition, it is necessary to consider all aspects of the economic and social impacts associated to a local content program in order to evaluate the feasibility of the alternative measure. This detailed analysis contributes to the transparency and good governance of local content measures to the extent that it requires WTO Members to provide more information on the functioning and expected results of their measures.

Additionally, it is also possible o envisage, under a development-oriented approach, that WTO adjudicatory bodies adopt a full proportionality analysis in connection with the general exceptions. This allows the adjudicatory bodies to mitigate the rigidness of the necessity test and to weight the competing values/interests more freely at stake, seeking reasonable and fair results by taking recourse to factors and criteria which are identified in a particular context. However, it is recognised that in a scenario where the Appellate Body is accused of judicial activism, a full proportionality analysis would probably face resistance.

In addition, current Appellate Body's interpretation of Article III.8(a) of the GATT 1994 could be reviewed. It has been suggested that current interpretation does not result in an harmonious and effective reading of this provision in light of the GPA. As a plurilateral agreement, the GPA only binds those WTO Members that decided to join it. Under the GPA, WTO Members make commitments under the coverage schedules to open their procurement activities and not to discriminate against foreign products, services or suppliers. Where WTO Members wish to impose restrictions and limitations to their

public procurement activity, they can sign the GPA. GATT national treatment rule should not apply to domestic content requirements applied in the context of government procurement in view of the derogation established in Article III.8(a) of the GATT 1994. However, the Appellate Body established a strict "competitive relationship' test, where *"the derogation of Article III:8(a) must be understood in relation to the obligations stipulated in Article III', the product of foreign origin must be either 'like', or 'directly competitive' with or 'substitutable' for – i.e. in a 'competitive relationship' with – 'the product purchased'."*[1436]

Interpreting the term "payment of subsidies" in Article III.8(b) of the GATT 1994 more broadly in line with the dissenting opinion of one member of the Appellate Body in *Brazil - Taxation* would also provide WTO Members more flexibilities in implementing localisation subsidies which can be relevant for their developmental purposes.

Furthermore, as relates to the SCM Agreement, a development-oriented approach would require reading into flexibities that are not explicit in the text or using the right to regulate as an affirmative defence so that local content subsidies could also be justified under the SCM Agreement where they entail important policy objectives. Nevertheless, again this type of interpretation risks being criticised for judicial activism.

Also, a development-oriented interpretation of the TRIPS Agreement allows that local patent working requirements be adopted in the context of compulsory licensing, considering a holistic interpretation of Articles 2.1, 27.1 and 31 of the TRIPS Agreement, Article 5(A)(2) of the Paris Convention and the Declaration on the TRIPS Agreement and Public Health.

Even considering the interpretative approach advanced above, there is limited scope for justifying local content programs under WTO law. As mentioned, when the WTO was created, this type of policy instrument was seen by mainstream economics as inefficient. Therefore, WTO rules were mainly crafted under this rationale. Nowadays, a growing body of economic work has challenged this general negative view. As a result, it is necessary to review WTO rules affecting LCRs. This review should be guided by an in-depth study on the how LCRs are related to social objectives and how they affect trade and global markets. This better understanding about the functioning and effects of local content programs are crucial for evidence-based adjustments of WTO rules affecting LCRs.

1436 Appellate Body Report, *India – Solar Cells*, para. 5.22. See also Appellate Body Report, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.74.

In this context, this thesis has proposed to reform the general exceptions to include more policy objectives that would be in line with those of local content measures, including, for instance, protection of employment levels, protection of the rights of indigenous people, development of industries connected to essential goods (e.g. vaccines, health products), among others. Additionally, it has been suggested that WTO Members should clarify which type of proportionality test they intend WTO adjudicatory bodied to make in connection with the general exception clauses. Furthermore, it is necessary to reform the SCM Agreement to include general exceptions like those in the GATT 1994 and the GATS or to revisit and re-create the category of non-actionable subsidies so that WTO Members have more possibilities of justifying subsidies that are important to address legitimate societal concerns. WTO rules should also be reviewed to stimulate technology transfers from developed countries to developing countries in more effective and operational terms.

CONCLUSION

LCRs in the WTO

Mainstream economic literature generally condemns local content policies, stating that they are inefficient and generate market distortions. However, this is not the whole story. A growing number of empirical economic studies shows that, under certain circumstances, these policies can generate positive social and economic outcomes and contribute to a country's development process especially if they are designed in an open and transparent way, taking into account local capabilities and infrastructure, allowing for cooperation between the government, market and society, and set in the context of a wider strategy of economic and social development.

Of course, LCRs do not come without risks. For unscrupulous governments, they can be used as instrument for corruption, nepotism and illegal privileges. For the increasing number of populist leaders that the world has recently seen, they can also be used as a tool for popular appeal, but if implemented in a reckless way, the results can be extremely negative.

Regardless of their effects, LCRs have been extensively used by WTO Members despite specific prohibitions in WTO agreements. Even before the establishment of the WTO, industrialised countries adopted them to protect local industry and promote its competitiveness. Under the GATT system, LCRs were also prohibited by the well-known GATT national treatment obligation. Being a discriminatory instrument that favours domestic over imported goods, LCRs were naturally caught by that principle. Nevertheless, GATT dispute settlement system was weak, and it would not be effective to challenge measures that contracting parties themselves were frequently using.

With the advent of the WTO, new rules were created, which restricted even more the use of LCRs, for example, the SCM Agreement which prohibits local content subsidies (Article 3.1(b)) and the TRIPS Agreement which restricts laws and regulations imposing general patent local working requirements in view of the non-discrimination rule set forth in Article 27.1. In addition, the WTO dispute settlement system became strong and rules-based, which made it more feasible for any WTO Member to challenge any WTO-inconsistent measure from trading partners.

Surprisingly, even with the creation of stricter disciplines against the use of LCRs, WTO Members did not abandon their local content policies, except when challenged at the WTO dispute settlement system. In WTO committes, in particular, the Committee on Trade-Related Investment Measures (TRIMs), every year there are objections to WTO

Members' LCRs. Further, after the international economic crisis of 2008, more LCRs have been implemented by WTO Members. Now, with the current unprecedented crisis generated by the Covid-19 pandemic, new LCRs are being implemented by governments as massive support to domestic industry is expected. In fact, the US wasted no time and implemented, in March 2020, LCRs in connection with a funding program for small businesses.

As most WTO Members continue to use LCRs, one would expect that they did not challenges measures that they implement themselves domestically. Nevertheless, the number of LCRs challenged at the WTO dispute settlement system increased. There were 67 disputes involving LCRs from 1995 to 2021, and less than a half were actually analysed by WTO adjudicating bodies.

WTO Members challenge LCRs from other Members that affect their export interests, which may be closely connected to their (right to) development. While the country implementing a local content measure may have legitimate developmental objectives in doing so, the affected trade partners may also have developmental concerns in searching market access to the country restricting imports through LCRs. International trade can be an important source of finance to both the private sector and the public sector in developing countries in addition to interacting with various factors that influence social and environmental sustainability. This shows that the debate relating to the right of development is complex and comprises both the party adopting the local content policy and the other suffering from market access restrictions.

In all LCR disputes analysed by WTO adjudicating bodies (except one), the relevant LCR was considered WTO-inconsistent. No respondent was able to justify its local content policy based on WTO exception clauses or derogations. In addition, in only 3 (three) cases involving developing countries as respondents, they have articulated arguments based on their status as a developing country or the development objective of the measure, even though WTO Members often say that development is at the centre of WTO.[1437]

WTO restrictions on the use of LCRs

WTO law is very restrictive to LCRs. This is because, as explained, these rules were crafted under the rationale of mainstream economics, which deemed these instruments as inefficient and ineffective. The GATT 1994 contains the national treatment principle (Article

1437 See, for instance: European Commission, *Concept paper on WTO modernisation: Introduction of future EU proposals.* WTO. China's Proposal on WTO Reform. 13 May 2019. Available at: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?CatalogueIdList=254127&CurrentCatalogueIdIndex=0#. Accessed on: 26 June 2020.

III) that outlaws LCRs, which are discriminatory by nature. Additionally, the derogation/exemption from national treatment principle in cases of public procurement established in Article III:8(a) of the GATT 1994 does not comprise those procurements that set local content obligations for goods that are different from the good being procured. For instance, governmental procurements for electricity which require that the energy producers purchase *domestic* equipment for energy generation will be considered inconsistent with the GATT 1994. In addition, the exception set forth in Article III:8(b) in cases of domestic subsidies is not applicable to LCRs according to the interpretation of the majority of members of the Appellate Body.

The TRIMs Agreement, by prohibiting trade-related investment measures that violate GATT national treatment obligation, equally outlaws LCRs. The Agreement even has an express prohibition in its Illustrative List for those measures which are "mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage, and which require the purchase or use by an enterprise of products of domestic origin or from any domestic source, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production."

