SOUTH AFRICAN LOCALISATION POLICIES' CONSISTENCY WITH THE BASIC PRINCIPLES OF WTO LAW

by

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DECLARATION

I, Themba Zimo declare that this research report is my own unaided work. It is submitted in partial fulfilment of the requirements for the degree of Master of Laws (by Coursework and Research Report) at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

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ABSTRACT

South Africa has over the years introduced various measures to industrialise its economy and lift its people out of abject poverty and increase the unemployment rate which has reached record highest since it was first recorded. The measures are formally encouraged by the sectorial Master Plans adopted in the past few years and are either legislated or contained are not legislation but can still be sanctioned under World Trade Organization's (WTO) law, they include local content measure, which term 'local content' is a commonly used industrial policy lever, having no formally agreed definition of what it refers to. The purpose of this research report is to identify the various local content measures adopted by South Africa in recent years and whether these measures conform to the basic principles of WTO particularly, Article III:4 of the GATT 1994.

The research report will examine the identified local content measures against the elements of the applicable basic principle of WTO law, consider the WTO position on government action and whether South Africa is exempted from the application of Article III:4. The report notes that there may be under one or more of the WTO agreements which South Africa can rely upon to justify its measures, but those exceptions, including other localisation measures South Africa has adopted, are beyond the scope of this research.

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LIST OF ACRONYMS

APDP - Automotive Production and Development Programme

CSP - Company Specific Percentage

DTIC - Department of Trade, Industry and Competition

IPAP - Industrial Policy Action Plan

ITAC - The International Trade Administration Commission of South Africa

OEM – Original Equipment Manufacture

PRC - Production Rebate Certificate

PPPFA - Preferential Procurement Policy Framework Act

RRLP - Recommended Retail List Price

SACU - Southern African Customs Union

SABS - The South African Bureau of Standards ()

VAA - Volume Assembly Allowance

VALA - Volume Assembly Localisation Allowance

VAT - Value-Added-Tax

WTO - World Trade Organization

REIPPP - Renewable Energy Independent Power Producer Programme

SARS - South African Revenue Service

1 INTRODUCTION

South Africa (SA) faces persistent challenges of inequality, unemployment, and poverty. Its unemployment rate currently sits at 33.9 per cent.[1] This follows its highest ever recorded since the start of the Quarterly Labour Force Survey in 2018, in the last quarter of 2021.[2] South Africa is a comparatively small and open economy accounting for 0.53 per cent of the world's trade in goods and approximately 0.8 per cent of trade in services.[3] Its trade balance fluctuates yearly. However, its trade in manufactured products is consistently in deficit because of the high levels of manufactured imports.[4]

To achieve economic growth, with the aim to stabilise the rising unemployment and the need for greater skills development and improved job opportunities, the South African government, through the Department of Trade, Industry and Competition (the dtic), has released its trade policy for industrialisation[5] and six sectoral Master Plans. They are underpinned by a localisation strategy aimed at strengthening the local industrial capacity for the domestic market and for export markets.[6] To satisfy its localisation strategy, the SA government adopted sectoral Master Plans aimed at supporting the poultry,[7] sugar,[8] automotive,[9] furniture,[10] steel and metal fabrication,[11] and clothing, textile, footwear, and leather domestic sectors[12] (together, Master Plans). The Master Plans build on the South

[1] Statistics South Africa 'Quarterly Labour Force Survey (QLFS) – Q2:2022' 23 August 2022 https://www.statssa.gov.za/?p=15685, accessed on 1 August 2022.

[2] Statistics South Africa 'Quarterly Labour Force Survey (QLFS) – Q4:2021' 29 March 2022 http://www.statssa.gov.za/publications/P0211/Media%20release%20QLFS%20Q4%202021.pdf, accessed on 14 April 2022.

[3] The Department of Trade, Industry and Competition (the dtic) 'A Trade Policy for Industrial Development and Employment Growth' 20 May 2021 at 2, available on *http://www.thedtic.gov.za/wp-content/uploads/SA_Trade_Policy.pdf*, accessed on 1 August 2022.

[4] Ibid.

[5] Ibid.

[6] Ibid.

[7] The South African Poultry Sector Master Plan (Poultry Master Plan) *http://www.thedtic.gov.za/wp-content/uploads/Poultry_Sector_Master_Plan.pdf*, accessed on 26 July 2022.

[8] South African Sugar Value Chain Master Plan 2030 (Sugar Master Plan) *http://www.thedtic.gov.za/wp-content/uploads/Masterplan-Sugar.pdf*, accessed on 26 July 2022.

[9] Geared for Growth South Africa's Automotive Industry Master Plan to 2035 (Automotive Master Plan) *http://www.thedtic.gov.za/wp-content/uploads/Masterplan-Automotive_Industry.pdf*. accessed on 26 July 2022.

[10] Masterplan for the South African Furniture Industry *http://www.thedtic.gov.za/wp-content/uploads/Master-Plan-South_African_Furniture_Industry.pdf*, accessed on 26 July 2022.

[11] The South African Steel and Metal Fabrication Master Plan 1.0 (Steel and Metal Master Plan) *http://www.thedtic.gov.za/wp-content/uploads/Steel_Industry_Master_Plan.pdf*, accessed 11 April 2022.

[12] South African R-CTFL Value Chain Master Plan to 2030 (R-CTFL Master Plan) November 2019 *http://www.thedtic.gov.za/wp-content/uploads/Masterplan-CTFL_Value_Chain.pdf*, accessed on 11 April 2022.

African Economic Reconstruction and Recovery Plan.[13] The Master Plans either contain the localisation objectives of the particular industry or indicate the authority responsible for creating the measures that are aimed at supporting and transforming the industries above in line with the localisation objectives through to 2035.

In general, localisation policies are protectionist in nature, aimed at providing domestic producers and products competitive advantages over imported products. They, therefore, might be incompatible with some of the basic principles of the World Trade Organization (WTO)[14] law: the obligation to immediately and unconditionally provide favourable treatment to one WTO Member as provided to any other country,[15] the obligation to provide imported products no less favourable treatment than treatment provided to domestic products,[16] and the obligation to reduce market access restrictions, including to eliminate quantitative restrictions.[17] While these basic principles are included in several of the WTO agreements, most relevant for localisation policies are those contained in the General Agreement on Tariffs and Trade 1994 (GATT 1994)[18] governing cross-border trade in goods at a multilateral level, which South Africa is bound to as one of the founding members of the WTO.[19]

Potential measures that formally encourage localisation are (1) various local content measures, (2) increased import tariffs, (3) the introduction of new tariff lines and different tariff rates on imports and (4) the prohibition of exports. Due to the word limit, I focus in this report on examining whether and to what extent the various local content measures and policies, i.e., measures under category 3 are consistent with the applicable basic principles of WTO law. While it might be possible to justify the one or other potential inconsistency by invoking one of the general or special exceptions included in WTO law, I do not address such an inquiry in this report due to the word limit.

