**The Impact of WTO Case Law on the use of Local Content Requirements**

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**Abstract** The WTO Agreements, to wit the Agreement on Subsidies and Countervailing Measures (SCM) and the Trade Related Investment Measures (TRIMs) (applicable in conjunction with the General Agreement on Tariffs and Trade (GATT 1994)), contain prohibitions on the use by WTO Members (Members) of local content requirements (LCRs). LCRs are types of measures that condition the grant of a benefit, by means of subsidies or other kinds of incentives, on the use of domestic products and services. Although the SCM is more explicit as to the prohibition on the use of LCRs, WTO case law is mostly concerned with the analysis of the legality of LCRs in light of Article III. 4 of the GATT 1994 and Articles 2.1 and 2.2 of the TRIMs. In this respect, both the Panel and the Appellate Body (AB) have coherently and consistently found LCRs to be in violation of those provisions. Findings and rulings by the Panel and the AB in *Canada Renewable Energy* (DS 412, DS 416) and *Indian Solar Cells* (DS 456), which further restricted the *policy space* of Members to adopt LCRs, and the findings by the Panel in *Brazil – Certain Measures Concerning Taxation and Charge* (DS472/497) confirmed a *jurisprudence constante* or unequivocal jurisprudential trends in this regard. This paper sustains that such unequivocal jurisprudential trends are in line with the new global trading system, which requires new tools of industrial or incentive policies that are consentaneous with an economy ever more integrated into the global value chains in which discriminatory measures of LCRs are likely to lose relevance and purpose increasingly.

**1 Introduction**

 The normative regime of the International Investment Law (IIL) is very much fragmented. It is decentralized and contained in many international instruments, such as Bilateral Investment Treaties (BITs), Regional or Preferential Trade Agreements and WTO Agreements (multilateral domain). As regards the latter, while investment provisions are spread in a number of covered Agreements, such as the General Agreement on Trade in Services (GATS), Trade Related Intellectual Property Rights (TRIPS) and Government Procurement Agreement (GPA), the legality of certain measures adopted by Members, which are deemed by investors to be harmful to their investments, has been challenged before the WTO Dispute Settlement Body (DSB) on the grounds that they are inconsistent with the TRIMs and the SCM.

 Among these measures are the LCRs. LCRs, one type of performance requirements, are industrial policy measures that condition the grant of a benefit, by means of subsidies or other kinds of incentives, on the use of domestic products and services. Both the Panel and the AB have been coherently and consistently condemning the use of LCRs. Their recommendations and rulings are likely to lead governments and investors alike to review strategies of industrial policies and investments especially in traditional sectors of the economy, such as the automobile industry, which, in fact, has already occurred in some of the Members.

 Nonetheless, given the need for Members to develop other sectors, such as the renewable energy sector, LCRs measures tend to be used again as an important tool to make this development viable. To the extent that Members adopt these measures, tensions and conflicts arise that test the limits of current WTO rules which may result in a contraction of investments. In the cases *Canada Renewable Energy* and *India Solar Cells*, in which the AB further reduced Members’ policy space to implement LCRs, these tensions and conflicts became very clear. However legitimate the incentives to the development of renewable energy may be, the question arises as to how to implement them without necessarily violating Articles III. 4 of the GATT 1994 and 2.1 of the TRIMs.

 Against this backdrop, this paper intends to show that the coherent and consistent interpretation by the Panel and the AB on the use of LCRs that has led to the expansion of restrictions on this type of industrial policy points to unequivocal jurisprudential tendencies. These jurisprudential tendencies are likely to have the effect of making more difficult for Members to use LCRs. They may have a “chilling impact” – to use Bohanes’ words[[2]](#footnote-2) – on the intention of Members to adopt this model of industrial policy that in the medium run may turn into a governmental privilege of support to increasingly inefficient and uncompetitive industries. The new global trade architecture requires new tools of industrial policies that are in line with an economy increasingly integrated into the global value chains. In the next sections, the fragmentation of the IIL regime, the advantages and disadvantages of LCRs, the reach and scope of Articles III. 4 of the GATT 1994 and 2.1 of TRIMs and the consistent and coherent rulings in the cases *Indonesia – Autos*, *Canada – Autos*, *India – Autos*, *China – Auto Parts*, *Canada Renewable Energy*, *India – Solar Cells* and *INOVAR – AUTO* are discussed.The inadequacy of the use of LCRs and alternative measures are also examined.

