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# NON-TARIFF MEASURE UNDER WTO LAWS: CASE STUDY ON THE APPLICATION OF LOCAL CONTENT REQUIREMENT FOR 4G LTE DEVICES IN INDONESIA

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## Abstract

*Under the WTO laws, countries are allowed to protect their national industry by imposing tariffs as well as non-tariff measures (NTM). While the WTO is committed to reduce tariff, it does not have uniform treatment towards NTMs. One type of NTM that becomes the disputed subject of several WTO cases is Local Content Requirement (LCR) because while it can help national industry, it is seen as discriminatory towards imported products. This work discusses whether the application of the Tingkat Komponen Dalam Negeri (TKDN) or LCR provisions for 4G LTE communication devices in Indonesia is in conformity with WTO laws. By analyzing relevant WTO agreements and rulings, this work will demonstrate that Indonesia's LCR provisions in 4G LTE sector may not be in conformity with the GATT and TRIMS but at the same time it does not violate the GATS, ASCM, and GPA because such LCR provisions do not fall under those three agreements. In light of those, this writing suggests that the government of Indonesia bring the LCR provisions in 4G LTE sector into conformity with WTO laws by revoking the provisions mandating the need to use local over imported products to avoid potential claims from other WTO members.*

**Keywords:** *Local Content Requirement, Tingkat Komponen Dalam Negeri, WTO, international trade law, TRIMS, GATT*

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## I. INTRODUCTION

The industry of electronics in Indonesia is among the prioritized due to its high growth, especially the mobile phone industry as one of its strategic subsectors.<sup>1</sup> According to Indonesia Cell Phone Association (APSI), this 30-50% annual growth rate of smartphone users places Indonesia as the third largest market in the region.<sup>2</sup> It is therefore not surprising that there is a high amount of mobile phone import in

<sup>1</sup> Ministry of Industry, "Impor Ponsel Ditargetkan Turun Jadi Rp 74 Triliun," <http://www.kemenerin.go.id/artikel/12359/Impor-Ponsel-Ditargetkan-Turun-Jadi-Rp-74-Triliun>, accessed on February 23rd 2017.

<sup>2</sup> *Ibid*

Indonesia. In 2017, approximately 90% of cellular phones in Indonesia are imported with a value of Rp 66,59 trillion.<sup>3</sup>

This high number of mobile phone import has raised some considerable concerns. According to the latest data provided by Central Body of Statistics (*Badan Pusat Statistik*), Indonesia's trade surplus decreased from US\$ 1,21 billion in October 2016 to US\$ 837,8 million in November 2016 due to the escalation of mobile phone imports in November among other factors.<sup>4</sup> This means that if the number of import keeps getting higher, there is a threat of further decrease of trade surplus that might even lead to deficit. Additionally, the Ministry of Industry also aims for Indonesia to be involved in the production chain of mobile phones instead of just being a market for imported products.<sup>5</sup>

In relation to that, the Indonesian government has launched several initiatives to reduce the number of mobile phone import and integrate Indonesia into the production chain, one of which is the imposition of Local Content Requirement (hereinafter "LCR").<sup>6</sup> It is a provision that limit foreign investors and companies to a minimum threshold of goods and services that must be purchased or procured locally.<sup>7</sup> Its purpose is to ensure that domestic goods and services are drawn to the industry, thus providing an opportunity for local content to substitute domestic value-addition for imported inputs.<sup>8</sup> Indonesia has used LCR provision in several sectors<sup>9</sup> including 4G LTE sector. Under Ministry

<sup>3</sup> Kompas, "Impor Ponsel Tahun Ini Bisa 100 Juta Unit," <https://kompas.id/baca/ekonomi/2017/02/13/impor-ponsel-tahun-ini-bisa-100-juta-unit/>, accessed on February 23rd 2017.

<sup>4</sup> Miftah Ardhian, "Surplus Dagang November 2016 Mengecil Akibat Impor Ponsel," <http://katadata.co.id/berita/2016/12/15/makin-susut-surplus-neraca-dagang-november-cuma-us-8378-juta>, accessed on February 23rd 2017.

<sup>5</sup> Ministry of Industry, "Aturan TKDN Bukan untuk Larang Impor Ponsel 4G," <http://www.kemenperin.go.id/artikel/12536/Aturan-TKDN-Bukan-untuk-Larang-Impor-Ponsel-4G>, accessed on February 23rd 2017.

