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# A CASE FOR REBALANCING THE AGREEMENT ON TRADE-RELATED INVESTMENT MEASURES (TRIMS) – POLICY SPACE TO PROMOTE INDUSTRIALISATION AND STRUCTURAL TRANSFORMATION IN DEVELOPING COUNTRIES

COMMUNICATION FROM THE AFRICAN GROUP (ANGOLA; BENIN; BOTSWANA; BURKINA FASO; BURUNDI; CABO VERDE; CAMEROON; CENTRAL AFRICAN REPUBLIC; CHAD; CONGO; CÔTE D'IVOIRE; DEMOCRATIC REPUBLIC OF CONGO; DJIBOUTI; EGYPT; ESWATINI; GABON; THE GAMBIA; GHANA; GUINEA; GUINEA-BISSAU; KENYA; LESOTHO; LIBERIA; MADAGASCAR; MALAWI; MALI; MAURITANIA; MAURITIUS; MOROCCO; MOZAMBIQUE; NAMIBIA; NIGER; NIGERIA; RWANDA; SENEGAL; SEYCHELLES; SIERRA LEONE; SOUTH AFRICA; TANZANIA; TOGO; TUNISIA; UGANDA; ZAMBIA AND ZIMBABWE)

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## 1 INTRODUCTION: TRIMS RULES AND DEVELOPMENTAL CHALLENGES FACING DEVELOPING COUNTRIES AND LDCS

1.1. Trade-related investment measures (TRIMs) are policy tools that have been crucial in efforts to advance industrial development and the creation of backward and forward linkages, enhancing technology transfer and local research and development, contributing to increasing local employment, and to addressing balance-of-payments concerns.[1] These measures could be designed to attract foreign direct investment (FDI), encourage local entrepreneurship, and foster the growth of domestic industries. Moreover, these measures have been critical for effective industrial policies and have been widely deployed by developed economies at some time in their industrialization process.[2]

1.2. TRIMs encompass a broad range of performance requirements and incentives that Governments may place on foreign investors. TRIMs may be used to pursue many different policy objectives, such as (a) promoting exports from the host country (export performance requirements and trade balancing requirements); (b) encouraging local production and improving productivity; (c) advancing economic and social policy goals, including job creation; and (d) technology transfer.

1.3. The Agreement on Trade-Related Investment Measures (TRIMs Agreement) clarifies the application of Article III or Article XI of GATT 1994 in relation to investment measures related to trade in goods. It constrains the ability of WTO Members to utilize many of these measures. Most prominent among them are those encouraging the expansion of domestic manufacturing activities, including those that involve small and medium enterprises. Some developed countries trying to