**2 The fragmentation of the IIL regime**

The IIL, unlike the WTO or EU law, is not organized around a multilateral treaty or central international organization. On the contrary, IIL is heavily decentralized and composed of a multitude of bilateral, regional and multilateral treaties, such as BITs, Free Trade Agreements like the North American Free Trade Agreement (NAFTA) and the Energy Charter Treaty (ECT), customary international law, domestic laws, contracts and insurance schemes, and a diversity of arbitral institutions, such as the International Centre for Settlement of Investment Disputes (ICSID), the United Nations Commission on International Law (UNCITRAL) and the International Chamber of Commerce (ICC) and domestic courts and investment agencies, without central authority.[[3]](#footnote-3)

 Over the years, there have been several unsuccessful attempts to establish a regulation on international investments mainly conducted by the Organisation for Economic Co-operation and Development (OECD). OECD’s most relevant initiative was the presentation, in 1995, of the proposal for a Multilateral Agreement on Investment (MAI), which eventually was not approved by its members.

 In that very same year though, the WTO Agreement composed of various agreements, such as the GATS, TRIPS, GPA, SCM and TRIMs, came into force. While those agreements fell short of providing for a comprehensive set of liberalizing measures and protection for international investments, they introduced, as highlighted by Weiss, an “investment dimension” in the multilateral trading system. While the GPA, GATS and TRIPS set forth obligations related to the entrance and treatment of foreign individuals and companies or their property rights, the TRIMs and the SCM operate indirectly by imposing restrictions on Members’ ability to adopt investment incentives or influence international investors operations.[[4]](#footnote-4)

 It is exactly under the TRIMs and SCM that restrictions, such as the prohibition on the use of LCRs, are found. Article 3.1 (b) of the SCM provides for the most explicit prohibition on the use of local content measures of all WTO agreements. Subsidies related to import substitution are those contingent upon the use of domestic over imported goods. Nevertheless, the WTO case law shows that its adjudicating bodies, the Panel and the AB, have chosen to analyse the consistency or not of LCRs with Article III of the GATT 1994 (national treatment) and TRIMs Article 2.1 and 2.2 provisions.

**3 The advantages and disadvantages of LCRs**

 For a limited period, LCRs may be, depending on certain circumstances, an efficient tool to the construction, protection and support of domestic industries. Nonetheless, they generate distortions to competition, which, in the long run, make the protected domestic industry not competitive with huge social costs.

 According to Muchlinsky (2008), LCRs “are usually justified on the basis of the host country´s need to minimize the possible disadvantages, and maximize the potential benefits, of the investment in line with its economic and developmental policies”. However, “they are often criticized as an unwarranted interference, through governmental action, in the process of economic decision-making on the part of investors and that they will result in a distortion of that process with detrimental results to productive efficiency.”[[5]](#footnote-5)

 Cimino, Hufbauer and Schoot (2014) stress that, historically, “LCRs have been associated with government procurement and mandates attached to publicly financed projects. But, LCRs can take many forms, including price preferences awarded to domestic firms that bid on government procurement contracts, mandatory minimum percentages required for the domestic goods and services used in production, import licensing procedures designed to discourage foreign suppliers, and discretionary guidelines that both encourage domestic firms and discourage foreign firms.”[[6]](#footnote-6)

 Moreover, it is also worth mentioning that many countries, such as the United States, taking due regard of LCRs scope and coverage, classify them as “localization barriers to trade”.

 LCRs have been extensively adopted by both developed and developing countries and subject to negotiations for decades. After the 2008 global financial and economic crisis, the use of LCRs picked up. A number of countries decided to use them as a strategy for protection of their domestic economy against the unexpected consequences stemming from the crisis.