Although the term 'local content' is a commonly used industrial policy lever, there is no formally agreed definition of what local content refers to.[20] However, local content

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[13] The South African Economic Reconstruction and Recovery Plan pdf 15 October 2020 at page 34 available on https://www.gov.za/sites/default/files/gcis_document/202010/south-african-economic-reconstruction-and-recovery-plan, accessed on 26 July 2022.
[14] Agreement Establishing the World Trade Organization (15 April 1994) 1867 UNTS 154 (Marrakesh Agreement).
[15] General Agreement on Tariffs and Trade 1994 (15 April 1994) 1867 UNTS 190 (GATT 1994) Article I.
[16] GATT 1994 Article III.
[17] GATT 1994 Article XI.
[18] GATT 1994 Article III.
[19] See World Trade Organisation (WTO) 'History and present status.' available at http://www.dirco.gov.za/foreign/Multilateral/inter/wto.htm. Accessed 29 January 2023.
[20] Nyakabawo, W. '*South Africa's Local Content Policies: Challenges and Lessons to Consider*' (2017) 7 Trade & Industrial Policy Strategies 7/2017 3.

requirements in its ordinary meaning condition a benefit from the government on the use of domestic goods in the production of those goods.[21] They can apply to virtually any good or service that is used as an input into the end product and can come in form of:

(i) minimum thresholds on the amount of locally sourced materials for the production of goods, usually expressed as a percentage of volume, tonnage, length, or number;
(ii) minimum thresholds on the amount of locally sourced expenditure or man-hours for the production of the goods;
(iii) explicit or implicit conditions to develop local content in project and strategic planning; or
(iv) conditions to locally establish facilities, factories, production units or other operations for the purposes of carrying out any production, manufacturing or service provision currently being imported.[22]

I will set out a brief overview of the principles of WTO law. For the South African context, I then assess three types of local content measures for their consistency with the basic principles of WTO law, namely the incentive programme within the automotive industry (part 3); the buy local programme (part 4), and the preferential procurement measures adopted by government in their procurement strategy (part 5). The first two measures are encouraged by the Masterplans but established in accordance with different legal instruments other than the Masterplans; the third measure came before the Master Plans but are refined from time to time to support the localisation drive of the government. I conclude the report in part 6.

2 Brief Overview: General Principles of WTO Law

While WTO law allows its members to set their own domestic policies relating to the treatment of imported products, the WTO obliges the country to treat imported products no less favourably than '*like*' domestic products.[23] Article III of the GATT 1994 is one of the most important provisions affecting local content measures[24] and provides the rule of national

[21] Holger P. Hestermeyer & Laura Nielsen '*The Legality of Local Content Measures under WTO Law'* (2014) *World Trade Journal* at 556.
[22] Sacha Silva '*Local Content Requirements and The Green Economy'* (2013) available at https://unctad.org/system/files/official-document/ditcted2013d7_en.pdf accessed on 29 December 2023.
[23] GAAT Article III.
[24] Cathleen Cimino, Gary Clyde Hufbauer, and Jeffrey J. Schott '*A proposed code to disciple local content measures'* (2014) Policy Brief 14-6 Peterson Institute for International Economics at 4, available at https://www.piie.com/sites/default/files/publications/pb/pb14-6.pdf, accessed on 26 July 2022.

treatment obligation in respect of both internal taxation[25] and internal regulation.[26] Article III of the GATT 1994 provides that, once imports have crossed the border and have paid the applicable import duty, they must be treated no less favourably than domestic products. Internal laws, regulations and requirements affecting the sale, purchase, transportation, distribution, or use of imported products must be no less favourable than for goods of national origin.[27]

The Appellate Body in Japan – Alcoholic Beverages II confirmed that 'the broad and fundamental purpose of Article III is '*to avoid protectionism in the application of internal tax and regulatory measures*.'[28] The Appellate Body also confirmed that Article III:1 provides the general principle of anti-domestic protectionism that serves as a guide to understanding and interpreting the first and second sentence of Article III:2 and other paragraphs of Article III, while respecting and not diminishing the meaning of the words used in those paragraphs.[29]

3 INCENTIVE PROGRAMME FOR THE AUTOMOTIVE INDUSTRY

In the Industrial Policy Action Plan (IPAP), the government recognises the automotive industry as a critical sector with cross-cutting linkages to several other industries and services, contributing to various economic development imperatives.[30] To support the automotive industry, the government adopted the Motor Industry Development Programme (1995 to 2012) and the Automotive Production and Development Programme (APDP) (2013 to 2020).[31]

Notwithstanding the importance of the automotive industry and the support measures provided by the government, the industry's domestic market has stagnated since its vehicle consumption peak in 2006, while domestic market imports have surged as global vehicle assemblers have aggressively sought markets to fill their production capacity.[32] It is within this context that the dtic formalised the South African Automotive Master Plan (Automotive Master Plan) to guide the development of the South African automotive value chain through to 2035.[33] In the Automotive Master Plan, the automotive industry is confirmed as 'South Africa's most

[25] GAAT Article III:2.
[26] GATT 1994 III:4.
[27] GATT Article III:2.
[28] WTO Appellate Report (WTO ABR) Japan: Taxes on Alcoholic Beverages (1996) WT/DS8/AB/R (Japan – Alcoholic Beverages II) 16.
[29] Pauwelyn, Guzman & Hillman International Trade Law 3 ed (2016) 259 and WTO Panel Report WTO PR European Communities – Measures Affecting Asbestos and Asbestos-Containing Products (31 March 1998) WT/DS135/AB/R (ABR EC – Asbestos (31 March 1998) para 93.
[30] Automotive Master Plan op cite note 9 at 3.
[31] Ibid at 3.
[32] Ibid at 3.
[33] Ibid at 3.

important manufacturing sector'[34] and stipulates local market optimisation and localisation as one of its six key objectives.[35]

For both objectives, the dtic is selected as a key support agency with the task to introduce a policy aligned with the Automotive Master Plan post 2020. In reply, the dtic revised the APDP and introduced the new revised Automotive Production and Development Programme Phase 2 regulations (APDP Phase 2), which entered into force on 1 July 2021.[36] I first discuss the content of the APDP Phase 2 (part 3.1) before I assess its consistency with the basic principles of the WTO law (part 3.2).

3.1 The Automotive Production and Development Programme Phase 2

The APDP Phase 2 is an incentive scheme for the automotive industry, administered by the International Trade Administration Commission of South Africa (ITAC) and South African Revenue Service (SARS),[37] with the objective to 'support the vision of the South African Automotive Masterplan' which vision will 'guide the development of the South African automotive industry to 2035, with all the policy elements of the APDP Phase 2 targeting its realization.'[38] The APDP Phase 2 offers rebates and refunds[39] to original-equipment manufacturers (OEMs), or vehicle manufacturers, and other automotive importers to decrease their duty account built up with the South African Revenue Service (SARS)[40] in relation to the customs duties usually charged on their imported vehicles (25 per cent)[41] and original equipment components imported for assembly (20 per cent).[42]

ITAC handles the application and determines the rebate applicable.[43] Subsequently, SARS will rebate or refund the OEMs in terms of the relevant rebate provisions which can be found in rebate items 317.04 and 460.17 of Schedules 3 and 4 respectively to the Customs and Excise Act, 1964 (Customs Act),[44] and in refund items 536.00, 537.00 and 538.00 in Schedule 5 to the

[34] Ibid at 3.
[35] Ibid at 19.
[36] Automotive Production and Development Programme Phase 2 Regulations (APDP Phase 2 Regs) GN R.80 GG 44144 of 11 February 2021.
[37] Ibid para 4.2.
[38] APDP Phase 2 Regs op cit note 37 para 2.
[39] Ibid para 5.1.
[40] Chapter 98 of Part 1 of Schedule No. 1 to the Customs and Excise Act, 1964 (Customs Act).
[41] Customs Act: Chapters 87 and 98 of Part 1 of Schedule No. 1.
[42] Customs Act: Chapter 98 of Part 1 of Schedule No. 1.
[43] APDP Phase 2 Regs op cit note op cit note 37 para 6.1.
[44] Ibid para 5.3.

Customs Act.[45] Participation in the APDP Phase 2 is voluntary.[46] Put differently, only the OEMs that register under, and participate in, APDP Phase 2 unconditionally bind themselves to the rules in the APDP Phase 2. Consequently, only those OEMs that fulfil the relevant requirements can obtain the benefits offered by the programme. The two benefits offered under the APDP Phase 2 are the Production Incentive (PI) (part 3.1.1) and the volume assembly localisation allowance (VALA) (part 3.2.2).