<sup>6</sup> Peraturan Menteri Komunikasi dan Informatika Republik Indonesia Nomor 27 Tahun 2015 tentang Persyaratan Teknis Alat dan/atau Perangkat Telekomunikasi Berbasis Standar Teknologi Long Term Evolution

<sup>7</sup> United Nations Conference on Trade and Development, *Local Content Requirements and The Green Economy* (Geneva: United Nations Publication, 2014), pg. 3.

<sup>8</sup> *Ibid*

<sup>9</sup> Indonesia, Ministry of Industry, Ministry of Industry Regulation on Domestic Product Usage Guidance for Electric Power Infrastructure Development, Ministry Regula-

of Communications and Information Regulation Number 27/2015, LTE devices that are manufactured, assembled, imported for commercial use and/or utilized in Indonesian territory are obliged to comply with technical requirements and to fulfill a minimum of 30% local content value.<sup>10</sup>

However, in relation to this measure the United States, Japan, and other countries questioned the conformity of the LCR provisions in 4G LTE sector with Indonesia's commitment under the WTO.<sup>11</sup> They recognized Indonesia's intentions to integrate itself into global value chains, but claimed that such efforts had to be done in line with WTO regulations.<sup>12</sup>

LCR is recognized as a non-tariff measure under the WTO agreements.<sup>13</sup> In relation to LCR, there is no specific and definitive provision in the WTO agreements that directly allow or outlaw LCR per se.<sup>14</sup> Under WTO, LCR is dealt with in various WTO agreements

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tion Number 54 Year 2012, Indonesian State Gazette Year 2012 Number 342, Article 2 (1) in conjunction with Indonesia, Ministry of Energy and Mineral Resources, Ministry of Energy and Mineral Resources Regulation on Domestic Product Usage in Upstream Activities of Oil and Gas, Ministry Regulation Number 15 Year 2013, Indonesian State Gazette Year 2013 Number 311, Article 3 (1) in conjunction with Indonesia, Ministry of Industry, Ministry of Industry Regulation on Domestic Product Usage Guidance in Government Procurement of Goods and Services, Ministry Regulation Number 15 Year 2011, Indonesian State Gazette Year 2011 Number 103, Article 2.

<sup>10</sup> Ministry of Industry, "Aturan TKDN Bukan untuk Larang Impor Ponsel 4G," <http://www.kemenperin.go.id/artikel/12536/Aturan-TKDN-Bukan-untuk-Larang-Impor-Ponsel-4G>, accessed on February 23rd 2017.

<sup>11</sup> 11 World Trade Organization Committee on Trade-Related Investment Measure, Minutes of the Meeting Held on 5 October 2015, G/TRIMS/M/39, 2015, pg.2.

<sup>12</sup> *Ibid*

<sup>13</sup> 13 International Classification of Non-Tariff Measures, UNCTAD, 2012. The International Classification of Non-Tariff Measures is a document that was developed by a team of international organizations consisting of Food and Agriculture Organization of the United Nations, International Monetary Fund, International Trade Centre, Organization for Economic Cooperation and Development, United Nations Conference on Trade and Development, United Nations Industrial Development Organization, World Bank, and World Trade Organization (WTO). It was composed from 2007 until 2012 and the document referred in this writing is the latest version finished in 2012. This classification only serves as a database of non-tariff measures without any prejudice on the legitimacy of those measures.

<sup>14</sup> Holger P. Hestermeyer and Laura Nielsen, "The Legality of Local Content Mea-

such as the GATT, Agreement on Trade-Related Investment Measures (hereinafter “**TRIMS**”), General Agreement on Trade in Services, Government Procurement Act, and Agreement on Subsidies and Countervailing Measures, but most common forms of LCR usually falls under the GATT.<sup>15</sup>

Understanding the diversity of regulation in WTO concerning LCR as well as taking into account complaints raised by some of Indonesia’s trading partners, this paper seeks to contribute in such endeavor by providing description on how LCR is regulated under WTO agreements and breaking down Indonesia’s LCR provisions in 4G LTE sector in order to analyze its conformity with WTO laws. Thus, this article aims to understand the regulation of LCR under WTO agreements and to evaluate whether the LCR provisions for 4G LTE communication devices in Indonesia in conformity with WTO agreements.