 More than one hundred LCRs measures were introduced or implemented since 2008 in different types of economies, as well as in a wide range of industrial sectors. Many of them produce effects well beyond trade flows impacting directly or indirectly on investments, services and employment.[[7]](#footnote-7)

**4 Article III of the GATT 1994 and the TRIMs**

 As noted by Mavroidis (2013), the TRIMs agreement constitutes *lex specialis* of Articles III (national treatment) and XI (quantitative restrictions) of the GATT 1994, as it specifically prohibits the use of two governmental action tools related to public policies covered by those Articles, to wit: LCRs and export requirements.[[8]](#footnote-8)

 One of the basic principles of Article III of the GATT 1994 is the national treatment, under which imported products may not be discriminated in favor of domestic products. As outlined by Van den Bossche and Zdouc (2013), “Article III of GATT 1994 prohibits discrimination*against* imported products. Generally speaking, it prohibits Members from treating imported products less favourably than like domestic products once the imported product has entered the domestic market, i.e. once it has been cleared through customs”.[[9]](#footnote-9) Article III.1 of the GATT 1994 constitutes, to use John Jackson (2002) words, “a general statement of policy, but includes an important phrase obligating contracting parties to avoid using taxes and regulations “*so as to afford protection to domestic production*””. [[10]](#footnote-10)

 LCRs often violate Article III. 4 of the GATT 1994. By its very nature, LCRs condition the grant of a benefit, by means of subsidies or other kinds of incentives, on the use of domestic products and services, i.e. they discriminate products in view of their territorial origin.[[11]](#footnote-11)

 Article III. 5, in turn, is more explicit as to the inconsistency of LCRs with its provisions. According to it, no govern shall impose the obligation of use of domestic products in the productive chain by restricting the use of imported products to a percentage of domestic products. LCRs are not only trade, but also investment related measures.[[12]](#footnote-12) It would seem reasonable to assume that, because it is more specific, Article III. 5 should be applied more frequently in the case law related to LCRs. However, both the AB and the Panels have chosen to scrutinize consistency of LCRs measures with WTO rules based on the provisions of Article III. 4 of the GATT 1994.

 Hestermeyer and Nielsen (2014) point out that the jurisprudential preference for Article III. 4 of GATT 1994 is probably a coincidence. In cases regarding LCRs measures, a complaining party will generally invoke both Article III.4 and III.5. It is incumbent upon the Panel to take the decision on which provision it will analyse first. “In the overwhelming majority of cases involving Article III.4 and 5 panels have started their analysis with the paragraphs parties have cited to *first*”.[[13]](#footnote-13)

 The most important exception to the national treatment obligation is related to Government Procurement as set forth in Article III, 8, a. It exempts from Article III national treatment, purchases by “governmental agencies of products purchased for governmental purposes…” (Government Procurement).[[14]](#footnote-14)

 The TRIMs Agreement was conceived to prevent trade restrictive and distorting effects of investment measures and specifically treats LCRs as prohibited trade-related investment measures. Its coverage is limited to the trade in goods as set out by Article 1.

 Investment measures related to trade are not defined under the TRIMs. It solely provides in its Annex I an illustrative list of measures that, under Article 2.2, are incompatible with the national treatment obligation set forth in Article III. 4 of GATT 1994 and the obligation of general elimination of quantitative restrictions foreseen in Article XI.1.[[15]](#footnote-15)

Such measures limit the right to a free management of the investment by imposing certain obligations. They affect the international trade in goods violating fundamental principles of the WTO international trading system. The TRIMs agreement has therefore the effect of limiting the political options of a Member to regulate the international investment once it has been admitted to the country (post-entrance) by means of the measures expressly prohibited thereunder.

**5 The consistent and coherent findings and rulings by the AB and the Panel against the use of LCRs**

As mentioned above, both developed and developing countries implemented certain industrial policies by fostering the use of LCRs in many sectors, such as the Automobile Industry and the so-called green economy. As a general matter, the scope (or justification) of such policies is to create a favorable environment to assure economic growth and development through the generation of jobs and domestic technology.

 However, the legality of a number of such measures has been challenged by Members on the grounds that they violate Articles III. 4 of GATT 1994 and 2.1 of the TRIMs.