Likewise, the SCM Agreement restricts LCRs when they take the form of "subsidies contingent upon the use of domestic over imported goods". Local content subsidies are prohibited subsidies under Article 3.1(b). Therefore, there is no need to prove their adverse effects on trade and they should be withdrawn without delay.

In turn, the GATS is more flexible towards the adoption of LCRs relating to services as Members can decide to make or not specific commitments to grant market access and national treatment to services and service providers. [1438] However, if commitments are made and subject to any limitations inscribed in Members' Services Schedules, LCRs affecting foreign investment and employment of local and foreign staff can be restricted under the GATS in view of market access (Article XVI) and national treatment (Article XVII) clauses. In particular, Members will not be able to restrain foreign service providers' ability to access the host country's market; to use LCRs to secure employment of local workforce; to require firms to have a certain percentage of domestic equity or to partner with local companies. No measures can be implemented that give an advantage for companies that privilege services rendered locally.

1438 Johnson, *Space for Local Content Policies and Strategies: A Crucial Time to Revisit an Old Debate,* 17.

Further, the GPA as a plurilateral agreement will only curb the behaviour of those WTO Members that are parties to it and that have made specific commitments. GPA clearly prohibits LCRs in the context of public procurements. However, as mentioned above, certain LCRs associated to public procurements are already prohibited under Article III of the GATT 1994, as WTO adjudicating bodies have not exempted them under the derogation set forth in Article III:8(a).

In addition, under the TRIPS Agreement, questions can be raised as to the legality of establishing local working requirements, that is, requirements that a patented technology be produced locally in view of the non-discrimination rules established in Article 27.1 and Article 3.1 of the Agreement. However, as seen, there are relevant arguments for defending that, at least the grant of compulsory license for failure to locally work a patent on a case-by-case basis and after considering the individual merits of each case can be potentially justified under Article 31 of the TRIPS Agreement.

A close look at the WTO jurisprudence on local content measures show that disputing parties cannot adequately rely on current exception clauses in WTO agreements, in particular, Article XX of the GATT 1994 (and Article XIV of the GATS), to justify their otherwise WTO-inconsistent LCRs. The most relevant policy objectives stated in the paragraphs of Article XX of the GATT 1994 for the purposes of justifying LCRs (paragraphs (a), (b) and (d)) require the application of the so called "necessity test". Under this test, WTO adjudicating bodies assess other less trade-restrictive measures that could substitute the relevant local content measure at stake. Panels and the Appellate Body have often found that LCRs could be replaced by these alternative measures. Therefore, LCRs are not considered to be justified under Article XX of the GATT 1994. In addition, the SCM Agreement does not contain an exception clause like Article XX of the GATT 1994 that could be used to justify prohibited local content subsidies.

Developmental and societal dimension of LCRs

LCRs have historically been used for developmental purposes, considering that they can potentially encourage the development of local industry, increasing its competitiveness in the long run; stimulate the creation of jobs and the transfer of skills/know-how; enhance technology transfer, increasing local technological capabilities; promote innovation, research and development; and develop backward, forward and sideways linkages along the value chain. In specific sectors, LCRs can play additional roles. When connected to the renewable energy sector, LCRs can be associated with broader goals of promoting a clean environment; when linked to the broadcasting and programming sectors, LCRs can promote local culture and local heritage; when linked to the health sectors, LCRs can help the development of a local industry for drugs and medical sup-

plies in a country which may be highly dependent on expensive imports of medicines and medical products; when implemented to integrate local communities displaced by mining projects, LCRs can contribute to the realisation of indigenous peoples' rights.

If, from the point of view of international trade, LCRs can be seen as prejudicial, by favouring domestic industries and displacing imports and potentially excluding more competitive international players at the cost of temporarily protecting the national industry; from the developmental and societal perspective, if they are properly designed, LCRs could fulfil important objectives and contribute to the realisation of human rights in the long haul. Therefore, from a trade liberalising standpoint, LCRs may be harmful at least in the short and medium-term while, from a developmental and societal view, they may be positive in the long run.

As stated by Peter Van den Bossche in his farewell speech from the Appellate Body, "the most challenging cases for me were those regarding the balance struck in the relevant WTO agreement between free trade and conflicting societal values, as well as cases regarding the proper role under WTO law of governments in the economy."[1439]

LCR cases are precisely these difficult and challenging cases where WTO adjudicating bodies are placed at the crossroad between free trade and development and shall decide which path to take. They are also those cases where the WTO adjudicating bodies have to rule on the role of governments vis-à-vis WTO rules. These are disputes where there is no pre-determined solution, but conflicts to manage.

In addition to the right to development of the WTO Member implementing the LCR, there is also the right to trade of other WTO Members which can be closely connected to their own development process as trade (market access included) is also an import tool for development. The economic and social benefits of trade include, for instance, export-led economic growth, economic diversification and restructuring, industrialisation, efficient resource allocation, positive income effects, technological innovation and poverty alleviation. There are also non-economic benefits on peace and democratic institutions.[1440]

1439 Peter Van den Bossche, "Farewell speech of Appellate Body member Peter Van den Bossche," (28 May 2019). https://www.wto.org/english/tratop_e/dispu_e/farwellspeech_peter_van_den_bossche_e.htm#:~:text=On%2028%20May%202019%2C%20departing,This%20is%20what%20he%20said%3A&text=I%20served%20on%20WTO%20dispute,and%20that%20is%20long%20enough. Accessed on: 30 June 2020.

1440 UNCTAD, *Better Trade for Sustainable Development: The role of voluntary sustainability standards* (United Nations, 2021), 5.

In view of this developmental and societal dimension of LCRs, it is necessary to discuss the interpretation and application of WTO rules affecting them specially in a time that (i) development has become a primary value and objective at the domestic and international levels, (ii) there is a call for a global partnership for development since the MDGs and now with the SDGs, (iii) the WTO itself recognises that it is "central to achieving the 2030 Agenda for Sustainable Development and its Sustainable Development Goals (SDGs), which set targets to be achieved by 2030 in areas such as poverty reduction, health, education and the environment";[1441] (iv) under SDGs, it is very important to bring the WTO and its trade agenda closer to citizens and ensure that trade contributes to the pursuit of broader objectives set by the global community;[1442] (v) the WTO Agreement incorporates the development objective by referring to several development issues in its preamble, including full-employment, raising living standards, sustainable development, and concerns regarding the different levels of economic development of its Members; and (vi) WTO law has mechanisms to establish a dialogue with the normative framework for development through systemic integration.

The development-oriented approach to WTO law and the legal framework for development

In view of the above, this thesis has proposed a development-oriented approach to WTO law, that is, a way of interpreting WTO agreements that potentially better captures the development dimension of the WTO agreements and provides an enhanced landscape for WTO adjudicating bodies to strike a proper balance between free trade and developmental objectives. This approach to WTO law stresses the relevance of teleological interpretation of WTO rules and systemic interpretation of WTO agreements in light of the normative framework for development.

Such development-oriented approach is intended to make interpretation of WTO agreements more in line with the promotion of the right to development and human rights, consistent with the 2030 Agenda for Sustainable Development. It also aims at alleviating some of the burdens of trade liberalisation; and facilitating those aspects of the development objective that are enshrined in the WTO agreements or that are set forth in the relevant international law that the interpretative process is informed by.[1443] Such approach is also believed to bring more legitimacy - understood as accepted authority – of WTO and its dispute settlement system. Ultimately, lack of consideration

1441 'The WTO and the Sustainable Development Goals'. Available at: https://www.wto.org/english/thewto_e/coher_e/sdgs_e/sdgs_e.htm. Accessed on: June 30, 2020.
1442 European Commission, *Concept paper on WTO modernisation: Introduction of future EU proposals,* 6.
1443 Qureshi, *Interpreting WTO Agreements: Problems and Perspectives*, 185.

to developmental and societal concerns will inevitably result in loss of authority of WTO adjudicating bodies.

WTO law should not be read in isolation from international law and, accordingly, from the norms pertaining to the normative framework for development. Such legal framework is a product of historical demands of developing countries during the decolonisation process and efforts from legal doctrine and from UN bodies and agencies to internalise a new concept of development that goes beyond economic considerations and is premised on principles of inherent dignity, a fair social and international order, and self-determination. Although it is comprised of a wide multitude of norms, its pillars lie in the ESC rights, mainly embodied in the ICESCR, and the right to development crystallised in the UNDRD and cross-referenced in other treaties and soft law instruments. Of particular importance for current times is the intrinsic relationship between the right to development and the idea of sustainable development. While originally the right to development was not particularly concerned with environment, the increasing awareness of climate change problems, loss of biodiversity, water shortage, among others, results in an integrative approach of development where economic and social development must be an integral part of environmental protection, and vice versa. In this context, it is necessary to recognise that the right to development cannot be realised if development is not sustainable.

Development, under the UNDRD, entails "a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom". From the right to development, two key notions derive. First, the idea that "the right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized" (Article 1.1 of the UNDRD). Second, that the right to development implies the full realisation of the right of peoples to self-determination, including the States' right to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom.