3.1.1 Production Incentive

The PI is an incentive available to final manufacturers of eligible products and is calculated at the point of sale based on local value added on qualifying motor vehicles, automotive tooling, automotive components manufactured in South Africa.[47] The PI is calculated on the tax invoice of the final manufacturer less the value of imports and non-qualifying local materials used by itself or by other manufacturers in the manufacturing value chain.[48] A manufacturer participating in this programme can either be a company or a close corporation.[49] Entities with manufacturing operations based in South Africa that are registered with SARS as taxpayers in good standing and are compliant with the Broad-Based Black Economic Empowerment (B-BBEE) codes[50] may qualify for the benefit. ITAC will then issue Production Rebate Certificates certificate (PRC). The latter is used to indicate the amount of customs duty that can be rebated for the Eligible Products by the participating manufacturers using the PI.[51] Eligible Products under the APDP Phase 2 mean those specified motor vehicles, automotive components and automotive tooling adhering to the qualifying criteria set out in section 9 of APDP Phase 2 regulations.[52] They are:

(i) Specified motor vehicles that are light motor vehicles consisting of motor cars (including station wagons), minibuses and light commercial vehicles, fitted with an engine and gearbox, manufactured in a licensed, special vehicle manufacturing warehouse;

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[45] Ibid para 5.4.
[46] APDP Phase 2 Regs op cit note op cit note 37 para 4.1.
[47] APDP Phase 2 Info Doc A para 6.2, available on http://www.itac.org.za/pages/services/tariff-investigations/apdp-post-2020-documents accessed on 15 February 2023.
[48] APDP Phase 2 Regs op cit note op cit note 48 paras 7 and 11.
[49] APDP Phase 2 Info Docs op cit note 48 para 6.2.
[50] Broad Based Black Economic Empowerment Act 46 of 2013.
[51] APDP Phase 2 Info Doc A op cit note 42 para 3.
[52] APDP Phase 2 Regs op cit note 37.

(ii) specified motor vehicles that are light motor vehicles consisting of motor cars (including station wagons), minibuses and light commercial vehicles, not fitted with an engine or gearbox, manufactured in the licensed, special vehicle manufacturing warehouse;

(iii) automotive components;

(iv) automotive tooling;

(v) automotive components applicable to heavy motor vehicles as defined in Customs Act;[53] and

(vi) specified motor vehicles manufactured in a licenced, special manufacturing warehouse in South Africa, destined for assembly outside the borders of the Republic, must be in the form of kits that have untrimmed painted bodies with no parts assembled to the body.[54]

In addition, for the foregoing products to qualify as Eligible Products, they must fulfil the following requirements:

a. The products listed in (i) to (vi) must be wholly manufactured in the South Africa;
b. Not less than 25 per cent of the ex-factory selling price (exclusive of VAT, ad valorem excise duty and environmental levy) of the components, at the time of sale, is represented by the sum of:
    i. The cost of labour incurred in South Africa;
    ii. The value of materials originating in the SACU; and
    iii. The factory overhead expenses incurred in the South Africa (excluding profit).
c. The final process of manufacture was carried out in South Africa provided that operations that consist only of packing or painting will not qualify as manufacturing.[55]

3.1.2 Volume assembly localisation allowance

A volume assembly localisation allowance (VALA) is a is a rebate incentive offered by ITAC that can be used by a registered light motor vehicle manufacturer to reduce the value of original equipment components imported for customs duty purposes. OEM receive the benefit of lowering their customs duty account owing to SARS in case they achieve a minimum of 10 000 units per annum. However, the incentive calculation excludes imported content built into the wholesale price as it needs to be deducted from the VALA calculation.[56] Therefore, to receive a maximum benefit under VALA, OEMs need to increase their local content in the manufacture

[53] Customs Act: Note 1 to rebate item 317.07 of Part 1 of Schedule No. 3.
[54] APDP Phase 2 Info Doc A op cit note 48 para 3.
[55] Ibid para 3.3.
[56] Ibid.

or assembly of original equipment components or specified motor vehicles, which is in line with the automotive master plan localisation rate objective of 60 per cent local content industry level by 2035.[57] For an OEM to qualify for a VALA benefit, the OEM must be a light motor vehicle manufacturer registered with the ITAC and SARS and it must be manufacturing 'specified motor vehicles in South Africa'[58] as set out in the Customs Act.

Specified motor vehicle manufacturers, component manufacturers and component suppliers to specified motor vehicle manufacturers under the APDP Phase 2 must declare their imported content values in respect of original equipment components and material for use in the manufacture of specified motor vehicles.[59] ITAC calculates the Company Specific Percentage (CSP) that is used by SARS in the calculation of VALA.[60] An OEM shall not receive or be entitled to utilise VALA unless a CSP has been determined by ITAC in the relevant quarter.[61] The CSP is a calculated percentage expressing the mark-up by the retailer and market related expenditure by the OEM as a percentage to the recommended retail list price ("RRLP").[62]

In the case of vehicles built for the local market, the CSP is the difference between the RRLP and the invoice price by the OEM, exclusive of Value added Tax, ad valorem excise duty[63] and environmental levy,[64] plus market related expenditure, expressed as a percentage of the RRLP.[65] In the case of vehicles exported outside SACU, the CSP is the market related expenditure expressed as a percentage of the invoice price by the OEM.[66] To qualify for a CSP, a motor vehicle manufacturer must first achieve a plant capacity of 10 000 units per annum to submit applications to ITAC for registration as a specified motor vehicle manufacturer described above.[67] OEMs must deduct the value of imported content from the vehicle's wholesale selling price, get a number and then multiply this by the applicable VALA percentage is which will eventually drop to 35 per cent.[68] This means OEMs will still get an incentive for assembly, but they will no longer be incentivised for parts content that is imported

[57] Automotive Master Plan op cite note 9 at 17.
[58] Ibid.
[59] APDP Phase 2 Regs op cit note 37 para 20.
[60] Customs Act: Note 7.1(c) to Rebate Item 317.04 of Schedule 3.
[61] Customs Act: Note 7.2 to Rebate Item 317.04 of Schedule 3.
[62] APDP Phase 2 Info Doc B available on http://www.itac.org.za/pages/services/tariff-investigations/apdp-post-2020-documents accessed on 15 February 2023 para 1.5.
[63] Customs Act: Section B of Part 2 of Schedule 1.
[64] Customs Act: Section D and E in Part 3 of Schedule No. 1.
[65] APDP Phase 2 Info Doc B op cit note 63 para 3.
[66] Customs Act: Note 7.1 to Rebate Item 317.04 of Schedule 3.
[67] Ibid para 17.1.
[68] APDP Phase 2 Info Doc B op cit note 63 para 1.2.

and built into the wholesale price as VALA is not an assembly allowance, irrespective of the levels of local sourcing.[69]

3.2 Consistency with the basic principles of WTO law

Given that the APDP Phase 2 regulations incentivises OEMs to use automotive products that are local under the over products that have been imported outside SACU, the national treatment (NT) obligation that requires imported goods to not treat less favourable than 'like' domestic goods becomes relevant for assessing their consistency with the WTO law basic principles. According to Article III:4 of the GATT 1994, a measure is inconsistent with the NT principle, if the following three elements are satisfied (subject to the Article III (8) derogation in case of government procurement, which will be discussed later in the report):

a. The measure at issue is a 'law, regulation, or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution, or use';
b. The imported and domestic products at issue are like products; and
c. The imported products are accorded treatment less favourable than that accorded to like domestic products.[70]

I now address these elements in respect of each of the two measures at issue.

3.2.1 Laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution, or use of relevant products'

The first element of the legal test under Article III:4 of the GATT 1994 raises two questions: (i) whether the measures are covered by the phrase 'laws, regulations, and requirements' and, if so, (ii) whether they 'affect the internal sale, offering for sale, purchase, transportation, distribution or use' of the products at issue. I examine these two issues in turn.