 In *Indonesia Autos*[[16]](#footnote-16), the Panel examined a series of measures enacted by the Indonesian government aimed at providing comparative advantages to domestic automobile company and stimulating foreign companies to assemble vehicles in the country by means of local production of parts and components. One of the “Programmes” provided import duty reductions or exemptions on imports of automotive parts based on the local content percent. If the local content of a passenger car were lower than 20%, the importer would pay an import duty of 100% on the imported parts and so on up to the exemption when the local content rate achieved 60%. The Panel found that those measures were inconsistent with Article 2.1 of the TRIMS:

“14.91 We thus find that the tax and tariff benefits contingent on meeting local requirements under these car programmes constitute “advantages”. Given this and our earlier analysis of whether these local content requirements are TRIMs and covered by the Illustrative List annexed to the TRIMs Agreement, we further find that they are in violation of Article 2.1 of the TRIMs Agreement”.

*In Canada – Autos[[17]](#footnote-17)*, the Canadian government granted to certain producers of automobiles, buses and commercial vehicles the right to import vehicles without import duties. In order to be eligible for such an exemption, domestic vehicles producers, including in certain cases the production of parts, should meet a minimum amount of domestic added value (CVA requirements). The AB found that such requirements were inconsistent with Article III. 4 of GATT 1994:

“10.85… We further consider that the CVA requirements accord less favourable treatment within the meaning of Article III:4 to importedparts, 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”.

 In *India – Autos[[18]](#footnote-18)*, car manufactures were required by Indian Government to commit to achieving a level of local content components up to a minimum level of 50% in the third year or earlier and 70% in the fifth year or earlier, in order to obtain import licenses. To meet the local content requirement, car manufacturers were compelled to purchase Indian parts and components rather than imported products. License imports were used as a way of inducing those companies to meet LCRs. The Panel left no doubt as to the inconsistency of the local content requirement (*indigenization requirement*) with Article III. 4 of GATT 1994:

“7.202 Such a requirement clearly modifies the conditions of competition of the domestic and imported parts and components in favour of domestic products. The Panel therefore finds that the indigenization requirement…, by requiring manufacturers to use specified percentages of parts and components of domestic origin is a requirement affecting the internal sale of like imported products, and which affords these imported products less favourable treatment than that accorded to like products of national origin”.

 In *China – Auto Parts[[19]](#footnote-19)*, measures adopted by the Chinese government were not in compliance with its obligations to open the domestic market, reduce tariffs and eliminate LCRs in the automobile sector. Such measures imposed discriminatory domestic burdens on imported parts if vehicles manufactured in China that were to use them exceeded certain maximum limits of foreign content. Consequently, the cost of using foreign products would be higher than like domestic products. The Panel took the view that those measures, coupled with certain administrative procedures, accord less favourable treatment to imported auto parts than to domestic auto parts. Additionally, the AB found that:

“195….the measures at issue in this dispute impose administrative procedures, and associated delays, on automobile manufacturers using imported parts, which could be avoided entirely if a manufacturer were to use exclusively domestic auto parts. These incentives “affect” the conditions of competition for imported auto parts on the Chinese internal market”.

 Both the Panel and the AB made clear that those measures were inconsistent with Articles III. 4 of GATT 1994 and 2.1 of the TRIMs.

 All this case law demonstrates the consistent, coherent and restrictive way both the Panel and the ABhave been condemning the use of LCRs. Confronted with intricate and complex measures adopted by Members, the WTO adjudicating bodies have sought to reestablish normal market conditions by making sure that discriminatory and distorting practices to competition, which generate insecurity and unpredictability to foreign investors, are strongly discouraged. This results in a gradual reduction of Members’ policy space to implement certain industrial policies, such as the use of LCRs, which has led certain Members to reassess their industrial policies, as well as, if necessary, modify their investments and developing incentives regimes for specific sectors of their economies.

**6 Further and stricter restrictions to the use of LCRs. The inadequacy of LCRs**

 Panels and AB rulings in *Canada – Renewable Energy[[20]](#footnote-20)* and *India – Solar Cells[[21]](#footnote-21)* resulted in stricter restrictions on the scope of LCRs adoption, which has raised heated discussions as they involved a crucial issue for the environmentally sustained development: the renewable energy. In both cases, the AB ruled that a measure inconsistent with Articles 2.1 and 2.2 of the TRIMs violates Article III. 4 of GATT 1994 even if it falls within the exemption of Article III. 8 (a). The allegation of Canada and India that their respective measures involving LCRs constituted Government Procurement was rejected by the AB.