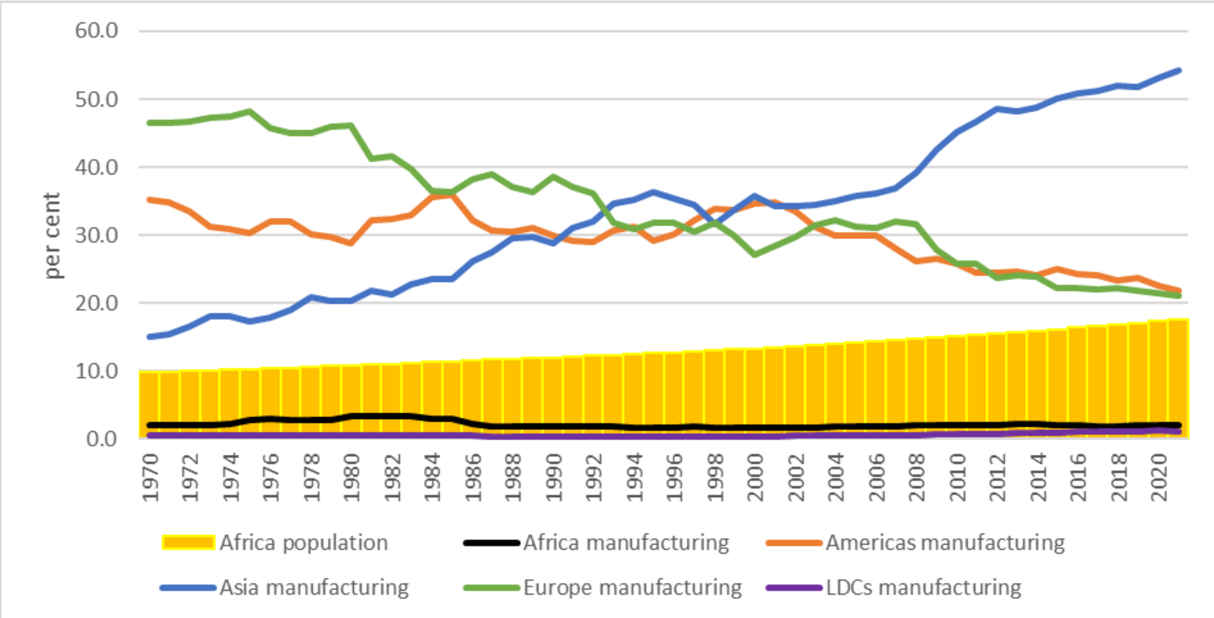
[1] G/C/W/307/Add.1 – joint study by the WTO and UNCTAD Secretariats.
[2] Kumar, N. and Gallagher, K., 2007. 'Relevance of Policy Space for Development: Implications for Multilateral Trade Negotiations'. New Delhi: Research and Information System for Developing Countries. See also : Kumar, N., 2005. Performance requirements as tools of development policy: Lessons from developed and developing countries. Putting Development First.
Putting Development First: The Importance of Policy Space in the WTO and International Financial Institutions edited by Kevin P. Gallagher, Chapter 9 (2005): 89-91.

offset the limitations set by the TRIMs Agreement replaced measures covered by the Agreement with others that would be WTO compatible, such as adopting stringent rules of origin which have the same effect as local content regulations, through establishing certain levels of regional content that have to be met for a product to benefit from free trade among them (i.e. to qualify as an originating product in a preferential trading agreement).[3]

1.4. For industrialization purposes, raising manufacturing productivity and moving into new technologies and products with a higher skill component are crucial.[4] A 2007 study by UNCTAD[5] concluded that while the use of certain TRIMs is no longer an option in most WTO Member States, such objectives as promoting industrialization, improving the trade balance and encouraging local sourcing remain of high priority to developing country governments. To a large extent, that continues to be the case today.

1.5. TRIMs assume renewed importance in the policy toolbox that developing countries require today in order to address development and industrialization objectives. The industrialization imperative is particularly pressing in the African context. In Africa, the manufacturing sector accounted for only 12.4 per cent of national income in 2021, short of the world average of 17 per cent.[6] There is a wide productive capacity gap in manufacturing output between Africa and the rest of the world (figure 1). Even though Africa accounted for 18 per cent of the world population in 2021, its share in the world manufacturing output was around 2 per cent. Asian economies, on the other hand, increased their productive capacities in the manufacturing sector significantly to account for 54 per cent of the world total in 2021.

**Figure 1: Share of manufacturing value added by region and share of Africa in world population (per cent)**




Source: UNCTADStat.

1.6. UNCTAD has called for 'industrialization based on minimal use of fossil fuel machinery and an emphasis on local production to meet basic needs' and for 'coordinated industrial policies based on intellectual property and technology available within the global South'.[7] TRIMs are particularly

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[3] See: Ibid, Kumar and Gallagher (2007) and UNCTAD (2007), **'**Elimination of TRIMs, the Experience of Selected Developing Countries**'**. According to these studies, such measures were applied within NAFTA and the EU.