## **II. LEGAL MATERIALS AND METHODS**

This writing will be a normative juridical research as it analyzes written legal norms.<sup>16</sup> The analysis in this writing will refer to relevant prevailing laws and regulations in Indonesia and those under the WTO agreements regarding non-tariff measures, particularly LCR. To support the analysis on the applicability of the WTO agreements to Indonesia’s LCR provisions in relation to the second research question in this writing, there will also be discussions on the case of India – Certain Measures Relating to Solar Cells and Solar Modules and Canada – Certain Measures Affecting the Renewable Energy Generation Sector and Measures Relating to the Feed-In Tariff Program decided by the Dispute Settlement Body of the WTO in 2016 and 2013 respectively. These cases were chosen to be the basis of analysis regarding the applicability of WTO agreements because these are the most recent cases that discuss the elements in the relevant WTO agreements and in the consideration of the case, the Panel utilizes relevant considerations from past WTO rulings.

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ures under WTO Law,” *Journal of World Trade* (2014), pg. 566.

<sup>15</sup> *Ibid*, pg. 581.

<sup>16</sup> Soerjono Soekanto dan S. Mamudji, *Penelitian Hukum Normatif: Suatu Tinjauan Singkat*, (Jakarta: Raja Grafindo Persada, 1985), pg. 5.

Since this is a normative research, the type of data that will be used is secondary data which is data obtained from library sources.<sup>17</sup> Secondary data is divided into three types which are primary legal source, secondary legal source, and tertiary legal source.<sup>18</sup>

The primary legal sources that will be used in this writing include Law Number 7 Year 1994 on Ratification of Agreement Establishing the WTO, Ministry of Communications and Information Regulation Number 27 Year 2015 on Technical Requirements of Telecommunications Devices and/or Tools based on Long Term Evolution Standard Technology, General Agreement on Tariffs and Trade, Agreement on Trade-Related Investment Measures, and other relevant prevailing laws and regulations.

The secondary legal sources that will be used are primarily books among which are the following: The World Trade Organization: A Very Short Introduction by Amrita Narlikar which provides thorough explanation on the background and working system of WTO, The Regulation of International Trade by Michael J. Trebilcock and Robert Howse which explains about the aspects and main principles of international trade, and The Law and Policy of the World Trade Organization: Text, Cases and Materials by Peter van den Bossche which discusses the institutional aspect and the main policies of WTO as well as the globalization of world trade. In addition to books, the secondary legal sources will also include international journals, research reports, and other types of literatures regarding WTO, non-tariff measures, and LCR.

The tertiary legal sources that will be used include Black's Law Dictionary by Henry Campbell Black<sup>19</sup> and English dictionary which is Oxford Advanced Learner's Dictionary<sup>20</sup>.

The collected data will be analyzed qualitatively and presented in a descriptive-analytic way as it aims to provide a description of LCR

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<sup>17</sup> Soerjono Soekanto, Pengantar Penelitian Hukum. 3rd edition, (Jakarta: UI Press, 1986), pg. 12.

<sup>18</sup> *Ibid*

<sup>19</sup> Henry Campbell Black, Black's Law Dictionary Sixth Edition

<sup>20</sup> A. S. Hornby, Oxford Advanced Learner's Dictionary 8th Edition (United Kingdom: Oxford University Press, 2013).

regulations for 4G LTE communication devices in Indonesia and WTO agreements related to LCR, as well as analysis on the conformity of both.

### III.RESULT AND DISCUSSION

#### A. RESULT

The results of this research are:

1. There are five WTO agreements that are relevant to the use of LCR, namely the GATT, GATS, TRIMS, ASCM, and GPA. They principally prohibit the use of LCR because it affords less favorable treatment to imported products compared to domestic products.
2. Indonesia's LCR provisions in the 4G LTE sector may be in violation with Article III:4 of GATT and Article 2.1 of TRIMS.

#### B. DISCUSSION

In relation to the results above, the discussion shall begin with an elucidation on how WTO regulates the use of LCR. It will then be followed by discussions on Indonesia's LCR provisions in 4G LTE sector and analysis on how such provisions fall under the GATT and TRIMS in accordance with previous WTO rulings concerning the same matter.

Under WTO, various types of LCR are not treated identically because there is a diversity of measures falling under the heading of LCR.<sup>21</sup> WTO does not have any provision that outlaws LCR *per se*.<sup>22</sup> However, there are several provisions regarding LCR spread in various WTO agreements. Under the WTO, the most relevant agreements regarding LCR are the GATT, the TRIMS, the GATS, the ASCM, and the GPA.