*Canada – Renewable Energy* is one of the most complex cases involving LCRs. With a view to foster the development of renewable energy, such as wind and solar energy, the Canadian Government, through the FIT Programme, conditioned the purchase of energy for periods of 20 or 40 years with a good return rate to generators of this energy, provided that they purchased Canadian products for their facilities (*Minimum Required Domestic Content Levels*). The Panel found that the FIT Programme was inconsistent with Article 2.1 of the TRIMs and III. 4 of GATT 1994.

 According to the Panel, the *Minimum Required Domestic Content Levels* not only involved the purchase or use of products from a domestic source but also that such compliance was necessary for electricity generators to participate in the FIT Programme, and thereby obtain an advantage. However, in the Panel’s view, there was enough proximity between the two sets of products, namely electricity (purchased product) and wind powers (generation equipment of renewable energy), i.e. the LCRs were in fact requirements for the purchase of electricity (Government Procurement), which would allow for the Article III. 8 (a) exemption.

 The AB reversed such Panel’s finding. It said that for such an exemption to be triggered the product to which it is to be granted must be in a competitive relationship with the foreign product allegedly being discriminated. Clearly, this was not the case of electricity and generation equipment of renewable energy. The product object of LCRs was the generation equipment purchased by the generators of energy, while the product purchased by governmental agencies was in reality electricity:

“5.75…The product purchased by the Government of Ontario under the FIT Programme and Contracts, however, is electricity and not generation equipment. The generation equipment is purchased by the generators themselves. Accordingly, the product being purchased by a governmental agency for purposes of Article III:8 (a) – namely electricity – is not the same as the product that is treated lessfavourably as a result of the Minimum Required Domestic Content Levels of the FIT Programme and Contracts.

5.79…These two products are not in a competitive relationship…Accordingly, the discrimination relating to generation equipment…is not covered by the derogation of Article III.8 (a) of the GATT 1994”.

 As asserted by Bohanes (2015) “…the panel’s interpretation would have provided a potentially wide margin of discretion for governments to conduct industrial policy by discriminating in favour of a domestic product as long as that product was sufficiently closely related to the product being procured”.[[22]](#footnote-22) The AB’s interpretation, confirmed in *India –Solar Cells*, is likely to reduce the possibility of Members relying on the derogation of Article III.8 (a) in future LCRs measures not only in the energy sector given that its implications may go far beyond that. The AB reduced even more the policy space of Members to use Government Procurement to avoid the restrictions of Article III. 4 GATT 1994 and the TRIMs.

*India Solar – Cells* dealt with similar characteristics to those examined in *Canada – Renewable Energy.* With a view to incentivizing the development of solar energy in the country, the Government of India implemented incentive mechanisms to manufacturers (developers) of generation equipment of this energy. Under this Programme, the Government enters into long term electricity purchase contracts with developers interested in developing generation equipment with a guaranteed return rate for a period of 25 years. In exchange, such developers shall fulfil LCRs under which they shall use solar cells and modules manufactured in India.

 As in *Canada Renewable Energy* and other cases, the Panel found that LCRs were inconsistent with the national treatment obligation enshrined in Article III. 4 of GATT 1994 and, therefore, incompatible with Article 2.1 of the TRIMs:

“7.73 Having found that the DCR [Domestic Content Requirement] measures are TRIMs that “require the purchase or use by an enterprise of products of domestic origin”, and that ‘are mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage’, we find the DCR measures fulfil the requirements of paragraph 1 (a) of the TRIMs Illustrative List. Accordingly, the DCR measures ‘are 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”.

 As regards the derogation of Article III.8 (a), the Panel followed the *ratio* and conclusions of the AB in *Canada Renewable Energy*. The Panel dismissed the allegations presented by India that the measures of this case were distinguishable in any relevant respect from the measures examined by the AB in *Canada Renewable Energy*. The Panel highlighted that the LCRs of the Programme did not fall into the Article III. 8 (a) exemption as the electricity purchased by the Government was not in a “competition relationship” with the solar cells and modules subject to discrimination under the LCRs:

“7.135…In light of the Appellate Body’s legal interpretation of Article III.8 (a) as applied to the governmental purchase of electricity and discrimination against foreign generation equipment, we find that the discrimination relating to solar cells and modules under the DCR measures is not covered by the derogation of Article III: 8 (a)”.