[4] G/C/W/307/Add.1, page 19

[5] For more information on history of TRIMS negotiations, see: UNCTAD (2007), **'**Elimination of TRIMs, the Experience of Selected Developing Countries**'**, pages 6-10**.**

[6] UNCTADStat.

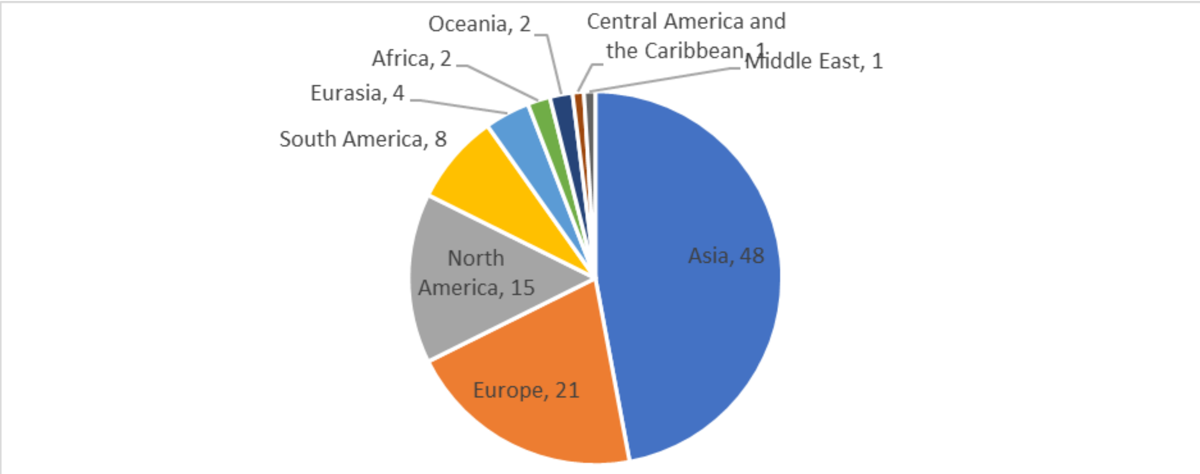
[7] Source https://unctad.org/tdr2022.

important for investment in manufacturing in countries at intermediate stages of industrialization. Most industries of developing countries that are linked to international production networks have high import content in technology-intensive parts and components while their domestic value-added mainly consists of wages paid to local workers. Raising domestic content would constitute an important step in industrial upgrading and improve the balance of payments.[8] In resource rich developing or least-developed countries (LDCs), restrictions over domestic content requirements can reinforce the 'resource curse syndrome' as the country wants to nourish resource-based industries, to enhance technology utilized by local firms and establish backward and forward linkages among them.[9]

1.7. More recently in the context of the polycrisis, governments in many developed economies have been implementing industrial policies and measures that would qualify as investment-related trade measures in the name of addressing inflation or the needed transformation to respond to the climate crisis.

1.8. Africa has massive untapped capacity that can be unlocked to benefit the global community in its collective effort to address the climate crisis. For instance, the global energy transition to achieve net-zero emission by 2050 as provided in the UNFCCC Paris Agreement creates opportunities for Africa. Between 2010 and 2020, the installed capacity of bioenergy, solar and wind power increased in middle and low-income countries, accounting for over 50 per cent of total installed capacity. Given its natural endowment, Africa possesses the world's largest potential capacity of renewable energy production, estimated to reach 310GW by 2030.[10] Yet, Africa's share in the world's renewable energy production capacity in 2022 remained only 2 per cent (Figure 6).

**Figure 6: Distribution of world renewable energy production capacity by region (2022, per cent)**




Source: IRENA renewable energy highlights, March 2023.