##### a. The General Agreement on Tariffs and Trade (GATT)

LCR provisions generally are most often found to be in violation of Article III of the GATT. The consistency of LCR is often defined according to the provisions of Article III:4 of the GATT<sup>23</sup> which obliges contracting parties to treat imports from other contracting parties no

<sup>21</sup> Holger P. Hestermeyer, "The Legality of Local Content Measures, pg. 565.

<sup>22</sup> *Ibid*, pg. 566.

<sup>23</sup> Isabelle Ramdoo, Unpacking Local Content Requirement, pg. 7.

less favorably than their national products in respect of all laws and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution, or use of the imported products.<sup>24</sup> LCR usually violates this provision because in nature they discriminate goods according to their territorial origin.<sup>25</sup>

b. The Agreement on Trade-Related Investment Measure (TRIMS)

LCR principally violates Article 2 of the TRIMS. Article 2 of TRIMS is essentially a complementary to article III of GATT as it requires host countries to treat foreign investors no less favorably than their national investors.<sup>26</sup> The TRIMS provides an illustrative list of measures that are inconsistent with article III:4 and XI:1 of GATT. LCR falls under Paragraph 1(a) as a provision that violates Article III:4 of the GATT because it mandates the use of domestic over imported products.

c. The General Agreement on Trade in Services (GATS)

Under the GATS, LCR is inconsistent with the obligation of national treatment set out in Article XVII. It is stipulated there that contracting parties must treat the services and service suppliers of other contracting parties no less favorably than they treat their like domestic services and service suppliers.<sup>27</sup>

d. The Agreement on Subsidies and Countervailing Measure (ASCM)

The ASCM generally addresses two issues which are the use of subsidies and the use of countervailing measures to offset any injury caused by subsidized imports.<sup>28</sup> It also prohibits subsidies contingent (solely or as one of several conditions) upon the use of domestic over imported goods<sup>29</sup>, thus LCR in relation to the granting of subsidy violates Article

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<sup>24</sup> WTO, GATT, article III:4.

<sup>25</sup> Holger P. Hestermeyer, "The Legality of Local Content Measures, pg. 566.

<sup>26</sup> WTO, TRIMS, article 2:1, "Without prejudice to other rights and obligations under GATT 1994, no Member shall apply any TRIM that is inconsistent with the provisions of Article III or Article XI of GATT 1994."

<sup>27</sup> WTO, GATS, article XVII:1.

<sup>28</sup> World Trade Organization, Agreement on Subsidies and Countervailing Measures ("SCM Agreement"), [https://www.wto.org/english/tratop\\_e/scm\\_e/subs\\_e.htm](https://www.wto.org/english/tratop_e/scm_e/subs_e.htm), accessed on April 17th 2017.

<sup>29</sup> WTO, ASCM, article 3(1)(b).



3(1)(b). Such provision is backed up by article 4.7 which demands that if the subsidy is found to be prohibited, it must be withdrawn without delay.<sup>30</sup>

e. The Agreement on Government Procurement (GPA)

Under this agreement, LCR violates the national treatment and non-discrimination obligation stipulated in Article III:1. The GPA obliges its parties, with respect to all laws and all practices regarding government procurement that are covered by GPA, to treat the products, services and suppliers of other parties no less favorably than they treat the products, services and suppliers of domestic origin or of any other parties.<sup>31</sup>

In order to analyze whether or not Indonesia's LCR provisions in 4G LTE sector are in conformity with WTO laws, there needs to be a description on such provisions. In Indonesia, LCR policy is embodied in a Local Component Value (*Tingkat Komponen Dalam Negeri*) provision. It is mostly stipulated under Ministry of Communications and Information Regulation Number 27 Year 2015 on Technical Requirements of Telecommunications Devices and/or Tools based on Long Term Evolution Standard Technology. The essential provisions related to Local Component Value set out in that regulation are as follows:

- 1) Every telecommunication devices based on Long Term Evolution (LTE) technology that are manufactured, assembled, imported for commercial purposes and/or utilized in Indonesian territory must fulfill the technical regulations stipulated in this regulation.<sup>32</sup>This is also affirmed by Article 71(1) of Government Regulation Number 52/2000 which stipulates exactly the same provision written in Article 1 of Ministry of Communication and Information Regulation Number 27/2015.

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<sup>30</sup> WTO, ASCM, article 4.7

<sup>31</sup> WTO, GPA, article III:1.