 The AB upheld the Panel’s findings by stating that:

“6.2…We find the Panel was properly guided by the Appellate Body report in Canada Renewable Energy/Canada – Feed-in Tariff Program in finding that the DCR measures are not covered by the derogation under Article III: 8 (a); (…)

c. Consequently, we uphold the Panel’s findings…that the DCR measures are not covered by the derogation under Article III: 8 (a) of the GATT 1994 and that, therefore, the DCR measures are inconsistent with Article 2.1 of the TRIMs Agreement and Article III.4 of the GATT 1994”.

 The adoption of such incentive measures to the renewable energy sector – however legitimate they may be – generate tensions and conflicts that test the limits of the WTO current rules. The question arises as to how to stimulate the indisputable need to develop this sector without necessarily violating Articles III. 4 of GATT 1994 and 2.1 of the TRIMs or as to which alternative policies could be implemented without the adoption of practices that also indisputably restrict beyond the reasonable the free trade.

 Members could develop their renewable energy programmes without using LCRs. As noted by Stephenson (2013), there are less distorting options that “would put less stress on the multilateral trading system and would serve to address the legitimate concern that countries have when they try to stimulate employment while pursuing climate and energy policies”. Some of such options would include “investment in infrastructure, promotion of government financing for infrastructure investment, creation of a better and more conducive business environment for firms in which to innovate toward more green technologies and targeted and well adapted training programmes for workers to allow them to develop skills for the energy sector with environmentally friendly technologies”.[[23]](#footnote-23)

 Additionally, incentives to the production of renewable energy, such as the investment in research and development in solar technologies or other renewable technologies, could be conceived and adopted as an alternative to the use of LCRs. It is therefore feasible for Members to grant a more advantageous treatment to sources of renewable energy without imposing LCRs.

**Concluding remarks**

In their analyses of the cases examined herein, the Panel and the AB took into consideration the legal interpretations and the *ratio decidendi* of prior cases. This became even clearer after they reiterated in *India –Solar Cells* the controversial findings of the AB in *Canada Renewable Energy* that significantly restricted the scope of what can be deemed Government Procurement, i.e. Members’ policy space to use LCRs as industrial policy tool.

 Regardless of the terminology used, namely “*jurisprudence constante*” or “*de facto precedents*”, there exist unequivocal jurisprudential trends in connection with LCRs. Such jurisprudential trends have been once more recently confirmed in *Brazil - Taxation[[24]](#footnote-24)*. The Brazilian Programmes INOVAR-AUTO and ICT (Communication and Information Technology) were challenged on the grounds that they were, among others, inconsistent with Articles III. 4 of GATT 1994 and 2.1 of the TRIMs. As regards the INOVAR-AUTO, based on the fact that it requires or incentivizes the use of components produced in Brazil, as well as strategic materials and inputs and laboratory equipment in the production of vehicles engines for motor vehicles so that the latter could be granted tax benefits, the Panel found that such requirements conceded less favourable treatment to imported products in relation to similar domestic products, being thereby inconsistent with Article III. 4 of GATT 1994. Pursuant to the Panel:

“7.772. In light of the foregoing, the Panel concludes that the INOVAR-AUTO programme, the conditions for accreditation in order to receive presumed tax credits, rules on accrual of presumed tax credits, and rules on use of presumed tax credits resulting from expenditure in strategic inputs and tools in Brazil accord less favourable treatment to imported products than that accorded to like domestic products, inconsistently with Article III:4 of the GATT 1994”.

“7.773. Additionally, the Panel concludes that (a) the accreditation requirement to perform a minimum number of manufacturing steps in Brazil: (b) the rules on accrual of presumed tax credits, with respect to purchases of strategic inputs and tools; and (c) that aspect of the accreditation requirements in respect of expenditure and investment in R&D in Brazil, pertaining to the purchase of Brazilian laboratory equipment; accord less favourable treatment to imported products than that accorded to like domestic products, inconsistently with Article III: 4 of the GATT 1994…”.