1.9. This paper reviews how the TRIMs Agreement has been applied and proposes how its rules could be adapted in order to address the current and future challenges that developing countries and LDCs face in the context of the polycrisis and the needed transformation to build resilience and to address developmental, industrialization, digital transformation and climatic challenges. This paper should be read together with the African Group paper entitled 'A Case for Rebalancing the Agreement on Subsidies and Countervailing Measures' (WT/GC/W/880 G/SCM/W/589 WT/COMTD/W/274) and the submission entitled 'Policy space for industrial development - a case for rebalancing trade rules to promote industrialisation and to address emerging challenges such as

[8] Montes and Mohamadieh, 'Throwing Away Industrial Development Tools: Investment Protection Treaties and Performance Requirements'. In South Centre, Investment Treaties: Views and Experiences from Developing Countries. Available at: https://www.southcentre.int/wp-content/uploads/2016/05/Bk_2015_Investment-Treaties_EN.pdf

[9] Ibid, Montes and Mohamadieh.

[10] UNCTAD (2023), Technology and Innovation Report 2023: Opening green windows - Technological opportunities for a low-carbon world.

climate change, concentration of production and digital industrialisation' (WT/GC/W/868, G/C/W/825, WT/COMTD/W/270, IP/C/W/695, WT/WGTTT/W/33).

## 2 ISSUES TO CONSIDER FROM THE EXISTING WTO JURISPRUDENCE PERTAINING TO TRIMS AGREEMENT

2.1. By 2015, 41 dispute settlement proceedings had been initiated that included a claim under the TRIMs Agreement. Of these 41 proceedings, 27 involved a developing country Member as a respondent, and 25 out of 27 included an allegation relating to local content. This shows that a number of developing countries still require flexibility to use local content requirements to promote upstream and downstream linkages within the local economy and achieve industrialization and structural transformation. Between 2015 and 2022, 6 dispute settlement cases included a claim under the TRIMs Agreement. Disputes pertaining to subsidies for renewable energy raised since 2010 involved local content requirements that were challenged under Article III of GATT 1994, under the TRIMs agreement, and under the Agreement on Subsidies and Countervailing Measures (ASCM).

2.2. The jurisprudence confirmed that the TRIMs Agreement is a clarification of the application of Articles III and XI of the GATT 1994 to TRIMs.[11] Yet, the TRIMs Agreement is not just a corollary of Articles III and XI of GATT 1994,[12] even if one of these provisions were not applicable, the other would remain applicable. For example, some measures (e.g. TRIMs) that do not directly regulate goods, or the importation of goods (such as restrictions imposed on investors, wholesalers, and manufacturers, as well as on points of sale and ports of entry) have been found to be inconsistent with Article III:4 or Article XI:1 of GATT 1994.[13]

2.3. The scope of measures that could fall under the disciplines of the TRIMs Agreement has been left undefined. The characterization of the measures as 'investment measures' depends on an examination of the manner in which the measures at issue relate to investment'.[14] The list of prohibited TRIMs annexed to the Agreement is illustrative not exhaustive; it does not give legal clarity on the types of measures prohibited. The TRIMs Agreement does not include an objective test for identifying when such measures may be deemed inconsistent with the Agreement. It thus leaves ample room for interpreting which other TRIMs not included in the list constitute 'trade related investment measures' prohibited by the Agreement.[15] The Agreement does not define whether the TRIMs included in the illustrative list are prohibited *per se* or subject to the determination of inconsistency with Articles III and XI of the GATT 1994. Yet, a panel found that TRIMs falling under paragraph 1(a) of the TRIMs Illustrative list 'are necessarily inconsistent with Article III:4 of the GATT 1994, thus obviating the need for separate and additional examination of the legal elements of Article III:4 of the GATT 1994'.[16]

2.4. Measures covered under the Agreement could relate to any enterprise, domestic or foreign. According to the panel in *Indonesia- Autos*, 'nothing in the TRIMs Agreement suggests that the nationality of the ownership of enterprises subject to a particular measure is an element in deciding whether that measure is covered by the Agreement'.[17] For example, measures relating to internal taxes or subsidies were found to fall under the scope of the Agreement as they are one of many types of advantages which may be tied to a local content requirement. The latter is a principal focus of the TRIMs Agreement and compliance with which may be encouraged through providing any type of advantage.[18] Furthermore, the panel in *India-Solar Cells* found that 'the wording of the illustrative

[11] Appellate Body Reports, Canada – Renewable Energy / Feed-In Tariff Program, paras. 5.19-5.33. See also Panel Report, EC – Bananas III, paras. 7.185-7.186.