<sup>32</sup> Indonesia, Ministry of Communications and Information Regulation on Technical Requirements of Telecommunications Devices and/or Tools based on Long Term Evolution Standard Technology, Ministry Regulation Number 27 Year 2015, Indonesian State Gazette Year 2015 Number 1031, Article 1, "Setiap alat dan/atau perangkat telekomunikasi berbasis standar teknologi Long Term Evolution (LTE) yang dibuat, dirakit, dimasukkan untuk diperdagangkan dan/atau digunakan di Wilayah Negara Indonesia wajib memenuhi persyaratan teknis yang ditetapkan dalam Peraturan Menteri ini."

- 2) In addition to technical requirements, 4G LTE devices as stipulated in Article 1 as explained above must also fulfill Local Component Value requirements.<sup>33</sup> This regulation does not provide the definition of Local Component Value, but such definition can be found in Article 1(1) of Ministry of Industry Regulation Number 65/2016 which stipulates that Local Component Level is the level of domestic component in cellular phone, handheld computer, or tablet computer products.<sup>34</sup>
- 3) For the purpose of the imposition of technical regulations and LCR, this regulation divides 4G LTE devices into two types, namely base station and subscriber station. Base station is defined as devices based on LTE technology, along with its antennae, which functions to provide connectivity, management and control over the subscriber station.<sup>35</sup> Base stations must fulfill a 40% minimum of local content.<sup>36</sup> Subscriber station is defined as telecommunication devices based on LTE technology which are utilized by the users<sup>37</sup>, for instance cellular phones. Subscriber stations must fulfill a 30% minimum of local content.<sup>38</sup>
- 4) The fulfillment of LCR provisions to be proven by a certificate or a letter issued by the ministry conducting the activity of governance in the field of industry.<sup>39</sup> In accordance with Article 53 *juncto* Article 54 *juncto* Article 120 of Law Number 3/2014 set out in the previous subsection, 4G LTE devices that do not fulfill the LCR provisions are not permitted to be circulated in Indonesia.

When these provisions are compared with WTO agreements and

<sup>33</sup> *Ibid*, Article 4(1), “Selain wajib memenuhi persyaratan teknis, alat dan/atau perangkat telekomunikasi berbasis standar teknologi Long Term Evolution (LTE) sebagaimana dimaksud dalam Pasal 1 juga wajib memenuhi Tingkat Komponen Dalam Negeri (TKDN)...”

<sup>34</sup> Indonesia, Ministry Regulation Number 65 Year 2016, Article 1(1).

<sup>35</sup> *Ibid*, Annex II, pg. 1.

<sup>36</sup> *Ibid*, Article 4(3)

<sup>37</sup> *Ibid*, Annex II, pg. 1.

<sup>38</sup> *Ibid*, Article 4(3).

<sup>39</sup> *Ibid*, Article 4(2). A provision similar to this article is found in Article 57(5) of Law Number 7 Year 2014 on Trade with stipulations as follows: “Barang yang telah diberlakukan SNI atau persyaratan teknis secara wajib...wajib dibubuhi tanda SNI atau tanda kesesuaian atau dilengkapi sertifikat kesesuaian yang diakui oleh Pemerintah.”

rulings that have been set out above, the most suitable agreements to be applied are the GATT and the TRIMS because the GATS only concerns trade in services, the ASCM concerns the usage of government subsidy, and the GPA concerns government procurement, none of which are relevant to Indonesia's LCR provision in 4G LTE sector. To assist the analysis on whether or not the LCR provisions are prohibited under GATT and TRIMS, this section will apply the criteria set out in the case of India – Solar Cells and Solar Modules and Canada – Renewable Energy to Indonesia's case.

1. The General Agreement on Tariffs and Trade (GATT)

a. That the imported and domestic products in question are “like products”

It was established by the panel of the India case that the products at issue shall be considered as “like products” if a difference in treatment between domestic and imported products is exclusively based on the products' origin.<sup>40</sup> In India case, the panel found this element to be fulfilled because the measures at issue directly stipulated that it is mandatory to use solar modules that are manufactured in India.<sup>41</sup>

In Indonesia, the requirements to use local products are embodied the form of Local Component Level specified in percentage.<sup>42</sup> Local Component Level (*Tingkat Komponen Dalam Negeri*) is defined as the level of **local component** in cellular phone, handheld computer, or tablet computer products.<sup>43</sup> Local products are defined as **goods or services produced by companies who invest and conduct its production activities in Indonesia, utilizing partly labors with Indonesian nationals**, in which the process utilizes local raw materials or partly imported materials.<sup>44</sup> Thus, it can be seen from the provisions above that the products in question which are the components for 4G LTE telecommunication devices are like products because the only distinguishing criterion is the products' origin.