[69] Irma Venter 'New-look APDP could change face of the local auto industry, says Naacam' Engineering News 1 February 2019 available at https://www.engineeringnews.co.za/article/new-look-apdp-could-change-face-of-the-local-auto-industry-says-naacam-2019-02-01 accessed on 27 January 2023.
[70] Confirmed in WTO Appellate Body Report (WTO ABR) Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef (11 December 2001) WT/DS161/AB/R, WT/DS169/AB/R (AB Korea – Various Measures on Beef (2001)) at 133.

3.2.1.1 *Laws, regulations, and requirements*

The first question is whether ADPD Phase 2 regulations, which include both the PI and VALA incentives, fall within the scope of the phrase 'laws, regulations and requirements' in Article III:4 of the GATT 1994. The panel in *Japan – Film* stated that 'panels have taken a broad view of when a governmental measure is a law, regulation or requirement.'[71] Further, the panel in *India – Autos* explained that GATT panel reports suggest two distinct situations that would satisfy the term 'requirement' in Article III:4: (i) obligations, which an enterprise is 'legally bound to carry out'; and (ii) obligations that an enterprise voluntarily accepts to obtain an advantage from the government.[72] Thus, for a governmental policy or action to fall within the scope of 'laws, regulations and requirements', it need not necessarily have a substantially binding or compulsory nature.

Both VALA and PI are contained in formal legal instruments rules, acts or statutes. VALA and PI are established through the APDP Phase 2 regulations which are established in terms of section 7 of the International Trade Administration Act.[73] The APDP regulations must be read together with rebate item 317.04 of Schedule 3 to the Customs Act.[74] Even though participation under the APDP is voluntary, by registering and participating under the APDP Phase 2, an OEM unconditionally binds itself to the rules and conditions of the APDP Phase 2.[75] These legal instruments qualify as 'law' or 'regulations' resulting from 'government action'[76] and setting out rules with which compliance is necessary to obtain an advantage from a government,[77] and also APDP Phase 2 is domestic law.

3.2.1.2 Affecting the internal sale, offering for sale, purchase, transportation, distribution and use of the relevant products

Moreover, VALA and PI must 'affect the internal sale, offering for sale, purchase of the products'. The term '*affecting*' has been defined broadly in WTO law and has been interpreted

[71] WTO Panel Report (WTO PR) Japan – Measures Affecting Consumer Photographic Film and Paper, (circulated 31 March 1998) WT/DSR 1998:IV (PR Japan – Film (1998)) para. 10.51.
[72] WTO Panel Report (WTO PR) India: Measures Affecting the Automotive Sector (circulated 21 December 2001) WT/DS146/R (PR India – Auto (2001)) para. 7.184.
[73] International Trade Administration Act. 71 of 2002
[74] APDP Phase 2 Regs op cit note 37 para 3.
[75] Ibid 4.
[76] PR Japan – Film (1998) op cit note 78 para. 10.51.
[77] WTO Panel Report (WTO PR) (WTO PR) United States — Certain Measures relating to the Renewable Energy Sector circulated (27 June 2019) WT/DS456/R (US — Renewable Energy) paras 7.152

to go beyond laws and regulations which directly govern the conditions of sale or purchase, to cover requirements which might adversely modify the conditions of competition between domestic and imported products,[78] Further, the panel in *Canada – Autos* concluded that where a challenged measure confers an advantage on the use of a domestic product but not on the use of a like imported product, it can clearly be characterized as affecting the internal sale or use of those products, because it necessarily has an impact on the conditions of competition[79]

The panel in *Canada – Autos* further rejected an argument that a measure may not satisfy this element because the domestic content requirements it established were very 'low'.[80] Having a look at the structure of the APDP Phase 2 programme, the PI and VALA were designed to provide incentives (i.e. an advantage) based on domestically procured specified components. APDP Phase 2 regulations do not prohibit the use of imported products in the assembly of vehicles in South Africa. However, OEMs are not incentivised for those imported products built into the selling price because the imported products are deducted from the selling price when calculating the applicable PI or VALA, and the OEM are incentivised for the amount of local value addition in the manufacture of specified vehicles and Eligible Products.

On this basis, I submit that the APDP Phase 2 regulations, read together with rebate item 317.03 of Schedule 3 to the Customs Act are sufficient to establish a prima facie case that the APDP Phase 2 incentives if they do adversely modify the conditions of competition between domestic and imported 'like products' and therefore 'affect' the sale, purchase, transportation, distribution or use of the relevant products.

3.2.2 'Likeness'

Article III of the GATT is silent on the definition of the term 'like'. Usually, assessing whether products are like requires a holistic analysis of the evidence on the record, considering the four Border Tax Adjustment criteria.[81] However, several past cases support the proposition that where a measure distinguishes between products solely on the basis of origin, the likeness of the products so distinguished can be presumed.[82] I will now examine whether the relevant

[78] Ibid para 7.197.
[79] WTO Panel Report (WTO PR) Canada - Certain Measures Affecting the Automotive Industry (Circulated on 11 February 2001) WT/DS139/R, WT/DS142/R (PR Canada – Autos (2001)) para 10.82.
[80] Ibid para 10.83.
[81] WTO Appellate Body Report (WTO ABR) European Communities – Measures Affecting Asbestos and Asbestos-Containing Products (5 April 2001) WT/DS135/AB/R, (AB EC – Asbestos) paras. 101-103.
[82] PR India – Auto (2001) para. 7.174; PR Canada – Autos (2001) para. 10.74; and WTO Panel Report (WTO PR) Turkey – Measures Affecting the Importation of Rice, (Circulated 21 September 2007) WT/DS334/R (PR Turkey Rice – Autos (2007)) paras. 7.214-7.216.

products under each measure are like within the meaning of Article III:4 of the GATT 1994. The relevant declared imported components and raw materials used in the supply chain in the manufacture of specified motor vehicles and the local components used in the manufacture and assembly of eligible products and the specified motor vehicle and eligible products must be 'like products'.

First, in respect of the PI, for the Eligible Products under APDP Phase 2 to qualify for consideration as eligible in order for the OEM to obtain increase PI, they must be wholly manufactured in the South Africa and the final process of manufacture must be carried out in South Africa provided that operations that consist only of packing or painting will not qualify as manufacturing.[83] For the calculation of PI, the APDP Phase 2 regulations only distinguishes between products solely on the basis of origin because the products that are imported to South Africa would serve the same function for the manufacturing of eligible products, however, because they are not from South Africa, the APDP Phase 2 would require the important content value to be deducted from the selling price (and calculation of the PI), in order for the OEM to obtain the benefit of reducing their customs duty payable to SARS. The likeness of the products so distinguished can therefore be presumed.[84]

Secondly, the VALA incentive is based on the wholesale selling price, less the value of declared imported content. The products which can be used to obtain the benefit under VALA are specified motor vehicles that an OEM must produce a minimum of 10 000 units of and have a qualifying criterion before applying to ITAC to be part of the programme. In order to receive a benefit, the OEM must use a lot of local products to increase the rebate provided under VALA and must declare the import content value used in the manufacturing of a specified motor vehicle so that the latter can be deducted from the selling price of the specified motor vehicle as VALA is calculated only on the value of domestic content.

Under VALA, all that needs to happen is a declaration that the products which ought to be deducted when calculating the amount of benefit an OEM will get, are not from South Africa. The only distinguishing feature is the origin of the eligible products and components and raw materials used in the manufacturing of a specified motor vehicle. If an imported like automotive products is used in the production of a specified vehicle, then it will not qualify the OEM to claim any benefit under the ADPD Phase 2.

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[83] Ibid para 3.3.