[12] Indonesia- Autos case, panel report WT/DS 54, 55, 59 64/R adopted on 23.7.98, paras: 14.60, 14.61, 14.62, and 14.63. Cited in
Correa, C.M. and Kumar, N., 2003. *Protecting foreign investment: implications of a WTO regime and policy options*, pages: 74-75. Zed Books.

[13] Appellate Body Report, China – Publications and Audio-visual Products, para. 227, where the Appellate Body referred to the Illustrative List in the Annex to the TRIMs Agreement.

[14] Panel Report, Indonesia – Autos, paras. 14.80-14.81.

[15] Supra n. 10, Correa and Kumar (2004).

[16] Panel Report, India – Solar Cells, paras. 7.47-7.54. The defendant had argued that where a TRIM falls within the terms of the Illustrative List, it must still be demonstrated that the measure accords 'less favourable treatment' within the meaning of Article III:4 of the GATT 1994 in order to find a violation of Article 2.1 of the TRIMs Agreement.

[17] Panel Report, Indonesia – Autos, para. 14.73.

[18] The panel in Indonesia-Autos found no reason why an 'internal measure would necessarily not govern the treatment of foreign investment'. See: Panel Report, Indonesia – Autos, para. 14.73.

list of the TRIMs Agreement makes it clear that a simple advantage conditional on the use of domestic goods is considered to be a violation of Article 2 of the TRIMs Agreement even if the local content requirement is not binding as such'.[19]

2.5. Examples of measures considered to constitute 'investment measures' as per the TRIMs Agreement include measures to encourage investment in the local production of equipment associated with renewable energy,[20] measures pursued for the promotion and development of specific industries with explicit reference to investment-related implications,[21] and measures dealing with research, development and production found to 'have an impact on trade, by affecting the sale and purchase of imported products, including the inputs used in the production of incentivized finished and intermediate products'.[22]

2.6. These cases indicate the extensive nature of some of the conclusions by WTO adjudicative bodies. The impact is to create uncertainty for policy formulation by developing countries in support of their industrial development and related investments, and in relation to flexibilities that are available under the Agreement.

## 3 RELEVANCE AND EFFECTIVENESS OF TRIMS RULES FROM A DEVELOPMENTAL PERSPECTIVE

3.1. The initial design of the TRIMs Agreement attempted to account for the potential developmental implications on developing countries. Yet, the way the relevant provisions have been designed and applied fell short of effectively addressing the developmental concerns and preserving the policy space necessary for the realization of legitimate development goals.

3.2. For example, Article 4 of the TRIMs Agreement recognizes that developing countries might need to adopt measures that are crucial to foster and facilitate their development strategies, and accordingly that they must be free to adopt such measures even when they would be inconsistent with WTO obligations. However, benefiting from the envisioned flexibility requires fulfilling a complex and burdensome set of requirements and eligibility conditions (under Article XVIII GATT, the understanding on Balance of Payments provisions, and the Declaration on Trade Measures taken for Balance of Payment purposes), which makes access to this flexibility almost impossible.[23]

3.3. Article 5.3 allowed developing and least developed countries to request a one-time extension of the transition period for the elimination of TRIMs notified. To get this extension, the requesting member had to demonstrate particular difficulties in implementing the provisions of the TRIMs Agreement. Most developing countries have not notified any TRIMs, which could be partially explained by the lack of measures in place at the time of negotiating the agreement. Several developing countries that notified TRIMs had requested transitions under Article 5.3 TRIMs[24], yet Article 5.3 is currently obsolete.