With these notions, the UNDRD contributed to the alignment of the concept of development to human rights, representing the right to development as one entailing the progressive realisation of civil, political, economic, social and cultural rights, which are

interdependent. In this context, it also shed light to the role of States in promoting a domestic environment that is conducive to the realisation of human rights, and also to their responsibility, at the international level, to cooperate for the promotion and fulfilment of human rights. Also, from the right to development is also derived the right of the State to an independent process of development, where it should determine the direction of legitimate public policies. Closely related to the right to development and the principle of self-determination is the international customary 'right to regulate.' Although traditionally resorted to in international investment law under the police powers doctrine, the right to regulate, under a broad sense, involves the States' right to regulate their political, economic and social affairs and adopt laws to protect matters of public interest in derogation of international commitments.

A development-oriented approach to WTO agreements tries to reconcile the principles, concepts and rights arising from the legal framework for development with WTO rules. Although many of the norms pertaining to that framework are of soft law nature, this should not reduce their role in the interpretation of WTO law. As seen, soft law has a role in the argumentative process of judges and influence the interpretation of treaties. Additionally, the normative framework for development also comprehends treaties, general principles and international customary law, which has a more established role in systemic interpretation. Therefore, at least in theory, it is possible to envisage the interpretation of WTO law in light of such legal framework.

Challenges to a development-oriented interpretation of WTO rules

A development-oriented approach to WTO law or, more specifically, to WTO rules applicable to LCRs, does not come without challenges of a legal, institutional and political nature.

First, from a legal perspective, although many customary interpretative rules and techniques used by panels and the Appellate Body, especially holistic interpretation under the VCLT rules of interpretation, systemic integration and the principle of effectiveness, encourage a development-oriented interpretation of WTO law, the vacillating way in which WTO adjudicating bodies have employed these techniques poses doubts on their systematic application so as to form a consistent approach to WTO law which furthers its development objective.

Second, the interpretation of panels and the Appellate Body of Article 31.3(c) of the VCLT restricts the scope of systemic interpretation in light of the norms pertaining to the development framework, considering that most of these norms are of soft law nature and relevant treaties were not signed by the whole WTO membership.

Although soft law has played some role in the interpretation of WTO law,[1444] being used as evidence of the common understanding of the parties as to the meaning of a term, in general, panels and the Appellate Body do not often use non-traditional sources of law in the interpretation of WTO agreements.[1445] Since a large part of the normative framework for development consists of soft law norms, there could be some barriers in considering them in the interpretation of WTO agreements considering WTO case law.

Further, the reference in Article 31(3)(c) of the VCLT to international law rules 'applicable between the parties' does not clarify whether these rules shall apply only to the parties to the dispute or whether it should be applicable to *all* the parties to the treaty under interpretation. If WTO case law interprets that WTO agreements can only be interpreted in light of international treaties or rules that are applicable to the whole WTO membership, this could also reduce the scope for systemic interpretation of WTO law in light of the normative framework for development, given that it is difficult to find human rights treaties whose parties correspond to the whole WTO membership. In *Peru – Agricultural Products* (2015), the Appellate Body arguably suggested (but it did not rule on the issue) that recourse to Article 31.3(c) may presuppose that all parties to the WTO are bound by the rules of international law,[1446] which reflects a restrictive approach to systemic interpretation.

Also, pursuant to WTO jurisprudence, WTO law shall be interpreted in light of international rules where they are relevant. The relevance in this case is analysed considering whether those rules *concern the same subject matter as the treaty terms being interpreted.*[1447] Where the expression "same subject matter" is interpreted too narrowly, it may impede that certain categories of legal instruments relating to the right to development, economic, social and cultural rights be used for interpreting WTO law.

1444 For instance, in *US-Shrimp* (1998), treaties/declarations not ratified by all Members were used to interpret the GATT 1994, even if not as a relevant rule of international law applicable in the relations between 'the parties' under Art 31.3(c) of the VCLT. See Appellate Body Report, *US – Shrimp* (1998), para. 130.

1445 For instance, in *EC – Approval and Marketing of Biotech Products* (2006), the Panel considered as 'rules', for the purpose of Article 31(3)(c), only those conventional elements of hard law. See: Panel Report, *EC – Approval and Marketing of Biotech Products* (2006), para 7.67. In *US – Anti-Dumping and Countervailing Duties (China)* (2011), the Appellate Body equated 'rules of international law' under under Art 31.3(c) of the VCLT to those sources defined in Article 38 of the ICJ Statute. See: Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)* (2011), paras. 307 and 308.

1446 Because the AB did not find that the international norms resorted to by Peru were "relevant" for the purposes of Article 31.3(c), it argued that it did not need to address the meaning of the term 'parties' in this provision. However, from the reading of the AB report, it is possible to make some inferences as to its understanding of this term.

1447 Appellate Body Reports on *US – Antidumping and Countervailing Duties (China)* (2011), para. 308; *EC and certain member States — Large Civil Aircraft* (2011), para. 846-855; *Peru – Agricultural Products* (2015), paras. 5.102-5.103.

Third, although the principle of effectiveness as applied by panels and the Appellate Body is helpful in advancing a development-oriented approach of the WTO agreements, its role is still modest. According to the definition of the principle of effectiveness adopted by WTO adjudicators, "interpretation must give meaning and effect to all the terms of the treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility".[1448] WTO adjudicating bodies have advocated that, according to this principle, "a treaty interpreter must read all applicable provisions of a treaty in a way that gives meaning to all of them, harmoniously."[1449] Nevertheless, in international law doctrine, the principle of effectiveness can be also viewed as a requirement that the adjudicator acts "on the implied intention of the parties, i.e. on his understanding, having regard to the contract as a whole and to surrounding circumstances, as to what would have been the attitude of the parties if confronted with the issue." [1450] Under this latter approach, judges could potentially give more operational value to vaguer obligations. The language of the hortatory provisions of the WTO agreements, however, make this task difficult.

In addition, panels and the Appellate Body adopt a strict necessity test under Article XX of the GATT 1994, which may, in certain cases, impede the justification of LCRs under WTO law. It would be important, for a development-oriented approach, to mitigate the rigidness of the necessity test by applying a strict proportionality analysis. Further, WTO jurisprudence is not open to the use of human rights and other non-WTO norms as applicable law in WTO disputes, which could prevent the use of the right to regulate as an affirmative defence for WTO-inconsistent LCRs.

Fourth, from an institutional and political point of view, a development-oriented interpretation of WTO law also finds many challenges. The crisis of the Appellate Body was motivated, among other reasons, by strong criticism over its alleged judicial activism. Considering that a development-oriented interpretation of WTO law demands strong purposive and systemic interpretation of WTO agreements, WTO adjudicating bodies may fear that, in doing so, they migh be accused again of engaging in judicial activism and this could bring more problems to the WTO dispute settlement system already confronted by an unprecedented crisis. Also, because there is strong disagreement between WTO Members on the role for development, WTO adjudicating bodies, for the

1448 Appellate Body Report, *US — Gasoline* (1996), p. 23. See also: Appellate Body Report, *Canada — Dairy* (1999), para. 133; *Korea — Dairy*, para. 81; Appellate Body Report, *US — Section 211 Appropriations Act* (2002), para. 338; Appellate Body Report, *US — Offset Act (Byrd Amendment)* (2003), para. 271; *US — Upland Cotton* (2005), para. 549; *US — Softwood Lumber V (Article 21.5 — Canada)* (2006), para. 99.

1449 Appellate Body Report, *Argentina — Footwear (EC)* (2000), para. 81. See also *Canada — Renewable Energy / Canada — Feed-in Tariff Program* (2013), para. 5.26.

1450 Lauterpacht, "Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties," 80.

same reason, may not be prone to adopt a development-oriented approach to WTO law where the Members themselves have not agreed on the function of development within the WTO.

Further, the rise of far-right populist leaders has made major powers such as the US to adopt a unilateral behaviour contrary to international cooperation and multilateralism. These populist leaders frequently disregard human rights and development concerns. The US has made WTO Members refrain from availing their developing status. Other developing countries such as Brazil, which had a leading role in articulating the agenda of developing countries within the WTO, has lost its relevance in the multilateral forum as the government of the far-right president Bolsonaro adopts an "anti-globalism" approach. Although the election of Joe Biden has revitalised the hope for a decline of populism worldwide, it is too early to declare victory against populism and against the demise of multilateralism.

In addition, the rise of emerging powers, in particularly China, has resulted in a new balance in world geopolitics. Although these emerging powers allegedly support multilateral institutions such as the WTO, their increasing influence in the system has made it more difficult for countries to achieve consensus in multilateral discussions.

Also, under the Covid-19 pandemic crisis, countries have shown lack of cooperation at the international level. The UN Secretary-General said in an interview that it is a "tragedy" that the world's leaders have not been able "to come together to face COVID-19 in an articulated coordinated way. (…) Each country went with its own policy, different countries with different perspectives, different strategies and this has allowed the virus to spread."[1451]

In view of the above, current political scenario does not seem sympathetic to multilateralism, development concerns in general (let alone a global partnership for development, as envisaged in the 2030 Agenda), and much less to advancing development in the interpretation of WTO agreements.