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<sup>40</sup> World Trade Organization, “Turkey – Measures Affecting the Importation of Rice (Report of the Panel),” (2007) para. 7.214.

<sup>41</sup> WTO, “India – Solar Cells and Solar Modules (Report of the Panel),” pg. 54.

<sup>42</sup> Indonesia, Ministry Regulation Number 27 Year 2015, Article 4(1).

<sup>43</sup> Indonesia, Ministry Regulation Number 65 Year 2016, Article 1(1).

<sup>44</sup> Indonesia, Law on Industry, Law Number 3 Year 2014, Elucidation of Article 85.

- b. That the measure at issue is a “law, regulation, or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution, or use”

The panel in India case found that measures which create an incentive for the use of domestic over imported products can be deemed to affect the internal sale, purchase, or use of those products.<sup>45</sup> In India case, it was ruled that the sole requirement to use Indian products over imported ones is deemed sufficient to create an incentive to do so. Following the judgment in this case, the requirements in Indonesian Local Component Level provision may also be deemed as creating an incentive for 4G LTE telecommunication devices to use local instead of imported components to achieve the minimum required percentage value of Local Component Level.

- c. That the imported products are accorded “less favorable” treatment than that accorded to like domestic products

In India case, there are two ways that the standard for “less favorable” treatment can be applied. The term “treatment no less favorable” which is obliged by Article III:4 requires the existence of effective equality of opportunities for imported products to compete with like domestic products.<sup>46</sup> In other words, “less favorable” treatment exists when the measure at issue modifies the conditions of competition in the relevant market to the detriment of imported products.<sup>47</sup> The panel considered this element to be fulfilled by proving that the measures in that case requires the usage of domestic products and **prohibits** the use of imported products if producers of solar cells and modules wanted to get the benefit that accrue from obeying the LCR measure.

In Indonesia, there is no outright prohibition in using imported components in 4G LTE sector. However, with the existence of mandatory Local Component Value it modifies the competition in the

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<sup>45</sup> World Trade Organization, “China – Measures Affecting Imports of Automobile Parts (Report of the Appellate Body),” WT/DS339, (2009) para. 196.

<sup>46</sup> World Trade Organization, “European Communities – Measures Prohibiting the Importation and Marketing of Seal Products (Report of the Appellate Body),” WT/DS400, (2014), para 5.101.

<sup>47</sup> World Trade Organization, “Korea – Measures Affecting Imports of Fresh, Chilled, and Frozen Beef (Report of the Appellate Body),” WT/DS161, (2001) para. 137.

market for 4G LTE device components. If such provision is not enacted, there will be equal opportunities and competition between imported and local 4G LTE device components. As explained above, the enactment of LCR measure effectively creates an incentive for 4G LTE device manufacturers to use domestic instead of imported components in order to achieve the minimum Local Component Level value.

## 2. The Agreement on Trade-Related Investment Measures (TRIMS)

The panel in the case of India – Solar Cells and Solar Modules divide the elements of Paragraph 1(a) into three elements that will be addressed in turn below.

### a. whether the measures at issue are “trade-related investment measures”

In the absence of definition on the term trade-related investment measures, the panel provided a characterization as to what constitutes an investment measure. In India case, the measures imposed by the Indian government were considered as an investment measure because it contains investment objectives.<sup>48</sup> In addition to investment objectives, a measure can also be deemed as an investment measure if it has investment features, refer to investment programs, or aims to encourage the development of a local manufacturing capability for the goods and sectors at issue. The panel also deemed that “(i)nherent to this objective is that these measures necessarily have a significant impact on investment in these sectors.”<sup>49</sup>

As set out in Ministry of Industry Regulation Number 65/2016, one of the ways to achieve Local Component Level Value is through an investment scheme where the higher the value of investment, the higher the Local Component Level value that will be granted to the investor.<sup>50</sup> This provision has in fact resulted to a significant impact on investment in the sector of 4G LTE devices. Global smartphone vendors such as Samsung and LG have conducted investment in Indonesia by cooperating with local manufacturers in order to achieve a minimum of

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<sup>48</sup> WTO, “India – Solar Cells and Solar Modules (Report of the Panel),” pg. 49.

<sup>49</sup> World Trade Organization, “Indonesia – Certain Measures Affecting the Automobile Industry (Report of the Panel),” WT/DS54, (1998), para. 14.80.

<sup>50</sup> Indonesia, Ministry Regulation Number 65 Year 2016, Article 26.