3.4. Given the importance of investment-related measures for their developmental and industrialization policies, developing countries requested the review of flexibilities under the TRIMs Agreement, under the mandates pertaining to 'implementation-related issues and concerns' (para. 12 of WT/MIN(01)/DEC/1) and strengthening and making special and differential treatment more precise and operational (para. 44 of WT/MIN(01)/DEC/1).[25]

[19] Panel Report, Indonesia – Autos, paras. 14.88-14.91.

[20] See: Panel Reports, Canada – Renewable Energy / Feed-In Tariff Program, paras. 7.109-7.110.

[21] Panel Report, India – Solar Cells, para. 7.60.

[22] Panel Report, Brazil – Taxation, para. 7.360.

[23] South Centre (2002), 'Review of the Existing Special and Differential Treatment Provisions: Implementing the Doha Mandate'.

[24] Ten developing country Members requested extensions of the transition period pursuant to Article 5.3. On 31 July 2001, eight developing country Members were granted extensions of the transition period to eliminate TRIMs through end-2003. The extensions were provided through decisions of the Council for Trade in Goods under Article 5.3 in seven of the eight cases (see G/L/460-466 and G/L/497-504), and in the other case through a waiver under Article IX of the WTO Agreement (see WT/L/410). See also Argentina (G/C/W/295), Colombia (G/C/W/296), Malaysia (G/C/W/291/Rev.2), Mexico (G/C/W/293), Pakistan (G/C/W/294), Philippines (G/C/W/289), Romania (G/C/W/290), Thailand (G/C/W/292).

[25] For example, see : JOB(01)/152/Rev.1, WT/MIN(01)/17, TN/CTD/W/28, G/TRIMS/W/25, G/TRIMS/M/31, TN/CTD/W/3/Rev.2, JOB/DEV/65, JOB/TNC/97

## 4 THE SIGNIFICANCE OF TRIMS IN SUPPORTING AND BOLSTERING THE PROCESS OF INDUSTRIALIZATION:

4.1. *Attracting foreign direct investment (FDI):* TRIMs can indirectly foster or attract FDI by creating a more favourable investment environment. One of the primary objectives of developing and least developed countries is to attract FDI, as it plays a vital role in promoting industrialization. This could be demonstrated in the potential developmental benefits of export-performance. TRIMs, particularly when they are used to create a favourable environment for a specific industry can attract investments to establish world-scale production within a host country for an industry that exhibits increasing returns to scale. In this regard, export-performance TRIMs, including trade-balancing requirements, could be used to incentivize and promote production within the host country, therefore attracting FDIs.

4.2. *Encouraging local entrepreneurship*: TRIMs could also support industrialization by fostering the growth of local entrepreneurship and MSMEs. Governments can implement measures that incentivize domestic businesses, enabling the expansion of domestic markets. For example, TRIMs can provide support to locally-owned enterprises in the form of subsidies and low-interest loans to domestic entrepreneurs. These measures promote the development of local industries, encourage innovation, build backward linkages and create job opportunities, thereby contributing to industrialization.

4.3. *Technology transfer and knowledge spillovers*: Industrialization requires the adoption and diffusion of advanced technologies. TRIMs can play a crucial role in facilitating technology diffusion and eventual indigenous technology development . When multinational corporations invest in a country, they often bring along advanced production techniques, machinery, and know-how. This facilitates technology transfer and integration of new and advanced production methods enabling local firms to advance their positions in the domestic, regional and global market. Additionally, when foreign companies operate in a host country, knowledge spillovers can occur, as local firms can learn from their practices and technologies, further contributing to industrial development.