Alternatives for a development-oriented interpretation of WTO law applicable to LCRs

The legal, institutional and political challenges for advancing a development-oriented interpretation of WTO law cast doubts on the feasibility of furthering this approach to

1451 "UN Chief: 'Tragedy' That World Lacks Coordinated Approach Against COVID-19," updated 1 May, 2020. Available at: https://www.voanews.com/covid-19-pandemic/un-chief-tragedy-world-lacks-coordinated-approach-against-covid-19. Accessed on July 1, 2020.

WTO rules applicable to LCRs. This thesis has discussed possible interpretative alternatives for the case of LCRs in the WTO which could in theory provide the respondent more room for justifying their local content measures on policy grounds.

Ultimately, a development-led interpretation of WTO law seeks to give adequate space for WTO Members to pursue their economic, social, cultural and political processes in view of the normative framework for development, and in light of a revitalised notion of embedded liberalism whereby international markets should be reconciled with social values and, accordingly, international trade rules should be compatible to different kinds of active public management of the economy, prioritising policy space based on legitimate policy objectives.

Despite the challenges to a development-oriented approach to WTO law, it has been suggested that LCRs have certain peculiarities that still permit advancing such interpretation. First, developing and developed WTO Members are increasingly making use of LCRs since the 2008 global financial crisis. Second, with the deepening of economic crisis caused by coronavirus pandemic and the disruption of GVCs, it is also possible that countries resort more to those types of policies that support domestic industry and stimulate the creation of jobs. In this context, local content measures can become even more popular. Therefore, WTO Members may be more open to approaches that give them more space to justify their LCRs vis-à-vis WTO law.

In this scenario, it has been suggested that, in analysing LCRs, disputing parties may benefit from the expansive reading of the "public morals" exception adopted by panels and the Appellate Body. At the same time, however, disputing parties would have to advocate for a full proportionality analysis of Article XX of the GATT 1994 (or Article XIV of the GATS) in order to mitigate the rigidness of the necessity test. In addition, current interpretation of Article III.8(a) of the GATT 1994 has been criticised. A more consistent and harmonic interpretation of this provision in light of the GPA is necessary so that LCRs can be used in public procurements without being considered a violation to the non-discrimination principle embodied in the GATT 1994. Also, Interpreting the term "payment of subsidies" in Article III.8(b) of the GATT 1994 more broadly in line with the dissenting opinion of one member of the Appellate Body in *Brazil - Taxation* would also provide WTO Members more flexibilities in implementing localisation subsidies which can be relevant for their developmental purposes.

Furthermore, a development-oriented approach would enable reading flexibilities in the SCM Agreement which are not explicit in the text. However, this approach would be in practice very difficult to justify in the WTO context, considering current criticism

over judicial activism. Lastly, the legality of patent local working requirements has been advocated when they are implemented in the context of compulsory licensing, provided that the conditions set forth in Article 31 of the TRIPS Agreement are satisfied.

This thesis has also made an appeal for disputing parties to embrace development-oriented approaches to WTO applicable to LCRs, given that, so far, they have not been sufficiently articulated in WTO disputes.

Finally, although it is not the focus of this thesis, it concluded that it would be adequate for WTO members to agree on new rules on LCRs, since the rationale for restricting them in WTO has been severely questioned and WTO Members continue to make use of these policy instruments despite restrictive WTO rules. In addition, there is a limit to the interpretative process and the WTO adjudicatory bodies cannot rewrite the WTO agreements at the risk of undermining their legitimacy, which is already in crisis. It is very important that the legislative and the judicial function of the WTO remains in equilibrium. In this sense, it would be appropriate to engage in negotiations supported by a larger body of economic analysis on LCRs so that a more reasonable framework on the regulation of LCRs could be designed. In particular, it would be necessary (i) to expand the the policy objectives of the general exceptions to comprise those goals more closely related to local content measures; (ii) clarify the type of proportionality test to be adopted by panels and the Appellate Body under the general exceptions; (iii) reform Article III.8(a) of the GATT 1994 so as to allow LCRs in public procurement; (iv) interpret Article III.8(b) of the GATT 1994 more broadly to provide WTO Members more flexibilities in implementing localisation subsidies; (v) amend the SCM Agreement to include a policy exceptions clause or to recreate a category of non-actionable subsidies and to review the list of prohibited subsidies and (vi) revisit the TRIPS Agreement to facilitate technology transfer to developing countries considering their particular needs and context.

As explained by Howse, "the Appellate Body, through case law that may often appear inconsistent – at least where various shifts in approach are inadequately explained – has nevertheless developed a number of judicial policies, which have, overall, oriented adjudication towards maintaining a balance between trade liberalization and the right to regulate, i.e., domestic regulatory autonomy."[1452] Nevertheless, there are a number of issues that now requires a new compromise among WTO Members. No matter how careful WTO adjudicatory bodies are in their judgment, the solutions may seem unsatisfatory. This, however, is not necessarily a problem of the interpretation conducted by

1452 Robert Howse, "The World Trade Organization 20 Years On: Global Governance by Judiciary," *European Journal of International Law* 27, no. 1 (2016): 13.

panels and the Appellate Body but of the agreements, which do not adequately reflect anymore the interests of the Members and the political dynamic among them. The issue of LCRs is ultimately part of this history. While there are some opportunities that WTO adjudicatory bodies can size in interpreting WTO rules affecting LCRs to further the development objective, ultimately the rules itself are highly hostile to local content policies. In the end, it is mainly in the WTO Members' hands to restore the negotiating function of the WTO and revisit the rules applicable to local content measures.

SUMMARY

LCRs between trade and development

Mainstream economic literature generally condemns local content policies, stating that they are inefficient and generate market distortions. However, this is not the whole story. A growing number of empirical economic studies shows that, under certain circumstances, these policies can generate positive social and economic outcomes and contribute to a country's development process especially if they are designed taking into account local capabilities and infrastructure, if they are designed in an open and transparent way, allowing for cooperation between the government, market and society, and if they are set in the context of a wider strategy of economic and social development.

Of course, LCRs do not come without risks. For unscrupulous governments, they can be used as instrument for corruption, nepotism and illegal privileges. For the increasing number of populist leaders that the world has recently seen, they can also be used as a tool for popular appeal, but if implemented in a reckless way, the results can be extremely negative.

Regardless of their effects, LCRs have been extensively used by WTO Members despite specific prohibitions in WTO agreements. Even before the establishment of the WTO, industrialised countries adopted them to protect local industry and promote its competitiveness. Under the GATT system, LCRs were also prohibited by the well-known GATT national treatment obligation. Being a discriminatory instrument that favours domestic over imported goods, LCRs were naturally caught by that principle. Nevertheless, GATT dispute settlement system was weak, and it would not be effective to challenge measures that contracting parties themselves were frequently using.

With the advent of the WTO, new rules were created, which restricted even more the use of LCRs, for example, the SCM Agreement which prohibits local content subsidies (Article 3.1(b)) and the TRIPS Agreement which restricts laws and regulations imposing general patent local working requirements in view of the non-discrimination rule set forth in Article 27.1. In addition, the WTO dispute settlement system became strong and rules-based, which made it more feasible for any WTO Member to challenge any WTO-inconsistent measure from trading partners.

Surprisingly, even with the creation of stricter disciplines against the use of LCRs, WTO Members did not abandon their local content policies, except when challenged at the WTO dispute settlement system. In WTO committes, in particular, the Committee on

Trade-Related Investment Measures (TRIMs), every year there are objections on WTO Members' LCRs. Further, after the international economic crisis of 2008, more LCRs have been implemented by WTO Members. Now, with the current unprecedented crisis generated by the Covid-19 pandemic, new LCRs are being implemented by governments as massive support to domestic industry is expected. In fact, the US wasted no time and implemented, in March 2020, LCRs in connection with a funding program for small businesses.

As most WTO Members continue to use LCRs, one would expect that they did not challenges measures that they implement themselves domestically. Nevertheless, the number of LCRs challenged at the WTO dispute settlement system increased. There were 67 disputes involving LCRs from 1995 to 2021, and less than a half were actually analysed by WTO adjudicating bodies.

WTO Members challenge LCRs from other Members that affect their export interests, which may be closely connected to their (right to) development. While the country implementing a local content measure may have legitimate developmental objectives in doing so, the affected trade partners may also have developmental concerns in searching market access to the country restricting imports through LCRs. International trade can be an important source of finance to both the private sector and the public sector in developing countries in addition to interacting with various factors that influence social and environmental sustainability. This shows that the debate relating to the right of development is complex and comprises both the party adopting the local content policy and the other suffering from market access restrictions.