[84] PR India – Auto (2001) para. 7.174; WTO Panel Report (WTO PR) PR Canada – Autos (2001) para. 10.74; and WTO Panel Report (WTO PR) Turkey – Measures Affecting the Importation of Rice, (Circulated 21 September 2007) WT/DS334/R (PR Turkey Rice – Autos (2007)) paras. 7.214-7.216.

Accordingly, Eligible Products under PI and imported components and raw materials used in the manufacture and assembly of specified motor vehicles under the APDP Phase 2 regulations are like for the purposes of Article III:4 because APDP Phase 2 regulations treat like domestic and imported products under PI and VALA differently solely because of their origin.

3.2.3 Less favourable treatment

The final element under Article III:4 relates to the determination of whether the Eligible Products under the PI and the components and raw materials used for VALA purposes are such that they accord less favourable treatment to the declared imported like products by but providing benefits for using domestic inputs and thereby denying effective equality of opportunity to the imported products to compete in the domestic product. This determination includes an examination of whether ADPD Phase 2 modifies the conditions of competition in the South African market to the detriment of imported products.[85]

The Appellate Body has emphasised that an assessment under Article III:4 of the GATT 1994 'may well involve, but does not require, an assessment of the contested measure in the light of evidence regarding the actual effects of that measure in the market.'[86] A finding of less favourable treatment therefore 'need not be based on the actual effects of the contested measure in the marketplace.'[87] This is so because 'Article III protects expectations not of any particular trade volume but rather of the equal competitive relationship between imported and domestic products.'[88] A panel must recognise 'the implications of the contested measure for the equality of competitive conditions first'[89] by considering the design, structure, and expected operation of the measure at issue.[90]

The APDP Phase 2 incentive is available to an OEM to rebate their customs duty account when adding local content into specified vehicles assembled in South Africa or components produced in South Africa for export. The duty rebate is conditioned upon the use local content. Looking at the text, design, and structure of the measure at issue, in relation to the calculation of the PI, a higher domestic manufacturing value addition results in a higher PI valuation. A

[85] WTO Panel Report (WTO PR Japan - Measures Affecting Consumer Photographic Film and Paper (Circulated on 31 March 1998) (PR Japan – Beef) para 10.328.
[86] Ibid para. 129.
[87] WTO Appellate Report (WTO ABR) United States — Tax Treatment for 'Foreign Sales Corporations" WT/DS108/AB/R (US – FSC (2000)) para 215.
[88] Japan – Alcoholic Beverages II op cite note 28 at 16.
[89] WTO Appellate Report (WTO ABR) Thailand — Customs and Fiscal Measures on Cigarettes from the Philippines WT/DS371/AB/R (Thailand – Cigarettes (Philippines)) para 130.
[90] Ibid para 134.

higher PI valuation allows for a greater duty account reduction. There is no incentive available for use of imported products under the PI.

For VALA, the formula requires the OEMs to deduct the value of imported content from the vehicle's wholesale selling price, get a value of domestic inputs used and factored into the selling price and then multiply this by the applicable VALA percentage which percentage differs each year.

In both these incentives, the 'fundamental effect' of PI and VALA is thus to tie the benefit to the use of certain South African equipment.[91] The higher the level of local content used, the higher the benefits received by OEM under the APDP Phase 2 regulations. These creates a situation where OEMs, in order to receive benefits, will have to prefer domestic products over imported like products as the higher domestic products is used in the specified vehicles used to apply for a benefit under APDP Phase 2, the higher the value of the customs duty reduction. Accordingly, the incentives under the APDP Phase 2 programme modify the conditions of competition in favour of South African-made components used in assembly of specified vehicles by creating a duty rebate incentive favouring South African like products.

4 Buy Local Programme

4.1 Content of the measure

South African local content measures include actions by private parties who are pursuing a government localisation strategy. Proudly South African (Proudly SA), is done under the guidance of the dtic but is not a direct government measure. Proudly SA is South Africa's national Buy Local programme, funded by National Treasury through the dtic, and has entered into MOU with the dtic in this regard.[92] Its mandated to encourage corporate South Africa and end consumers to increase their uptake of locally sourced and manufactured goods (and service required for their day-to-day operations, and to encourage end consumers on labels of origin and their role in contributing to job creation by making buying local goods.[93] Proudly SA member companies must ensure that 50 per cent of their cost of production are local[94] and to

[91] US – FSC (2000) supra note 89 para 215.
[92] Annual Report 2020-21 available at https://www.proudlysa.co.za/pdf_documents/Annual_Reports/Annual%20Report%202020-21(compressed).pdf accessed on 24 January 2023 at 175.
[93] Buy Local Summit and Expo available on *https://www.proudlysa.co.za/our_mandate*_pg accessed on 28 September 2022.
[94] Ibid.

give first preference to other Proudly SA companies when purchasing goods, materials and services required for the applicant organisation's activities.[95] Participation in the buy local programme is voluntary.

The benefits for member companies of Proudly SA are, among others: (a) Participation in the prestigious annual Proudly South African Buy Local Summit and Expo, which gives member an opportunity to exhibit their products and services and network with decision makers from business and government. (b) Access and first priority to tender opportunities in-line with the dtic's 21 Local Content Designation in certain sectors. (c) Benefitting from the campaign's marketing strategy and activities that encourage the purchasing/procurement of members' products and services.[96] If a member company does not adhere to the criteria set out above, Proudly SA reserves the right to cancel the member organisation's subscription.[97]

4.2 Consistency with the basic principles of WTO law

As already pointed out above, according to Article III:4 of the GATT 1994, a measure is inconsistent with the NT principle, if the (a) measure at issue is a 'law, regulation, or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution, or use'; (b) the imported and domestic products at issue are like products; and (c) the imported products are accorded treatment less favourable than that accorded to like domestic products.[98]

4.2.1 'Laws, regulations, and requirements'

In India – Autos, the panel explained that GATT panel reports suggest two distinct situations that would satisfy the term 'requirement' in Article III:4: (i) obligations which an enterprise is 'legally bound to carry out'; and (ii) those that an enterprise voluntarily accepts to obtain an advantage from the government.[99] Thus, for a governmental policy or action to fall within the

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[95] Proudly SA 'Membership' available on *https://www.proudlysa.co.za/how_to_register* accessed on 24 January 2023.
[96] Ibid.
[97] Membership Application Form available on https://www.proudlysa.co.za/pdf_documents/Membership_Application_Form_(Rev7).pdf accessed on 24 January 2023.
[98] Confirmed in WTO Appellate Body Report (WTO ABR) Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef (11 December 2001) WT/DS161/AB/R, WT/DS169/AB/R (AB Korea – Various Measures on Beef (2001)) at 133.
[99] WTO Panel Report (WTO PR) India: Measures Affecting the Automotive Sector (circulated 21 December 2001) WT/DS146/R (PR India – Auto (2001)) para. 7.184.

scope of 'laws, regulations and requirements', it need not necessarily have a substantially binding or compulsory nature. It is common cause that the Buy Local programme is a non-profit organisation not established according to any formal government legal instruments that would qualify as law or regulations for purposes of GATT 1994. However, given that the WTO law does not only discipline ‘in law or *de jure* violation by its members, but also covers in fact or *de facto* violation, there is a case for an analysis of this kind.