4.4. *Building industrial infrastructure*: TRIMs can be instrumental in encouraging the development of essential industrial infrastructure. Governments can use these measures to attract investment in infrastructure projects such as roads, ports, power plants, and industrial parks. By offering incentives and ensuring a conducive business environment, TRIMs can stimulate private investment in infrastructure development, which is crucial for supporting industrial activities and realization of the SDGs. Reliable infrastructure enables efficient transportation of goods, reduces production costs, and improves access to markets, thereby enhancing industrial competitiveness.

4.5. *Job creation and economic growth*: Industrialization supported by TRIMs can lead to substantial job creation and economic growth. The establishment of new industries and the expansion of existing ones generate employment opportunities across various sectors, lifting people out of poverty and improving living standards. Industrialization also contributes to economic growth by increasing productivity, diversifying the economy, and boosting exports. The revenue generated from industrial activities can be reinvested in education, healthcare, and social welfare programs, fostering overall socio-economic development.

## 5 ADAPTING THE TRIMS AGREEMENT RULES TO ENABLE INDUSTRIALIZATION AND STRUCTURAL TRANSFORMATION

5.1. The African Group underlined the importance of adapting the rules to allow Members the policy space to undertake measures that Members choose in order to achieve legitimate policy ends including incentivizing the strategic development and maintenance of domestic and regional capacities and advancing on achieving their industrial diversification, climate goals and digital transformation.[26] Measures are also needed to contribute to enhancing resilience in supply chains, as many firms consider the value of producing goods and services closer to markets, based on lessons from the implications of the recently lived crises on global logistics and supply costs.

[26] See: WT/GC/W/868.

5.2. For those purposes, the TRIMs Agreement and related GATT provisions should be adapted to contribute to industrialisation and structural transformation. The following is proposed:

1. Provide a flexibility under the TRIMs Agreement to allow developing countries policy space and tools in support of their developmental policies.

2. Implement measures to ameliorate their foreign exchange challenges. This exception should be availed to those countries that are facing balance of payments challenges.

3. Provide for an exemption from the TRIMs Agreement together with Articles III and XI GATT, and the obligations under the ASCM to the extent they apply to the concerned measure for local content requirements and similar TRIMs undertaken to address specific objectives aligned with the climate response and the 'nationally determined contributions' under the Paris Agreement and targeted at averting balance of payment crisis.

4. Consider a threshold that can be applied to local content requirements to facilitate industrialisation and structural transformation. The threshold aims to ensure a balance between advancing the trade and investment objectives. As such Members would be allowed to impose up to [x]% of local content requirements to boost domestic production.

5. Consider a specific flexibility that would extend to cover situations of crises, including, but not limited to, climatic and natural disasters, financial and economic crises, health emergencies, food-security related crises, and similar crises.

6. TRIMs taken by LDCs shall be given an exemption under the TRIMs Agreement together with Articles III and XI of the GATT, and the obligations under the ASCM to the extent they apply to the concerned measure, which extends for as long as the country is an LDC.

## 6 CONCLUSION

6.1. Developing countries face unique challenges in implementing the TRIMs Agreement, including limited resources, technological gaps, capacity constraints, and the need for policy flexibility to promote industrialization and structural transformation. It is crucial to evaluate how TRIMs impact sustainable development in the developing and least developed countries, particularly in areas like advancing renewable energy, technology development and transfer, digital transformation, and building resilient supply chains.

6.2. Analysing whether the TRIMs Agreement hinders or supports industrialization and sustainable development strategies is essential. Striking a balance between trade liberalization and supporting economic development is of utmost importance, considering the potential tensions between TRIMs obligations and the development priorities of developing countries. Flexibility and tailored approaches are necessary to address these challenges. Assessing the outcomes of TRIMs-related dispute settlement cases and their influence on interpretation and implementation is critical, while identifying any limitations or gaps in addressing the concerns of developing countries within the jurisprudence.

6.3. To alleviate these challenges, policy recommendations should focus on promoting policy coherence in support of sustainable development, capacity building, technical assistance, technology transfer, and ensuring a fair interpretation of the agreement.

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