In all LCR disputes analysed by WTO adjudicating bodies (except one), the relevant LCR was considered WTO-inconsistent. No respondent was able to justify its local content policy based on WTO exception clauses or derogations. In addition, in 3 (three) cases involving developing countries as respondents, they have articulated arguments based on their status as a developing country or the development objective of the measure, even though WTO Members often say that development is at the centre of WTO.[1453]

Considering this development dimension of LCRs and their potentially beneficial effects on countries' development processes, WTO rules should not raise undue obstacles to the use of LCRs when they are genuinely associated with development goals and

1453 See, for instance: European Commission, *Concept paper on WTO modernisation: Introduction of future EU proposals.* WTO. China's Proposal on WTO Reform. 13 May 2019. Available at: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?CatalogueIdList=254127&CurrentCatalogueIdIndex=0#. Accessed on: 26 June 2020.

related societal concerns.[1454] 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.

In this scenario, it is important to investigate how WTO rules affecting LCRs could be interpreted to further the development objective and to what extent interpretation could mitigate the rigidness 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.[1455]

Ultimately, it is widely accepted that trade is not an end in itself, but an instrument for development.[1456] 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 the political compromise of WTO Members with the so called "embedded liberalism", according to which markets should be embedded in their social context and trade agreements should be instrumental for the realisation of social objectives, including better standards of living, employment, etc. Under the notion of embedded liberalism, therefore, international trade rules should be compatible

1454 It is important to stress that not all LCRs contribute to development goals. Depending on how they are designed, they can contribute to the monopolisation of the market and turn into privileges to certain economic groups that lobby their interests with the government. In addition, they can conceal corruption schemes. See section I.2.5 of the thesis.

1455 For instance, the SCM Agreement explicitly prohibites local content subsidies (Article 3.1(b)) and the TRIMS Agreement in its Illustrative List explicitly outlaws certain LCRs.

1456 Rodrik, *The globalization paradox: democracy and the future of the world economy*, 24; Stiglitz, *Making Globalization Work*; Sen, *Desenvolvimento como Liberdade*; Prévost, *Balancing Trade and Health in the SPS Agreement: The Development Dimension*, 23. See also speeches from the WTO Director General which emphasise the need for trade to work for development and poverty alleviation: "WTO, IMF and World Bank leaders: trade must be an engine of growth for all". Available at: https://www.wto.org/english/news_e/news16_e/dgra_07oct16_e.htm (7 October 2016); "Azevêdo: trade works to create jobs and lift people out of poverty". Available at: https://www.wto.org/english/news_e/spra_e/spra83_e.htm (30 September 2015); "Lamy: it's time for a new "Geneva consensus" on making trade work for development". Available at: https://www.wto.org/english/news_e/sppl_e/sppl45_e.htm (30 October 2006). The instrumental role for trade in the promotion of development is also acknowledged in the Nairobi Ministerial Declaration, WT/Min(15)/Dec), (19 December 2015), paras. 6-8.

with different kinds of active public management of the economy.[1457] In this context, sufficient space should be left in WTO agreements for governments to respond to social and economic needs at the domestic level.[1458]

Importantly, Article XX of GATT 1994 as well as Article XIV of the GATS reflect this idea that free trade objectives should not prevail where certain relevant policy interests such as environment, health, among others, are at stake. In other words, trade liberalisation cannot be prioritised over Members' regulatory powers in important areas of public interest. Moreover, WTO agreements are not to be read in isolation from other international agreements. Systemic interpretation requires that treaties be interpreted together with any relevant rules of international law applicable in the relations between the parties.[1459] Accordingly, WTO law can be interpreted in light of an entire normative framework associated with human rights that encourages actions and measures targeted at the realisation of the right to development.

In this context, the International Convention on Economic, Social and Cultural Rights (ICESCR)[1460] establishes the State's obligation to respect, protect and fulfil different economic, social and cultural (ESC) rights such as the right to health, right to work, right to adequate standards of living, right to take part in cultural life, among others. The United Nations Declaration on the Right to Development (UNDRD)[1461] recognises development as *a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population*. It also recognises the right to development *as an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized*. The Millennium Development Goals (MDG) established in the 2000 United Nations Millennium Declaration[1462] and the Sustainable Development Goals (SDGs) adopted in the 2030 Agenda for Sustainable Development (2030 Agenda)[1463] are also part of international efforts to operationalise the fulfilment of the right to development.

1457 Helleiner, "The life and times of embedded liberalism: legacies and innovations since Bretton Woods " 2.
1458 Reid, "The WTO's purpose, regulatory autonomy and the future of the embedded liberalism compromise," 229.
1459 Article 31.3(c) of the Vienna Convention on the Law of the Treaties (VCLT). United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331.
1460 UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.
1461 UN General Assembly, *Declaration on the Right to Development: resolution / adopted by the General Assembly*, 4 December 1986, A/RES/41/128.
1462 UN General Assembly, *United Nations Millennium Declaration, Resolution Adopted by the General Assembly*, 18 September 2000, A/RES/55/2
1463 UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1

In view of the above, teleological interpretation of WTO agreements, which allows the reading of WTO law through the lens of sustainable development and societal objectives, and systemic interpretation, which enables clarification of WTO agreements in view of non-WTO norms, including those pertaining to the normative framework for development, lay the groundwork for a development-oriented approach of WTO law.

In order to promote development, trade policy must be embedded in a broader institutional setting that promotes a positive business environment and encourages investments in human capital (education), infrastructure and the quality of public and private sector governance.[1464] Behind-the-border policies should include "efficient regulatory regimes, institutions that support the participation of national firms in international markets, and measures to enhance the competitiveness of these firms by providing access to crucial services inputs." [1465]

Consequently, trade policy, as a tool for development, is more adequately assessed when the criteria are based not on its degree of openness to trade, but on how it contributes to the construction of a high-quality institutional environment that is conducive to development. As explained by Rodrik, a "high quality institutional environment has greater economic payoffs than a liberal trade regime."[1466] In this context, concerns with national development are more prominent and immediate for countries than concerns with free trade alone. This elucidates, in part, why LCRs continue to be used by WTO Members despite express prohibitions in WTO law. Additionally, it explains why development should play a role when interpreting LCRs under WTO law.

In this context and considering the potential benefits of LCRs for development, this study proposes a new interpretation to WTO law applicable to LCRs – one that is oriented towards the development objective. International trade regime and WTO rules should be thought as being at the service of development and not the contrary.[1467] Assuming that LCRs can indeed promote development at least under certain circumstances, then there is a need to further investigate where the WTO system and the normative framework for development should dialogue more and establish a deeper relationship.

As put by Qureshi, "the development dimension in the interpretation of the WTO agreements has been neither sufficiently articulated nor coherently structured in the architecture of international trade agreements."[1468] Development under the WTO has

1464 Hoekman, Mattoo, and English, *Development, Trade, and the WTO: A Handbook*, xxvii.
1465 Hoekman, Mattoo, and English, *Development, Trade, and the WTO: A Handbook*, 1.
1466 Rodrik, "Trade Reform as Institutional Reform," 3-4.
1467 Rodrik, "Trade Reform as Institutional Reform," 4.
1468 Qureshi, *Interpreting WTO Agreements: Problems and Perspectives*, 181.

so far been discussed more in terms of the transitional periods granted to developing countries for implementation of the agreements, limited development-oriented exceptions and derogations reflected in special and differential treatment (SDT) provisions and unilateral preferences. It has not been considered more broadly as a value and principle that should permeate the WTO Agreement and guide the interpretation of its agreements.[1469] Indeed, in the disputes involving LCRs, it is observable that in only an insignificant number of cases, the involved Members presented arguments stressing the development dimension of their local content policies.

A development-oriented approach to WTO law is much more than a discussion on carve-outs and SDTs. It is about interpreting international trade law taking into account the developmental dimension of public policies and trade measures and their potential in the realisation of human rights and the improvement of social and economic indicators within the country implementing them. It is about respecting the development needs of each WTO Member, their preferences and social values, and contributing to the promotion of human rights. Equally important, a development-oriented approach is preoccupied with "reducing or alleviating some of the burdens that accompany trade liberalisation; facilitating fair play between the differing membership of the WTO; and facilitating those aspects of the development objective that are enshrined in the WTO agreements or that are established in the relevant international law that the interpretative process is informed by."[1470]

As a result, the main purpose of this thesis is to evaluate whether a development-oriented approach to WTO law applicable to LCRs is possible, whether it could mitigate the severity of the WTO rules restricting LCRs and make the use of such policy instruments possible when they actually target development objectives. In assessing the feasibility of a development-oriented approach, it considers not only the technicalities involving the text of the WTO agreements and their interpretation, but also a broader picture.

It is suggested that interpretation of treaties cannot be dissociated from its institutional and political context. The institutional setup of panels and the Appellate Body matters as well as the social and political context where they are embedded. Current times are of great political turmoil. Debates over the crisis of liberal democracy, crisis of multilateralism, growing multipolarity, increasing inequality, the COVID-19 pandemic crisis, which has caused an "unprecedented disruption to the global economy and world trade"[1471]

1469 Rolland, *Development at the WTO*, 63-64. Nasser, *A OMC e os países em desenvolvimento*, 132.
1470 Qureshi, *Interpreting WTO Agreements: Problems and Perspectives*, 185.
1471 "COVID-19 and world trade" (2020). Available at: https://www.wto.org/english/tratop_e/covid19_e/covid19_e.htm. Accessed on: July 17, 2020.

and, more specifically, the paralysis of the Appellate Body have an impact on interpretation and therefore influence the feasibility of adopting a development-oriented approach to WTO law.