30% Local Component Level value.<sup>51</sup> Apple also took this investment scheme with an investment in the value of US\$ 44 million dollars.<sup>52</sup> In addition to those, other smartphone manufacturers already conveyed their intentions to invest in Indonesia to achieve the same purpose of attaining a minimum Local Component Level value.<sup>53</sup>

In addition to real impacts on investment in 4G LTE devices sector, it is also stipulated in the consideration of Ministry of Industry Regulation Number 65/2016 that the aim of the LCR provision imposed is to increase the competitiveness of mobile phone local industry according to its characteristics.<sup>54</sup> In light of these facts, Indonesia's LCR provisions can be deemed as an investment measure because it has investment features, refer to investment programs, and aims to encourage the development of a local manufacturing capability for the goods and sectors at issue. It also has a significant impact on investment in the sector of 4G LTE devices.

On the issue of whether or not a measure is trade-related, the case of India – Solar Cells and Solar Modules stipulate that if the measures are local content requirements, they would necessarily be trade-related because by definition, such measures always favor the use of domestic over imported products which therefore affect trade.<sup>55</sup> With respect to Indonesia, it has been discussed that the LCR provisions in Indonesia do require a certain minimum use of local components in the production of 4G LTE devices. Thus, the LCR measures in Indonesia are inherently trade-related.

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<sup>51</sup> Sholahuddin Al Ayyubi, "Samsung & LG Penuhi 20% TKDN," <http://industri.bisnis.com/read/20170320/257/638594/samsung-lg-penuhi-30-tkdn>, accessed on May 29th 2017.

<sup>52</sup> *Ibid*

<sup>53</sup> Sholahuddin Al Ayyubi, "Investor Ponsel Asal Prancis Tanam Rp 20 Miliar untuk TKDN," <http://industri.bisnis.com/read/20160224/105/522277/investor-ponsel-asal-prancis-tanam-rp20-miliar-untuk-tkdn>, accessed on May 29th 2017 and Kumparan, "Lenovo Siap Tambah Investasi Kejar TKDN 30% Ponsel 4G," <https://kumparan.com/aditya-panji/lenovo-siap-tambah-investasi-kejar-tkdn-30-ponsel-4g>, accessed on May 29th 2017.

<sup>54</sup> Indonesia, Ministry Regulation Number 65 Year 2016, Considerations.

<sup>55</sup> WTO, "Canada – Renewable Energy / Feed-In Tariff Program (Reports of the Panel)," para. 7.111.

- b. whether the measures at issue “require the purchase or use by an enterprise of products of domestic origin”

In this element, the panel found that India’s measures mandate the participants in the program to use solar cells and/or modules manufactured in India and such requirements are specified in terms of particular products, namely in terms of solar cells and modules. Thus, in the case of India this element is deemed fulfilled.<sup>56</sup> In Indonesia, the LCR provisions also oblige the use of products manufactured in Indonesia.<sup>57</sup> However in Indonesia, the requirements are specified in terms of value of products which also fall under Paragraph 1(a) of the TRIMS Illustrative List.<sup>58</sup> Therefore, Indonesia’s measures also fall under this element.

- c. whether the measures at issue are trade-related investment measures that are “mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage”

In the case of India, the LCR measures are established under the relevant Guidelines documents enacted by the government, thus it can be considered as “mandatory or enforceable under domestic law”. The panel also considers the mere bidding eligibility and potential contractual benefits under the LCR measures to qualify as “advantages” within the meaning of paragraph 1(a) of TRIMS Illustrative List. It is also supported by the fact that non-compliance with the LCR measures also has consequences of potential termination of the agreements entered into after fulfilling the LCR requirement. Thus, India’s measures fulfilled this element.<sup>59</sup>

In Indonesia, the LCR provisions are embodied in instruments enacted by the Government of Indonesia which are Law Number 3/2014, Ministry of Communication and Information Regulation Number 27/2015, and Ministry of Industry Regulation Number 65/2016. The fulfillment of LCR must be proven with a certificate or a letter issued by the ministry conducting the activity of governance

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<sup>56</sup> *Ibid*, pg. 50.

<sup>57</sup> Indonesia, Law on Industry, Law Number 3 Year 2014, Elucidation of Article 85.

<sup>58</sup> WTO, TRIMS, Article 1(a).