 Moreover, in the Panel’s view, the INOVAR-AUTO falls into Paragraph 1 (a) of the Illustrative List of the TRIMs insofar as it requires that eligible companies purchase or use products of national origin or from local sources with respect to certain inputs to obtain reductions of the “*Imposto sobre Produtos Industrializados (IPI)*”, a sort of tax on manufacture. The Panel said:

“7.805 Additionally, the Panel notes that the local content requirements identified and discussed in sections….above “require the purchase or use by an enterprise of products of domestic origin or from domestic purchase”, as referred to in paragraph 1 (a) of the Illustrative List annexed to the TRIMs Agreement. Pursuant to Article 2.2 of the TRIMs Agreement, a TRIM of the Illustrative List is **per se** inconsistent with Article III:4 of the GATT 1994, and therefore inconsistent with Article 2.1 of the TRIMs Agreement…”.

 Under the ICT Programme, the tax benefit is conditioned on specific inputs of certain products and/or specific amounts or proportions of such inputs being domestically supplied so that the use of imported inputs may disqualify a final product to be included in and get the benefit from the Programme. According to the Panel, this condition entails less favourable treatment to imported products, which is in violation of Article III. 4 of GATT 1994. The Panel also found that the ICT Programme was inconsistent with Article 2.1 of the TRIMs. The Panel said:

“7.365 In light of the foregoing, the Panel concludes that the Informatics, Digital Inclusion, PATVD and PADIS programmes constitute trade related investment measures, and that the aspects of these programmes found to be inconsistent with Article III.2 and III. 4of the GATT 1994 are also inconsistent with Article 2.1 of the TRIMs Agreement”.

 As can be noted, advantages and benefits that may come to be granted by Members, conditioned on the use of LCRs, will hardly be considered consistent with Articles III. 4 of GATT 1994 and 2.1 of the TRIMs. Findings and recommendations by the WTO adjudicating bodies in this matter may have a deterrent effect on Members. The coherent and consistent interpretations of the Panel and the AB, which characterize these jurisprudential trends, may induce Members to, at least, review or adapt their practices concerning LCRs.

 Such jurisprudential trends may have – to use Bohanes words again – a “chilling impact” on Members’ intention to adopt this model of industrial policy, including Brazil. Additionally, they are very much in line with the changing nature of the industrialization[[25]](#footnote-25) and the evolution of the global trading system. The new architecture of the global trading system requires new tools of industrial or incentive policies that are consentaneous with an economy ever more integrated into the global value chains in which discriminatory measures of LCRs are likely to lose relevance and purpose increasingly.

 The reduction of LCRs discriminatory measures would stimulate the international investment across developing and developed Members alike, fostering new opportunities of growing and economic development, as well as exportation.

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*Brazil – Certain Measures Concerning Taxation and Charge*, DS472/497, Panel’s Reports circulated on August 30, 2017.