Therefore, in addition to analysing it analysis the mechanisms in WTO law and the customary rules of interpretation that could be used to articulate development in its interpretative process, also examining its limits, this thesis also examines the feasibility of a development-oriented approach in light of the current institutional and political challenges of the WTO.

WTO restrictions on the use of LCRs

WTO law is very restrictive to LCRs. This is because, as explained, these rules were crafted under the rationale of mainstream economics, which deemed these instruments as inefficient and ineffective. The GATT 1994 contains the national treatment principle (Article III) that outlaws LCRs, which are discriminatory by nature. Additionally, the derogation/exemption from national treatment principle in cases of public procurement established in Article III:8(a) of the GATT 1994 does not comprise those procurements that set local content obligations for goods that are different from the good being procured. For instance, governmental procurements for electricity which require that the energy producers purchase *domestic* equipment for energy generation will be considered inconsistent with the GATT 1994. In addition, the exception set forth in Article III:8(b) in cases of domestic subsidies is not applicable to LCRs according to the interpretation of the majority of members of the Appellate Body.

The TRIMs Agreement, by prohibiting trade-related investment measures that violate GATT national treatment obligation, equally outlaws LCRs. The Agreement even has an express prohibition in its Illustrative List for those measures which are "mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage, and which require the purchase or use by an enterprise of products of domestic origin or from any domestic source, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production."

Likewise, the SCM Agreement restricts LCRs when they take the form of "subsidies contingent upon the use of domestic over imported goods". Local content subsidies are prohibited subsidies under Article 3.1(b). Therefore, there is no need to prove their adverse effects on trade and they should be withdrawn without delay.

In turn, the GATS is more flexible towards the adoption of LCRs relating to services as Members can decide to make or not specific commitments to grant market access and national treatment to services and service providers. [1472] However, if commitments are made and subject to any limitations inscribed in Members' Services Schedules, LCRs affecting foreign investment and employment of local and foreign staff can be restricted under the GATS in view of market access (Article XVI) and national treatment (Article XVII) clauses. In particular, Members will not be able to restrain foreign service providers' ability to access the host country's market; to use LCRs to secure employment of local workforce; to require firms to have a certain percentage of domestic equity or to partner with local companies. No measures can be implemented that give an advantage for companies that privilege services rendered locally.

Further, the GPA as a plurilateral agreement will only curb the behaviour of those WTO Members that are parties to it and that have made specific commitments. GPA clearly prohibits LCRs in the context of public procurements. However, as mentioned above, certain LCRs associated to public procurements are already prohibited under Article III of the GATT 1994, as WTO adjudicating bodies have not exempted them under the derogation set forth in Article III:8(a).

In addition, under the TRIPS Agreement, questions can be raised as to the legality of establishing local working requirements, that is, requirements that a patented technology be produced locally in view of the non-discrimination rules established in Article 27.1 and Article 3.1 of the Agreement. However, as seen, there are relevant arguments for defending that, at least the grant of compulsory license for failure to locally work a patent on a case-by-case basis and after considering the individual merits of each case can be potentially justified under Article 31 of the TRIPS Agreement.

A close look at the WTO jurisprudence on local content measures show that disputing parties cannot adequately rely on current exception clauses in WTO agreements, in particular, Article XX of the GATT 1994 (and Article XIV of the GATS), to justify their otherwise WTO-inconsistent LCRs. The most relevant policy objectives stated in the paragraphs of Article XX of the GATT 1994 for the purposes of justifying LCRs (paragraphs (a), (b) and (d)) require the application of the so called "necessity test". Under this test, WTO adjudicating bodies assess other less trade-restrictive measures that could substitute the relevant local content measure at stake. Panels and the Appellate Body have often found that LCRs could be replaced by these alternative measures. Therefore, LCRs are not considered to be justified under Article XX of the GATT 1994. In addition, the SCM

1472 Johnson, *Space for Local Content Policies and Strategies: A Crucial Time to Revisit an Old Debate,* 17.

Agreement does not contain an exception clause like Article XX of the GATT 1994 that could be used to justify prohibited local content subsidies.

Developmental and societal dimension of LCRs

LCRs have historically been used for developmental purposes, considering that they can potentially encourage the development of local industry, increasing its competitiveness in the long run; stimulate the creation of jobs and the transfer of skills/know-how; enhance technology transfer, increasing local technological capabilities; promote innovation, research and development; and develop backward, forward and sideways linkages along the value chain. In specific sectors, LCRs can play additional roles. When connected to the renewable energy sector, LCRs can be associated with broader goals of promoting a clean environment; when linked to the broadcasting and programming sectors, LCRs can promote local culture and local heritage; when linked to the health sectors, LCRs can help the development of a local industry for drugs and medical supplies in a country which may be highly dependent on expensive imports of medicines and medical products; when implemented to integrate local communities displaced by mining projects, LCRs can contribute to the realisation of indigenous peoples' rights.

If, from the point of view of international trade, LCRs can indeed be prejudicial, by favouring domestic industries and displacing imports and potentially excluding more competitive international players at the cost of temporarily protecting the national industry; from the developmental and societal perspective, if they are properly designed, LCRs could fulfil important objectives and contribute to the realisation of human rights in the long haul. Therefore, from a trade liberalising standpoint, LCRs may be harmful at least in the short and medium-term while, from a developmental and societal view, they may be positive in the long run.

As stated by Peter Van den Bossche in his farewell speech from the Appellate Body, "the most challenging cases for me were those regarding the balance struck in the relevant WTO agreement between free trade and conflicting societal values, as well as cases regarding the proper role under WTO law of governments in the economy."[1473]

LCR cases are precisely these difficult and challenging cases where WTO adjudicating bodies are placed at the crossroad between free trade and development and shall decide which path to take. They are also those cases where the WTO adjudicating bodies have to rule on the role of governments vis-à-vis WTO rules. These are disputes where there is no pre-determined solution, but conflicts to manage.

1473 Bossche, "Farewell speech of Appellate Body member Peter Van den Bossche." Accessed on: 30 June 2020.

In addition to the right to development of the WTO Member implementing the LCR, there is also the right to trade of other WTO Members which can be closely connected to their own development process as trade (market access included) is also an import tool for development. The economic and social benefits of trade include, for instance, export-led economic growth, economic diversification and restructuring, industrialisation, efficient resource allocation, positive income effects, technological innovation and poverty alleviation. There are also non-economic benefits on peace and democratic institutions.[1474]

In view of this developmental and societal dimension of LCRs, it is necessary to discuss the interpretation and application of WTO rules affecting them specially in a time that (i) development has become a primary value and objective at the domestic and international levels, (ii) there is a call for a global partnership for development since the MDGs and now with the SDGs, (iii) the WTO itself recognises that it is "central to achieving the 2030 Agenda for Sustainable Development and its Sustainable Development Goals (SDGs), which set targets to be achieved by 2030 in areas such as poverty reduction, health, education and the environment";[1475] (iv) under SDGs, it is very important to bring the WTO and its trade agenda closer to citizens and ensure that trade contributes to the pursuit of broader objectives set by the global community;[1476] (v) the WTO Agreement incorporates the development objective by referring to several development issues in its preamble, including full-employment, raising living standards, sustainable development, and concerns regarding the different levels of economic development of its Members; and (vi) WTO law has mechanisms to establish a dialogue with the normative framework for development through systemic integration.

The development-oriented approach to WTO law and the legal framework for development

In view of the above, this thesis has proposed a development-oriented approach to WTO law, that is, a way of interpreting WTO agreements that potentially better captures the development dimension of the WTO agreements and provides an enhanced landscape for WTO adjudicating bodies to strike a proper balance between free trade and developmental objectives. This approach to WTO law stresses the relevance of teleological interpretation of WTO rules and systemic interpretation of WTO agreements in light of the normative framework for development.

1474 UNCTAD, *Better Trade for Sustainable Development: The role of voluntary sustainability standards*, 5.
1475 'The WTO and the Sustainable Development Goals'. Available at: https://www.wto.org/english/thewto_e/coher_e/sdgs_e/sdgs_e.htm. Accessed on: June 30, 2020.
1476 European Commission, *Concept paper on WTO modernisation: Introduction of future EU proposals,* 6.

Such development-oriented approach is intended to make interpretation of WTO agreements more in line with the promotion of the right to development and human rights, consistent with the 2030 Agenda for Sustainable Development. It also aims at alleviating some of the burdens of trade liberalisation; and facilitating those aspects of the development objective that are enshrined in the WTO agreements or that are set forth in the relevant international law that the interpretative process is informed by. [1477] Such approach is also believed to bring more legitimacy - understood as accepted authority – of WTO and its dispute settlement system. Ultimately, lack of consideration to developmental and societal concerns will inevitably result in loss of authority of WTO adjudicating bodies.