To this end, informal measures that are not sanctioned law but can be indirectly linked to government measures can also be ‘requirements’ that are prohibited by WTO law.[100] The panel in Canada -- Auto stated that a measure by a private party could still fall within the ambit of Article III:4 if a connection between that measure and the government’s local content strategy can be made.[101]

Proudly SA was established to further the localisation strategy of South Africa. Notwithstanding Proudly SA being registered as a non-profit organisation, it voluntarily adheres to the Public Management Act, PPPFA[102] and the National Treasury Regulations specifically meant to regulate SOEs or any other government entity which shows its connection to the government. The dtic also sits on the board of Proudly SA and the National Treasury funds Proudly SA through the dtic and has concluded a Memorandum of Understanding whereby the dtic among other things, monitors the voluntary adherence by the different public sector laws and regulations even though Proudly SA is not subject to them on paper..[103]

The mandate of the Buy Local Programme accordingly qualifies at least as ‘requirements’ within the meaning of Article III:4, because it sets out the conditions and procedures that need to be followed to benefit from the relevant advantages, and they are issued in collaboration with a public authority responsible for administering these programs. In this regard, the position in panel in India – Autos supports the finding of ‘requirement’ as it includes those obligations which an enterprise voluntarily accepts in order to obtain an advantage from the government.’ through Produly SA.[104]

Thus, I submit that the Buy Local measure falls prima facie within the scope of the phrase "laws, regulations and requirements" as used in Article III:4 of the GATT 1994.

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[100] Hestermeyer et al op cit note 21 at 576.
[101] PR Canada – Autos (2001) supra note 81 para 10.123.
[102] Request for Proposals 3 August 2022 https://www.proudlysa.co.za/pdf_documents/tenders/RFP%20Television%20Advert_.pdf accessed on 28 September 2022.
[103] Annual Report 2020-21 Op cite note 46.
[104] PR India – Auto (2001) op cit note 86 para. 7.184.

4.2.2 'affecting the internal sale, offering for sale, purchase, transportation, distribution and use' of the relevant products

The mandate of Buy Local is to change consumer, retail, and corporate behaviour to see local as better, and underpins messages of support for the economy by purchasing local over imported. An analysis of the correctness of this position is beyond the scope of this report and this field, to some extent. However, it is safe to state that should the message be welcomed by consumers, foreign products' sales are affected despite their entry into the market having paid the applicable customs duty. The relevant question at this point is whether the measure has an impact on the conditions of competition between domestic and imported like products, not whether or the extent to which it has or is actually influencing the purchasing decisions of private firms 'under current circumstances. In my view, the Buy Local Programme involves formally different treatment of imported and domestic products albeit that the actual trade effects of this different treatment may be minimal under current circumstances.[105]

4.2.3 'Likeness'

Due to the Buy Local programme encouraging corporate South Africa to increase its uptake of locally sourced and manufactured goods and services required for their day-to-day operations, an analysis of whether the products locally sourced and manufactured should be done. The products qualifying as local content are prescribed by the dtic in its local content designation.[106] The products manufactured in South Africa and those imported are only distinguished by origin, i.e, those listed in the local content designation and are made and sourced in South Africa and where consumers and corporate SA are encouraged to purchase them and those products that are not made in South Africa and therefore cannot get the Proudly SA label. In the context of each of this measure, the relevant imported and domestic products are like products within the meaning of Article III:4 of the GATT 1994 because they are distinguished solely on the basis of origin.

4.2.4 Less favourable treatment

[105] Ibid para 10.84.
[106] Industrial Procurement available op cit note 59.

The final determination, as already been pointed out under APDP Phase 2 includes an examination of whether the South African localisation policies modify the conditions of competition in the South African market to the detriment of imported products.[107] Although the Proudly SA label is limited to local producers, campaigning to use domestic over foreign produces. Foreign products compete with South African goods after paying the applicable customs duty, and the intended change in behaviour, will, if it has not yet yielded the mandated results, affect imported products because members of Proudly SA will be limited in the quantity of goods that they can buy that are not South African which not only discriminates against them but potentially affect their market access for certain products into South Africa as the demand for the products is being targeted by the measure in collaboration with the government.

South African Buy local programme incentivises the use of local over like imported product through its mandate and ultimately campaigns to end-consumers, corporates, and the tender bidders. The differential treatment between imported and local products is a result of requiring retailers to encourage consumers to prefer and ultimate buy local products which bears the Proudly SA logo encouraging the view that imported products and domestic products are different, when they are, in terms of the analysis above, like products.

The decision is ultimately that of the consumers and targeted corporates, however, the marketing campaign, with the underlying message being that to do so will create jobs, can convince an average South African looking at the economic outlook of the country, and the unemployment rate and conclude that local is indeed better which modifies the competition of the like products and therefore affects their use. Looking at the text and design of the programme, the ultimate aim of the programme is for South African corporates and consumers to prefer local over imported goods.

5 Preferential Procurement

Preferential procurement policies and associated regulations, such as local content requirements in (a) Government procurement; and (b) Renewable Energy Independent Power Producer Programme are mechanisms used by the government and organs of state in the adjudication of tenders, to consider procuring locally manufactured that comply with specified requirements. Procurement in South Africa is primally informed by the Constitution, which

[107] WTO Panel Report (WTO PR Japan - Measures Affecting Consumer Photographic Film and Paper (Circulated on 31 March 1998) (PR Japan – Beef) para 10.328.

requires the enactment of national legislation to prescribe a framework for the implementation of the government's preferential procurement policies.[108]

5.1 Government preferential procurement in South Africa

Currently, procurement by almost all government institutions in certain sectors or subsectors is done through the Preferential Procurement Policy Framework Act 5 (PPPFA)[109] as well as the Preferential Procurement Regulations (Regulations).[110] The PPPFA prescribes the framework within which preferential procurement policies must be implemented,[111] and stipulate that the organs of state must include local content in their bid invites.[112] The PPPFA,[113] and the Regulations allow the dtic to designate certain industries, sectors or subsectors where only locally manufactured products that meet the stipulated threshold for local content will be considered for the South African government procurement.[114]

The South African Bureau of Standards (SABS) is the verification agency for local content in South Africa.[115] The winning bidders in state department, state-owned company and other public entity tenders are required to have their 'local content declarations' verified to ensure there is no misrepresentation.[116] Accordingly, in order to do business with the South African government, a supplier of goods would have to ensure that its products are manufactured in South Africa up to the threshold required for a specific industry.

5.2 Renewable Energy Independent Power Producer Programme

The Renewable Energy Independent Power Producer Programme (REIPPP) represents the largest government programme for reaching the renewables targets under the revised 2019 Integrated Resource Plan (IRP),[117] which targets a balance between different energy sources

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[108] Constitution of the Republic of South Africa: section 217(1).
[109] Industrial Procurement available at *http://www.thedtic.gov.za/sectors-and-services-2/industrial-development/industrial-procurement/v* accessed on 31 July 2022.
[110] Preferential Procurement Regulations (Regulations) in GN 32 *GG* 40553 of 20 January 2017
[111] Preferential Procurement Policy Framework Act (PPPFA) 5 of 2000: Preferential Procurement Regulations", 2011.
[112] Preferential Procurement op cit note 53: Reg 8(2).
[113] PPPFA: section 5.
[114] Regulations: Reg 8(1).
[115] Local Content Policy & Designation Measures to ensure Compliance and Verification http://www.thedtic.gov.za/wp-content/uploads/the-dti-Local_Content.pdf accessed on 26 July 2022. at 4.
[116] Ibid.
[117] Integrated Resource Plan (IRP) of 17 October 2019 at 11 available on https://www.energy.gov.za/irp/2019/IRP-2019.pdf accessed on 22 December 2022.

because of South Africa’s current energy crisis.[118] To give effect to the procurement process and implementation of the relevant capacity allocations of the IRP, the Minister of Mineral Resources and Energy, in consultation with the National Energy Regulator of South Africa determined a new electrical energy generation capacity requirements.[119] The determinations further specify whether the new generation capacity shall be established by Eskom, another organ of state or an independent power producer (IPP).[120]

The REIPPP is a competitive tender bidding process designed to facilitate private sector investment into grid-connected renewable energy generation in South Africa.[121] It is a procurement programme that invites bids from independent producers of renewable electricity in a series of bidding ‘windows’ for the seven major categories of renewable energy, that is, onshore wind, solar thermal, solar photovoltaic, biomass solid, biogas, landfill gas and small hydro.[122] As part of the bidding process, the REIPPP requires bidders to commit to achieving certain local content thresholds applicable to both goods and services for a bidding window[123] and the thresholds are set out by the Department of Mineral Resources and Energy (DMRE) in the Request for Proposal (RFP) documents.[124] In order for bid to be considered, the minimum targets have to be committed to in the tender documents in response to the RFP. Should these components be unavailable, bidders can apply for exemption, which needs to be lodged with the dtic.[125] The 6th round of the REIPPPP bid window (Bid Window 6) earmarked 4200 megawatts of onshore wind and solar photovoltaic (Solar PV) technologies to be procured from

[118] Confronting the energy crisis -actions to end load shedding and achieve energy security available on https://www.thepresidency.gov.za/content/confronting-energy-crisis-actions-end-load-shedding-and-achieve-energy-security accessed on 29 January 2023.