<sup>59</sup> WTO, “India – Solar Cells and Solar Modules (Report of the Panel),” pg. 52.

in the field of industry.<sup>60</sup> Non-fulfillment of the provisions set out in Ministry of Communication and Information Number 27/2015 which is a technical regulation will lead to the concerned products to be prohibited to be produced, imported, and/or circulated in Indonesia and must be immediately revoked or stopped.<sup>61</sup> It may be concluded that in this case, the advantage granted is the ability to enter the Indonesian market and obtain revenues from selling 4G LTE devices in the market if the manufacturers possess a Local Component Level certificate. This is similar to the facts of India case because bidding eligibility also grants the manufacturer the ability to obtain revenue from selling their products once they are elected to participate in the bid.

#### IV. CONCLUSION AND SUGGESTION

LCR is known as a performance requirement that sets a standard for companies for a minimum threshold of goods and services that must be purchased locally. The WTO does not have a specific agreement governing the use of LCR, but there are several provisions concerning the legality of LCR embedded in various WTO agreements. The most relevant agreements regarding LCR are the GATT, GATS, TRIMS, ASCM, and GPA. The GATT, GATS, and GPA have similar stipulations concerning the use of LCR, where essentially WTO members are required to treat products of another member no less favorably than they treat their national like products (national treatment obligation). However unlike the GATT and GATS, as a plurilateral agreement the GPA is only enforceable for members who have signed it. The TRIMS regulation concerning LCR restricts investment measures that require the purchase of domestic over imported products, while the ASCM prohibits government subsidies that are contingent upon the use of domestic over imported goods.

Indonesia's LCR provisions may be in violation of Article III:4 of GATT and Article 2.1 of TRIMS because based on the thresholds set out in the case of India – Solar Cells and Solar Modules, there is a similarity of facts and circumstances that are deemed to be sufficient to satisfy the

<sup>60</sup> Indonesia, Ministry Regulation Number 27 Year 2015, Article 4(2).

<sup>61</sup> Indonesia, Law on Industry, Law Number 3 Year 2014, Article 53 juncto Article 54.



elements of Article III:4 GATT and Article 2.1 TRIMS. Under Article III:4 of the GATT, Indonesia's provisions fulfill all the elements because of three reasons, namely: (a) the difference of treatment for imported and domestic 4G LTE components are only due to their origin, (b) the LCR measure enacted by Indonesia creates an incentive to use domestic over imported products, and (c) the LCR measure modifies the competition in the market of 4G LTE components to the detriment of imported 4G LTE components. In relation to Article 2.1 TRIMS, Indonesia's provisions fulfill the elements set out in Paragraph 1(a) because of three reasons, namely: (a) the LCR measure contains investment features such as the investment scheme for the calculation of Local Component Level and the measure has a significant impact on investment in 4G LTE sector, (b) the LCR measure requires the use of domestic products specified in terms of value of products, and (c) the LCR measure is established in a document enacted by the government and non-compliance will result to disadvantageous consequences.

Following the conclusions derived from the analysis, the Author proposes 2 (two) recommendations. Firstly, The WTO needs to reconsider the legality of LCR. From the analysis on various WTO agreements, it was found that under the WTO law the use of LCR is not allowed. In some instances, there are temporary exemptions granted by Special and Differential Treatment rules for developing countries. However apart from Special and Differential Treatment rules, the WTO needs to allow the implementation of LCR to some extent in order to liven up certain industries that are not yet developed. From the cases analyzed, it becomes apparent that LCR is used by countries for the objective of local industry development. However, this reason is not considered enough to allow the implementation of LCR. Allowing the use of LCR is important because if efforts to develop local industry are challenged at every turn, it may hamper the national development of countries which may in the end jeopardize the WTO itself. If the use of LCR is allowed but carefully regulated by the WTO, it can help bring favorable outcomes to the country enacting it without harming the exporting countries. Thus, it is worth considering for the WTO to accommodate the use of LCR.

Secondly, the government needs to bring the regulations regarding

4G LTE communication devices into conformity with relevant WTO laws by revoking the provisions mandating the need to use local over imported products. As a member of the WTO, Indonesia has an obligation to the other WTO members to commit to the WTO laws. Moreover, Indonesia's LCR provisions on 4G LTE sector had already caught the attention and concerned Indonesia's trading partners and members of WTO such as USA and Japan. Bringing the regulations into conformity will spare Indonesia from a potential case brought to the WTO dispute settlement body which, if it was found by the panel that Indonesia's LCR violates WTO laws, will only drain Indonesia's resources by being involved as a defendant in the case and lead to the same result which is the obligation to bring the regulations into conformity with WTO laws.

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