Ultimately, WTO law should not be read in isolation from international law and, accordingly, from the norms pertaining to the normative framework for development. Such legal framework is a product of historical demands of developing countries during the decolonisation process and efforts from legal doctrine and from UN bodies and agencies to internalise a new concept of development that goes beyond economic considerations and is premised on principles of inherent dignity, a fair social and international order, and self-determination. Although it is comprised of a wide multitude of norms, its pillars lie in the ESC rights, mainly embodied in the ICESCR, and the right to development crystallised in the UNDRD and cross-referenced in other treaties and soft law instruments. Of particular importance for current times is the intrinsic relationship between the right to development and the idea of sustainable development. While originally the right to development was not particularly concerned with environment, the increasing awareness of climate change problems, loss of biodiversity, water shortage, among others, results in an integrative approach of development where economic and social development must be an integral part of environmental protection, and vice versa. In this context, it is necessary to recognise that the right to development cannot be realised if development is not sustainable.

Development, under the UNDRD, entails "a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom". From the right to development, two key notions derive. First, the idea that "the right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms

1477 Qureshi, *Interpreting WTO Agreements: Problems and Perspectives*, 185.

can be fully realized" (Article 1.1 of the UNDRD). And, second, that the right to development implies the full realisation of the right of peoples to self-determination, including the States' right to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom.

With these notions, the UNDRD contributed to the alignment of the concept of development to human rights, representing the right to development as one entailing the progressive realisation of civil, political, economic, social and cultural rights, which are interdependent. In this context, it also shed light to the role of States in promoting a domestic environment that is conducive to the realisation of human rights, and also to their responsibility, at the international level, to cooperate for the promotion and fulfilment of human rights. Also, from the right to development is also derived the right of the State to an independent process of development, where it should determine the direction of legitimate public policies. Closely related to the right to development and the principle of self-determination is the international customary 'right to regulate.' Although traditionally resorted to in international investment law under the police powers doctrine, the right to regulate, under a broad sense, involves the States' right to regulate their political, economic and social affairs and adopt laws to protect matters of public interest in derogation of international commitments.

A development-oriented approach to WTO agreements tries to reconcile the principles, concepts and rights arising from the legal framework for development with WTO rules. Although many of the norms pertaining to that framework are of soft law nature, this should not reduce their role in the interpretation of WTO law. As seen, soft law has a role in the argumentative process of judges and influence the interpretation of treaties. Additionally, the normative framework for development also comprehends treaties, general principles and international customary law, which has a more established role in systemic interpretation. Therefore, at least in theory, it is possible to envisage the interpretation of WTO law in light of such legal framework.

Legal, institutional, and political challenges to a development-oriented interpretation of WTO rules

A development-oriented approach to WTO law or, more specifically, to WTO rules applicable to LCRs, does not come without challenges of a legal, institutional and political nature.

First, from a legal perspective, although many customary interpretative rules and techniques used by Panels and the Appellate Body, especially holistic interpretation under the VCLT rules of interpretation, systemic integration and the principle of effectiveness, encourage a development-oriented interpretation of WTO law, the vacillating way in which WTO adjudicating bodies have employed these techniques pose doubts on their systematic application so as to form a consistent approach to WTO law which furthers its development objective.

Second, the interpretation of panels and the Appellate Body of Article 31.3(c) of the VCLT restricts the scope of systemic interpretation in light of the norms pertaining to the development framework, considering that most of these norms are of soft law nature and relevant treaties were not signed by the whole WTO membership.

Although soft law has played some role in the interpretation of WTO law,[1478] being used as evidence of the common understanding of the parties as to the meaning of a term, in general, panels and the Appellate Body do not often use non-traditional sources of law in the interpretation of WTO agreements.[1479] Since a large part of the normative framework for development consists of soft law norms, there could be some barriers in considering them in the interpretation of WTO agreements considering WTO case law.

Further, the reference in Article 31(3)(c) of the VCLT to international law rules 'applicable between the parties' does not clarify whether these rules shall apply only to the parties to the dispute or whether it should be applicable to *all* the parties to the treaty under interpretation. If WTO case law interprets that WTO agreements can only be interpreted in light of international treaties or rules that are applicable to the whole WTO membership, this could also reduce the scope for systemic interpretation of WTO law in light of the normative framework for development, given that it is difficult to find human rights treaties whose parties correspond to the whole WTO membership. In *Peru – Agricultural Products* (2015), the Appellate Body arguably suggested (but it did not rule on the issue) that recourse to Article 31.3(c) may presuppose that all parties to the WTO are bound

1478 For instance, in *US-Shrimp* (1998), treaties/declarations not ratified by all Members were used to interpret the GATT 1994, even if not as a relevant rule of international law applicable in the relations between 'the parties' under Art 31.3(c) of the VCLT. See Appellate Body Report, *US – Shrimp* (1998), para. 130.

1479 For instance, in *EC – Approval and Marketing of Biotech Products* (2006), the Panel considered as 'rules', for the purpose of Article 31(3)(c), only those conventional elements of hard law. See: Panel Report, *EC – Approval and Marketing of Biotech Products* (2006), para 7.67. In *US – Anti-Dumping and Countervailing Duties (China)* (2011), the Appellate Body equated 'rules of international law' under under Art 31.3(c) of the VCLT to those sources defined in Article 38 of the ICJ Statute. See: Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)* (2011), paras. 307 and 308.

by the rules of international law,[1480] which reflects a restrictive approach to systemic interpretation.

Also, pursuant to WTO jurisprudence, WTO law shall be interpreted in light of international rules where they are relevant. The relevance in this case is analysed considering whether those rules *concern the same subject matter as the treaty terms being interpreted.*[1481] Where the expression "same subject matter" is interpreted too narrowly, it may impede that certain categories of legal instruments relating to the right to development, economic, social and cultural rights be used for interpreting WTO law.

Third, although the principle of effectiveness as applied by panels and the Appellate Body is helpful in advancing a development-oriented approach of the WTO agreements, its role is still modest. According to the definition of the principle of effectiveness adopted by WTO adjudicators, "interpretation must give meaning and effect to all the terms of the treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility".[1482] WTO adjudicating bodies have advocated that, according to this principle, "a treaty interpreter must read all applicable provisions of a treaty in a way that gives meaning to all of them, harmoniously."[1483] Nevertheless, in international law doctrine, the principle of effectiveness can be also viewed as a requirement that the adjudicator acts "on the implied intention of the parties, i.e. on his understanding, having regard to the contract as a whole and to surrounding circumstances, as to what would have been the attitude of the parties if confronted with the issue." [1484] Under this latter approach, judges could potentially give more operational value to vaguer obligations. The language of the hortatory provisions of the WTO agreements, however, make this task difficult.

In addition, panels and the Appellate Body adopt a strict necessity test under Article XX of the GATT 1994, which may, in certain cases, impede the justification of LCRs under

1480 Because the AB did not find that the international norms resorted to by Peru were "relevant" for the purposes of Article 31.3(c), it argued that it did not need to address the meaning of the term 'parties' in this provision. However, from the reading of the AB report, it is possible to make some inferences as to its understanding of this term.

1481 Appellate Body Reports on *US – Antidumping and Countervailing Duties (China)* (2011), para. 308; *EC and certain member States — Large Civil Aircraft* (2011), para. 846-855; *Peru – Agricultural Products* (2015), paras. 5.102-5.103.

1482 Appellate Body Report, *US — Gasoline* (1996), p. 23. See also: Appellate Body Report, *Canada — Dairy* (1999), para. 133; *Korea — Dairy*, para. 81; Appellate Body Report, *US — Section 211 Appropriations Act* (2002), para. 338; Appellate Body Report, *US — Offset Act (Byrd Amendment)* (2003), para. 271; *US — Upland Cotton* (2005), para. 549; *US — Softwood Lumber V (Article 21.5 — Canada)* (2006), para. 99.

1483 Appellate Body Report, *Argentina — Footwear (EC)* (2000), para. 81. See also *Canada — Renewable Energy / Canada — Feed-in Tariff Program* (2013), para. 5.26.

1484 Lauterpacht, "Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties," 80.

WTO law. It would be important, for a development-oriented approach, to mitigate the rigidness of the necessity test by applying a strict proportionality analysis. Further, WTO jurisprudence is not open to the use of human rights and other non-WTO norms as applicable law in WTO disputes, which could prevent the use of the right to regulate as an affirmative defence for WTO-inconsistent LCRs.

Fourth, from an institutional and political point of view, a development-oriented interpretation of WTO law also finds many challenges. The crisis of the Appellate Body was motivated, among other reasons, by strong criticism over its alleged judicial activism. Considering that a development-oriented interpretation of WTO law demands strong purposive and systemic interpretation of WTO agreements, WTO adjudicating bodies may fear that, in doing so, they might be accused again of engaging in judicial activism and this could bring more problems to the WTO dispute settlement system already confronted by an unprecedented crisis. Also, because there is strong disagreement between WTO Members on the role for development, WTO adjudicating bodies, for the same reason, may not be prone to adopt a development-oriented approach to WTO law where the Members themselves have not agreed on the function of development within the WTO.