[119] Electricity Regulation Act No.4 of 2006: Sec 13

[120] Ibid.

[121] Anton Eberhard and Raine Naude Review “Lessons Learned & Proposals to Reduce Transaction Costs’ available on https://www.gsb.uct.ac.za/files/EberhardNaude_REIPPPPReview_2017_1_1.pdf accessed on 28 December 2022.

[122] Anton Eberhard;, Joel Kolker and James Leigland (2014) ‘*South Africa's Renewable Energy IPP Procurement Program: Success Factors and Lessons.’ World Bank Group*, available at https://openknowledge.worldbank.org/handle/10986/20039 License: CC BY 3.0 IGO accessed on 28 December 2022 at 4.

[123] Bidders' Conference Presentation - REIPPPP BW6 IPP Renewables available at ipp-renewables.co.za accessed on 26 July 2022.

[124] Industrial Procurement op cit note 127.

[125] The Department of Mineral Resources and Energy’s Independent Power Producers Procurement Programme (IPPPP) overview on 30 June 2021 available on https://www.ipp-projects.co.za/Publications/GetPublicationFile?fileid=2cb151e8-eeee-eb11-954d-2c59e59ac9cd&fileName=20210630_IPP%20Office%20Q4%20Overview%202020-21%20WEB%20VERSION.PDF accessed on 2 January 2023 at Appendix 6.

the successful bidders.[126] The local content for Bid Window 6 was the total costs on South Africans and South African products and, the RFP required the projects to commit at least 40 percent local content during construction,[127] which the successful bidders committed about 44 percent local spend[128] as well undertaking to spend about 41 per cent of their committed budget during operations towards the purchasing of products that are locally produced and met the requirements for local content set out in the local content designation.[129]

5.3 Consistency with the basic principles of WTO law

As already indicated, to assess the consistency of a measure under Article III:4 requires three elements of the national treatment obligation to be satisfied and satsified, then there is a violation of Article III:4, subject to the Article III (8) derogation in case of government procurement which will be discussed at the end of category 5 analysis.

5.3.1 'Laws, regulations, and requirements'

The first analysis is whether each of the measures at issue falls within the scope of the phrase 'laws, regulations and requirements' in Article III:4 of the GATT 1994. The panel in Japan – Film stated that 'panels have taken a broad view of when a governmental measure is a law, regulation or requirement.'[130]

The panel in India – Autos explained that GATT panel reports suggest two distinct situations that would satisfy the term 'requirement' in Article III:4: (i) obligations which an enterprise is 'legally bound to carry out'; and (ii) those obligations that an enterprise voluntarily accepts to obtain an advantage from the government.[131]

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[126] Signing of Preferred Bidder projects under the 5th Bid Window, and announcement of Preferred Bidders under the 6th Bid Window of the REIPPPP available on https://www.ipp-projects.co.za/PressCentre accessed on 30 December 2022 at page 2.
[127] South African Wind Energy Association (SAWEA)'Bid window 6 and beyond' available on https://sawea.org.za/bid-window-6-and-beyond/ accessed on 28 December 2022.
[128] Signing of Preferred Bidder projects under the 5th Bid Window, and announcement of Preferred Bidders under the 6th Bid Window of the REIPPPP op cit note 140 page 2.
[129] Ibid.
[130] WTO Panel Report (WTO PR) Japan – Measures Affecting Consumer Photographic Film and Paper, (circulated 31 March 1998) WT/DSR 1998: IV (PR Japan – Film (1998)) para. 10.51.
[131] WTO Panel Report (WTO PR) India: Measures Affecting the Automotive Sector (circulated 21 December 2001) WT/DS146/R (PR India – Auto (2001)) para. 7.184.

5.3.1.1 *Measures at issue and 'laws, regulations and requirements'*

This report has identified the following legal instruments in respect of each of the measures at issue:

No.	Name	Relevant legal Instruments
1	Preferential Procurement	- Broad-Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry; - Preferential Procurement Policy Framework Act 5 (PPPFA); and - the Preferential Procurement Regulations
2	Renewable Energy Independent Power Producer Programme	- National Development Plan - Integrated Resource Plan for electricity (IRP) 2019; - Confronting the Energy Crisis: Actions to end Load Shedding and Achieve Energy Security Document; and - Electricity Regulation Act No.4 of 2006.

Most of the measures identified in this report and set out in the above table, are contained, wholly or at least partly, in formally legal instruments such rules, acts and statutes. These instruments should qualify as 'law regulations, or requirements' resulting from 'government action'.[132]

5.3.1.2 *affect the internal sale, offering for sale, purchase, transportation, distribution or use" of the products at issue.*

5.3.1.2.1 Government procurement in South Africa

Governments make identify specific industries which are deemed to be of critical importance to the economic sustainability and industrial development. This choice of local over imported products in those industries clearly indicates that this choice affects the conditions of competition as local products are favoured over imported products and 'affects' the relevant

[132] PR Japan – Film (1998) para. 10.51.

product. An example of this is the banned the use of imported cement in state-awarded contracts by stipulating that a bidder for state projects will only have their offer considered if it agrees to source all cement from local producers.[133]

5.3.1.2.2 Renewable Energy Independent Power Producer Programme

As explained above under the REIPPP, in order for a bidder to be considered to sell its renewable energy to the government and Eskom, the bid has to have a minimum local content committed to be considered. An exemption is allowed from the DMRE if components are unavailable in South Africa to satisfy the local content threshold, however the measure still formally treats local and imported equipment differently, and therefore has an impact on the conditions of competition in the market for the equipment itself.

5.3.2 Products at issue and 'likeness'

I now examine whether the relevant products under each measure at issue are like within the meaning of Article III:4 of the GATT 1994, and in particular whether, each of the measures distinguishes between relevant products solely on the basis of origin.

5.3.2.1 Government preferential procurement in South Africa

As noted above under preferential procurement, procurement by almost all government institutions in certain sectors or subsectors is done through the PPPFA empowering the dtic to designate specific industries/sectors, where only locally manufactured products that meet the stipulated minimum threshold for local content will be considered.[134]

The PPPFA and its regulations do not distinguish the products required for use in government procurement by any method other than their origin and source, which have to be South African. Certain industries are designated to make use of final products that have a minimum percentage of components manufactured in South Africa or components that are wholly produced in South Africa.

[133] PPPFA Designated Sector Circular NO. 01 of 2021/2022, http://ocpo.treasury.gov.za/Resource_Centre/Legislation/Designated%20Sectors%20Circular%20No%201%20of%202021-2022%20-%20Cement.pdf.
[134] Ibid.

5.3.2.2 Renewable Energy Independent Power Producer Programme

In terms of REIPPP, the local content requirement is placed on a source or a derivative product and not directly on electricity as the product the government is purchasing from IPPs. The analysis is therefore in respect of likeness of electricity generation equipment because in Bid Window 6, the local content requirement was the total costs of at least 40 percent construction using equipment made in South Africa or using a workforce composed by South Africans and spending 41 per cent of the IPP committed budget during operations towards the purchasing of South African products.