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e-mail: umbcelli@usp.br [↑](#footnote-ref-1)
2. See Bohanes (2015), p. 2. [↑](#footnote-ref-2)
3. Pauwelyn (2014), p. 12. [↑](#footnote-ref-3)
4. Weiss (2008), pp. 187 and 192. [↑](#footnote-ref-4)
5. Muchlinsky (2008), pp. 31-32. [↑](#footnote-ref-5)
6. See Cimino, Hafbauer, Schoot (2014), pp. 1-2. [↑](#footnote-ref-6)
7. Hufbauer; Schoot; Cimino, Vieiro; Wada (2013), p.3. It is important to highlight that the authors made severe criticism on the use of LCRs, for which reason they refer to “impacts”. Pursuant to them, since 2008, such measures have reduced the global trade by the amount of US$ 464 billion, which accounted for 2% of global trade in 2010. [↑](#footnote-ref-7)
8. See Mavroidis (2013), p. 308. For the purposes of this paper, analysis shall be focused on Article III.4 of the GATT 1994. [↑](#footnote-ref-8)
9. Van den Bossche; Zdouc (2013), p. 352. [↑](#footnote-ref-9)
10. Jackson (2002), p. 214. [↑](#footnote-ref-10)
11. Pursuant to Article III.4 of GATT 1994, “[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 theirinternal 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 economic operation of the means of transport and not on the nationality of the product.” [↑](#footnote-ref-11)
12. In addition to its commercial nature, the LCRs constitute measures related to investments. The relation between trade and investment had already been made clear in 1984 in the *FIRA* case. The *FIRA* confirmed that obligations existing under the GATT were applicable to requirements imposed by governments in an investment context to the extent that such requirements resulted in discrimination between domestic and imported products. According to the Panel: “6.1… [the] practice of Canada to allow certain investments subject to the Foreign Investment Review Act conditional upon written undertakings by the investors to purchase goods of Canadian origin, or goods from Canadian sources, is inconsistent with Article III:4 of the General Agreement according to which contracting parties shall accord to imported products treatment no less favourable than that accorded to like products of national origin in respect of all internal requirements affecting their purchase.” *Canada - Administration of the Foreign Investment Review Act,* L/5504 - 30S/140, Panel Report adopted on February 7, 1984. [↑](#footnote-ref-12)
13. Hestermeyer; Nielsen (2014), pp. 567-568. [↑](#footnote-ref-13)
14. In *Canada – Certain Measures Affecting the Renewable Energy Generation Sector* and *Canada Measures Relating to the Feed-In Tariff Programme,* the AB has clearly stated its understanding on this matter: “5.56 Article III: 8 (a) therefore establishes a derogation from the national treatment obligation of Article III for government procurement activities falling within its scope. Measures satisfying the requirements of Article III: 8 (a) are not subject to the national treatment obligations set out in other paragraphs of Article III. Article III: 8 (a) is a derogation limiting the scope of the national treatment obligation and it is not a justification for measures that would otherwise be inconsistent with that obligation”. (WT/DS412/AB/R, DS426/AB/R, circulated on May 6, 2013). [↑](#footnote-ref-14)
15. “**Article 2 National Treatment and Quantitative Restrictions** 1. Without prejudice to other rights and obligations under GATT 1994, no Member shall apply any TRIM that is inconsistent with the provisions of Article III or Article XI of GATT 1994. 2. An illustrative list of TRIMs that are inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III of GATT 1994 and the obligation of general elimination of quantitative restrictions provided for in paragraph 1 of Article XI of GATT 1994 is contained in the Annex to this Agreement. **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;…” [↑](#footnote-ref-15)
16. #  *Indonesia – Certain Measures Affecting the Automobile Industry (Indonesia Autos)*, DS54, DS55, DS59, DS64, report of the Panel adopted on July 23, 1998.

 [↑](#footnote-ref-16)
17. #  *Canada – Certain Measures Affecting the Automotive Industry (Canada – Autos)*, DS139, DS124, AB Report adopted on June 19, 2000.

 [↑](#footnote-ref-17)
18. *India – Measures Affecting the Automotive Sector* and *India – Measures Affecting Trade and Investment in the Motor Vehicle Sector*, DS146, DS175, Panels Reports adopted on April 5, 2002. [↑](#footnote-ref-18)
19. *China – Measures Affecting Imports of Automobile Parts, DS339, DS340, DS342*, Panel and AB reports adopted on January 12, 2009. [↑](#footnote-ref-19)
20. *Canada – Certain Measures Affecting the Renewable Energy Generation Sector* and *Canada – Measures Relating to the Feed-In Tariff* *Programme (Canada – Feed-In Tariff Programme*) DS412, DS426, Panel and AB Reports adopted on May 6, 2013. [↑](#footnote-ref-20)
21. *India – Certain Measures Relating to Solar Cells and Solar Modules*, DS456, Panel and AB Reports adopted on October 14, 2016. [↑](#footnote-ref-21)
22. Bohanes (2015), p. 14. [↑](#footnote-ref-22)
23. Stephenson (2013), p. 14. [↑](#footnote-ref-23)
24. *Brazil – Certain Measures Concerning Taxation and Charge*, DS472/497. Panel’s Reports circulated on August 30, 2017. [↑](#footnote-ref-24)
25. See in this respect Randoo (2015), p. 6. [↑](#footnote-ref-25)