Further, the rise of far-right populist leaders has made major powers such as the US to adopt a unilateral behaviour contrary to international cooperation and multilateralism. These populist leaders frequently disregard human rights and development concerns. The US has made WTO Members refrain from availing their developing status. Other developing countries such as Brazil, which had a leading role in articulating the agenda of developing countries within the WTO, has lost its relevance in the multilateral forum as its extremist president adopts an "anti-globalism" approach. Although the election of Joe Biden has revitalised the hope for a decline of populism worldwide, it is too early to declare victory against populism and against the demise of multilateralism. In addition, the rise of emerging powers, in particularly China, has resulted in a new balance in world geopolitics. Although these emerging powers allegedly support multilateral institutions such as the WTO, their increasing influence in the system has made it more difficult for countries to achieve consensus in multilateral discussions. Also, under the Covid-19 pandemic crisis, countries have shown lack of cooperation at the international level. The UN Secretary-General said in an interview that it is a "tragedy" that the world's leaders have not been able "to come together to face COVID-19 in an articulated coordinated way.

(…) Each country went with its own policy, different countries with different perspectives, different strategies and this has allowed the virus to spread."[1485]

In view of the above, current political scenario does not seem sympathetic to multilateralism, development concerns in general (let alone a global partnership for development, as envisaged in the 2030 Agenda), and much less to advancing development in the interpretation of WTO agreements.

Alternatives for a development-oriented interpretation of WTO law applicable to LCRs

The legal, institutional and political challenges for advancing a development-oriented interpretation of WTO law cast doubts on the feasibility of furthering this approach to WTO rules applicable to LCRs. This thesis has discussed possible interpretative alternatives for the case of LCRs in the WTO which could in theory provide the respondent more room for justifying their local content measures on policy grounds.

Ultimately, a development-led interpretation of WTO law seeks to give adequate space for WTO Members to pursue their economic, social, cultural and political processes in view of the normative framework for development, and in light of a revitalised notion of embedded liberalism whereby international markets should be reconciled with social values and, accordingly, international trade rules should be compatible to different kinds of active public management of the economy, prioritising policy space based on legitimate policy objectives.

Despite the challenges to a development-oriented approach to WTO law, it has been suggested that LCRs have certain peculiarities that still permit advancing such interpretation. First, developing and developed WTO Members are increasingly making use of LCRs since the 2008 global financial crisis. Second, with the deepening of economic crisis caused by coronavirus pandemic and the disruption of GVCs, it is also possible that countries resort more to those types of policies that support domestic industry and stimulate the creation of jobs. In this context, local content measures can become even more popular. Therefore, WTO Members may be more open to approaches that give them more space to justify their LCRs vis-à-vis WTO law.

In this scenario, it has been suggested that, in analysing LCRs, disputing parties may benefit from the expansive reading of the "public morals" exception adopted by panels

1485 News, "UN Chief: 'Tragedy' That World Lacks Coordinated Approach Against COVID-19." Available at: https://www.voanews.com/covid-19-pandemic/un-chief-tragedy-world-lacks-coordinated-approach-against-covid-19. Accessed on July 1, 2020.

and the Appellate Body. At the same time, however, disputing parties would have to advocate for a full proportionality analysis of Article XX of the GATT 1994 (or Article XIV of the GATS) in order to mitigate the rigidness of the necessity test. In addition, current interpretation of Article III.8(a) of the GATT 1994 has been criticised. A more consistent and harmonic interpretation of this provision in light of the GPA is necessary so that LCRs can be used in public procurements without being considered a violation to the non-discrimination principle embodied in the GATT 1994. Also, Interpreting the term "payment of subsidies" in Article III.8(b) of the GATT 1994 more broadly in line with the dissenting opinion of one member of the Appellate Body in *Brazil - Taxation* would also provide WTO Members more flexibilities in implementing localisation subsidies which can be relevant for their developmental purposes.

Furthermore, a development-oriented approach would enable reading flexibilities in the SCM Agreement which are not explicit in the text. However, this approach would be in practice very difficult to justify in the WTO context, considering current criticism over judicial activism. Lastly, the legality of patent local working requirements has been advocated when they are implemented in the context of compulsory licensing, provided that the conditions set forth in Article 31 of the TRIPS Agreement are satisfied.

This thesis has also made an appeal for disputing parties to embrace development-oriented approaches to WTO applicable to LCRs, given that, so far, they have not been sufficiently articulated in WTO disputes.

Finally, although it is not the focus of this thesis, it concluded that it would be adequate for WTO members to agree on new rules on LCRs, since the rationale for restricting them in WTO has been severely questioned and WTO Members continue to make use of these policy instruments despite restrictive WTO rules. In addition, there is a limit to the interpretative process and the WTO adjudicatory bodies cannot rewrite the WTO agreements at the risk of undermining their legitimacy, which is already in crisis. It is very important that the legislative and the judicial function of the WTO remains in equilibrium. In this sense, it would be appropriate to engage in negotiations supported by a larger body of economic analysis on LCRs so that a more reasonable framework on the regulation of LCRs could be designed. In particular, it would be necessary (i) to expand the policy objectives of the general exceptions to comprise those goals more closely related to local content measures; (ii) clarify the type of proportionality test to be adopted by panels and the Appellate Body under the general exceptions; (iii) reform Article III.8(a) of the GATT 1994 so as to allow LCRs in public procurement; (iv) interpret Article III.8(b) of the GATT 1994 more broadly to provide WTO Members more flexibilities in implementing localisation subsidies; (v) amend the SCM Agreement to include a policy exceptions

clause or to recreate a category of non-actionable subsidies and to review the list of prohibited subsidies and (vi) revisit the TRIPS Agreement to facilitate technology transfer to developing countries considering their particular needs and context.

As explained by Howse, "the Appellate Body, through case law that may often appear inconsistent – at least where various shifts in approach are inadequately explained – has nevertheless developed a number of judicial policies, which have, overall, oriented adjudication towards maintaining a balance between trade liberalization and the right to regulate, i.e., domestic regulatory autonomy."[1486] Nevertheless, there are a number of issues that now requires a new compromise among WTO Members. No matter how careful WTO adjudicatory bodies are in their judgment, the solutions may seem unsatisfactory. This, however, is not necessarily a problem of the interpretation conducted by panels and the Appellate Body but of the agreements, which do not adequately reflect anymore the interests of the Members and the political dynamic among them. The issue of LCRs is ultimately part of this history. While there are some opportunities that WTO adjudicatory bodies can size in interpreting WTO rules affecting LCRs to further the development objective, ultimately the rules itself are highly hostile to local content policies. In the end, it is mainly in the WTO Members' hands to restore the negotiating function of the WTO and revisit the rules applicable to local content measures.

1486 Howse, "The World Trade Organization 20 Years On: Global Governance by Judiciary," 13.

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 rigidness 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.[1487]

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.

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 interested 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.

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.

CURRICULUM VITAE

Natalia de Lima Figueiredo was born on 1st May 1987, in São Paulo (Brazil). She holds a Masters' degree in Business Law from the University of São Paulo (2015). From 2005 to 2009, she attended law school at the University of São Paulo. In 2008, she also attended an extension course in International Law at the Centre for Transnational Legal Studies in London (United Kingdom) as part of an exchange program of her university.

She is lecturer in Business Law at Sao Judas Tadeu University in São Paulo and the founder of Figueiredo Law, a law firm in São Paulo specialising in Economic Law, International Trade Law and Business Law. She is also the coordinator of the Competition Law subgroup of the Institution of Higher Education of the Brazilian Bar Association (Escola Superior de Advocacia - ESA) in São Paulo and project manager of the Women in Antitrust Brazil, a women's association aiming at strengthening female presence in the private, public and academic sectors in the area of Antitrust Law. She is also member of the Commission for Defense of Immigrants and Refugees of the Brazilian Bar in São Paulo.

Previously, she has worked in relevant law firms in São Paulo in the area of Competition Law and International Trade and has also participated in the program for international trade lawyers of the Trade Dispute Unit of the Brazilian Ministry for Foreign Affairs, acting in WTO disputes in which Brazil had been involved.

She is the author of the book "Marcas e Prática Antitruste" ("Trademarks and Antitrust Practice") and papers in Economic Law and International Trade Law. She was awarded the IBRAC-TIM prize for best papers in Antitrust Law in 2007, 2010 and 2020. From 2015 to 2017, she participated in the study group of International Courts (subgroup: WTO) of the University of São Paulo, where she had the opportunity to discuss in depth several decisions issued by WTO adjudicative bodies. From 2017 and 2018, she took a voluntary position as Portuguese teacher at ADUS Institute in São Paulo, a non-profit organization acting in the defence of immigrants and refugees in Brazil.

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