The only distinguishing criteria for obtaining bid points under the local content threshold is whether or not the equipment used in the generation of electricity as the final product using onshore wind and Solar PV technologies are manufactured in South Africa to the specified threshold discussed above. Similarly, the only distinguishing criteria for obtaining bid points is whether or not the renewable energy system using to produce electricity has been constructed using workforce composed of the South Africans.

The thresholds make a distinction based on origin, and therefore renewable energy generation equipment entitled to be evaluated are 'like' renewable energy generation that are, should they exceed a maximum threshold, not entitled to be evaluated for the purposes of Article III:4 of the GATT 1994.

5.3.3 Less favourable treatment

The final element under Article III:4 relates to the determination of whether the measures at issue are such that they accord less favourable treatment to the imported products by incentivizing the use of domestic inputs and thereby denying effective equality of opportunity to the imported products to compete in the domestic market. This determination includes an examination of whether the South African localisation policies modify the conditions of competition in the South African market to the detriment of imported products.[135]

With these considerations in mind, I turn to examine each of the challenged measures to determine whether they accord to imported products treatment less favourable than that accorded to like products of national origin.

[135] WTO Panel Report (WTO PR Japan - Measures Affecting Consumer Photographic Film and Paper (Circulated on 31 March 1998) (PR Japan – Beef) para 10.328.

5.3.3.1 Government procurement in South Africa

It's been established that preferential procurement policies and associated regulations are used by the government and organs of state in the adjudication of tenders, to procure locally manufactured that comply with specified requirements. An example of this is the banned the use of imported cement in state-awarded contracts by stipulating that a bidder for state projects will only have their offer considered if it agrees to source all cement from local producers.[136] This measure not only modifies competition, but also affects the sale and use of the relevant product because state agencies are prohibited by law, to purchase like imported products.

5.3.3.2 Renewable Energy Independent Power Producer Programme

The tender bids can only be evaluated if they achieve, among other things, local content targets contained in the RFP. Normally, under any other government procurement programme, the PPPFA scores bids on an 90/10 split in favour of price and the 10 per cent for economic development for contracts above R1 million, of which local content requirements form a part of the "economic development" criteria.

Looking at the text, design, and structure of the measure at issue, the split is 70/30, with the 30 per cent for economic development where local content requirements are contained because the programme is aimed to increase the local content considerations., the 'fundamental thrust and effect'[137] of the measure at issue is thus to tie the amount of the threshold to the use of certain South African equipment. The higher the level of local content used, the more certain a bidder is that the bid will be considered and if all other requirements are satisfied, the chances are better than they may be preferred.

5.4 GATT Article III (8) Exception

Local content requirements usually violate Article III but may be justified by establishing three factors under the Government Procurement exception to Article III:8.[138] *First*, the measures should be law, regulations or requirements governing the procurement of products purchases,

[136] PPPFA Designated Sector Circular NO. 01 of 2021/2022, http://ocpo.treasury.gov.za/Resource_Centre/Legislation/Designated%20Sectors%20Circular%20No%201%20of%202021-2022%20-%20Cement.pdf.
[137] Ibid para 215.
[138] GATT Article III:8*(a) – b.*

duly enacted and require compulsory compliance.[139] Secondly, government agencies should actually procure the said materials.[140] Thirdly, the procurement should be for governmental purposes, not direct or indirect commercial resale, i.e., the government should not be a market participant.[141] Article III would apply to SA if the SA government was party to government procurement scheduled under the plurilateral Agreement on Government Procurement (GPA).[142] However, South Africa is neither a party to the GPA nor an observer to the WTO Committee on Government Procurement.[143] The scope of Article III(8)*(a)* has recently come to the fore when it was analysed in the *Canada – Renewable Energy*.[144]

The Appellate Body in *Canada – Renewable Energy* accepted the argument that the product being subject to the local content requirement is renewable energy equipment (purchased by the generators of such electricity), and not the product actually purchased by government agencies which is electricity.[145] This position was also adopted in the was also accepted in the India – Certain Measures Relating to Solar Cells and Solar Modules.[146] This is relevant to the category 5 measures under preferential procurement, particularly the REIPPPP despite South Africa not using the Feed-in Tariff system that was employed by Canada. The REIPPPP is established by legal instruments indicated under 'laws, regulations, and requirements analysis above, and therefore the programme constitute 'laws, regulations, or requirements', the measures at issue prima facie satisfied the first two elements under the legal standard hereto.

Under the programme however, government purchases electricity but requires private parties to use certain local content in the equipment that produces electricity. The local content requirement is on a derivative product, and not directly on the product the government procures (electricity), the implication being that as in *Canada – Renewable Energy,* government will potentially be unable to justify its REIPPPP by using Article III:8*(a)* as the scope has been narrowed and the national treatment obligation will be applicable to their measures as already analysed in this report. Therefore, government requesting private parties to use local content in

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139 GATT Article III:8*(a)*

140 Ibid.

141 ibid

142 Annexure 4 to the WTO Agreement: Agreement on Government Procurement, Article XVI, available at https://www.wto.org/english/tratop_e/gproc_e/gp_app_agree_e.htm accessed on 31 July 2022.

143 Decision of the Committee on Government Procurement GPA/1, Annex 1 available at https://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm accessed on 31 July 2022.

144 WTO Appellate Body Report (WTO ABR) Canada – Certain Measures Affecting The Renewable Energy Generation Sector (6 May 2013). WT/DS412/AB/R WT/DS426/AB/R ((Canada – Renewable Energy 2013).

145 Hestermeyer et al op cit note 21 at 577.

146 WTO Panel Report (WTO PR) India - Certain Measures relating to Solar Cells and Solar Modules (circulated 22 February 2016) WT/DS456/R (India – Solar Cells (2016)) paras. 7.307-7.308.

its equipment used to generate clean technology to be sold to the government with a view for government commercial resale to the public is potentially in violation of the national treatment obligation because it is a law, that treats foreign products less favourably to domestic like products, thereby affecting the sale and competitive balance between the like products.

6 CONCLUSION

Despite the WTO's comprehensive rules that restrict local content requirement usage, these measures are widely adopted because they have seldom been challenged in the WTO. The measures have also been adopted by other developing countries all over the world.[147] South Africa has adopted measures under category 3 to 5 to manoeuvre around its WTO obligations through its sectorial Master Plans that were as a result of sector wide consultation and set out different responsibilities for the industry participants, including, but not limited to, dtic introducing measures that support the localisation objectives found in the Master Plans.

The report has found that the relevant domestic and imported products under each measure identified under this report are like products within the meaning of Article III:4 of the GATT 1994. It has also found that each measure at issue is a 'law', 'regulation' or 'requirement' 'affecting the internal sale, offering for sale, purchase, transportation, distribution or use' of the relevant products within the meaning of Article III:4 of the GATT 1994. Finally, the conclusion is made that each measure at issue accords to relevant imported products treatment less favourable than that accorded to like domestic products within the meaning of Article III:4 of the GATT 1994. There is also a case that the local content requirements found under the REIPPPP may not satisfy the Article III:8 derogation which applies to the other measures under category 5. Preferential procurement by South Africa might survive WTO scrutiny as South Africa is not part of the GPA.

The South African localisation measures identified in this report have therefore been analysed, and if challenged, may lead to a conclusion, similar to that found in this report, subject to South Africa rebutting the challenge through exceptions beyond the scope of this report, that each measure at issue fulfils all three elements of the legal test under Article III:4 of the GATT 1994 and is therefore inconsistent with Article III:4 of the GATT 1994.

[147] Rabiu Ado 'Local Content Policy and the WTO Rules of Trade related Investment Measures (Trims): The Pros and Cons' 2013 available *at http://www.universitypublications.net/ijbms/0201/pdf/RHS405.pdf* 141 accessed on 31 July 2022.

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