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## THE OBLIGATION OF LOCAL CONTENT REQUIREMENTS (LCR) OVER POWER PLANT CONSTRUCTION PROJECTS FROM THE PERSPECTIVE OF THE WORLD TRADE ORGANIZATION (WTO)

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### ABSTRACT

*As a developing country, Indonesia requires foreign investments to improve the welfare of its people. Trade provisions are regulated by the World Trade Organization (WTO) with the aim of reducing all barriers to world trade. Along with the entry of various foreign products and investments, developing countries will also apply local content requirements, which in Indonesia are known as the Tingkat Komponen Dalam Negeri (TKDN). Particularly in the field of electricity infrastructure development, the government of Indonesia regulates the minimum level of TKDN in the construction of power plants. The TKDN provisions normatively conflict with WTO principles, namely national treatment, because they are included in the illustrative list regulated in the Agreement on Trade-Related Investment Measures (TRIMS). In this article, the author applies a normative research method in which research is conducted by examining Indonesian TKDN regulations related to the construction of power plants against the WTO agreement for a more in-depth analysis. This article examines whether the TKDN provisions made by Indonesia's government align with WTO policies. The author concludes that Indonesia's TKDN policy could violate WTO provisions. Still, if the TKDN policy is for the community's welfare and managed directly by the government, it could be excluded since it is not for pursuing commercial profits.*

**Keywords:** *WTO, local content requirements, power plant, TKDN, TRIMS*

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### INTRODUCTION

As a developing country, Indonesia highly requires foreign investments to improve its people's well-being. In addition to the transfer of technology, the influx of foreign investors also stimulates job creation and promotes domestic industries. To deal with these requirements, Indonesia became a member of the World Trade Organization (WTO) by enacting Undang-undang No. 7 Tahun 1994 tentang Pengesahan Agreement Establishing The World Trade Organization (Persetujuan Pembentukan Organisasi Perdagangan Dunia). The WTO is an international organization that regulates international trade. Established in 1995, the WTO operates on the basis of a series of agreements negotiated and agreed upon by a number of countries around the world and ratified through parliaments. The objectives of the WTO agreements are to create a world that is increasingly free from trade barriers, regulate trade in goods and services, and regulate exports and imports in international trade.

One of the fundamental premises behind the establishment and foundation of the WTO is the Principle of National Treatment outlined in Article III of the 1994 GATT. Simply put, the principle requires Member States to treat imported products equally as their domestic products, especially for similar products. This disparity arises due to prevailing bias against imported

products in contrast to local products. This principle aims to ensure that internal provisions in a manner that favours local products are not applied to imported or local goods.

Along with the entry of various foreign products and investments since the establishment of the WTO, developing countries will also impose local content requirements (LCR) policies on foreign capital cultivation in order to develop and protect domestic industries. In general, LCR is a policy imposed by a country to maximize the potential of foreign investment entering its country.<sup>1</sup> This LCR often mandates foreign investors to be able to use local companies in the procurement of goods and services, the use of local raw materials, and the exploitation of the work of services performed by locals.<sup>2</sup> In addition, LCR encourages foreign companies to cooperate with local industries by establishing subsidiaries or engaging in local production processes.<sup>3</sup> The LCR required by each country may vary depending on the circumstances of that country. Generally, this LCR is required for the government's procurement of goods and services.

The provisions of this LCR are also enforced in Indonesia under the designation of Tingkat Komponen Dalam Negeri (TKDN). Various provisions of TKDN exist in the form of laws, government regulations, presidential regulations, and ministerial regulations. Article 85 of Law No. 3 of 2014 on Industry states, "To empower domestic industry, the government increases the use of domestic products." Furthermore, this law stipulated that the use of domestic products shall be carried out through a procurement process that uses the Anggaran Pendapatan dan Belanja Negara (APBN) Indonesia. Simply put, TKDN is a provision that requires foreign investors or domestic companies to use domestic goods and/or services. In the infrastructure sector, the government has issued various regulations related to the fulfilment of TKDN. For example, Peraturan Presiden Nomor 14 Tahun 2017 on Percepatan Pembangunan Infrastruktur Ketenagalistrikan regulates efforts to increase the use of domestic products, especially in terms of registered infrastructure. The use of local products became one of the key points in the construction of a power plant of 35,000 MW and a transmission network of 46,000 km. Furthermore, in the procurement of government goods and/or services in the case of registration, this provision is mandatory as set out in Article 2 of the Peraturan Menteri Perindustrian Number 54/M-IND/PER/3/2012 of 2012 and the Peraturan Menteri Perindustrian Number 05 / M-IND / PER/2/2017 on the Pedoman Penggunaan Produk Dalam Negeri untuk Pembangunan Infrastruktur Ketenagalistrikan ("Permenperin Infrastruktur Ketenagalistrikan"). In Article 2 paragraph (1) of the Permenperin Infrastruktur Ketenagalistrikan, it is stated that "Every construction of infrastructure for the public interest is obliged to use goods and/or services of domestic production." Permenperin Infrastruktur Ketenagalistrikan also regulates the quantitative quantity of TKDN for each type of power plant.

These provisions are mandatory and have sanctions when not fulfilled. The sanctions are regulated in Article 27 of Permenperin Infrastruktur Ketenagalistrikan, which regulates administrative sanctions and financial sanctions. In conducting the verification of the content of TKDN, the government has issued Peraturan Menteri Perindustrian Number 57 of 2006 on the mandated of PT Surveyor Indonesia (PT SI) and PT Superintending Company of Indonesian (PT Sucofindo) to verify the correctness of TKDN achievement. Coordinating Minister for Maritime and Investment Affairs, Luhut Binsar Pandjaitan, stated in the Rapat Bersama Lintas Kementerian, stated that violators of this TKDN can be sanctioned and dismissal.<sup>4</sup>

<sup>1</sup>Chilenye Nwapi, *Defining the "Local" in Local Content Requirements in the Oil and Gas and Mining Sectors in Developing Countries*, Law and Development Review 2015; 8(1): 187-216, hlm. 187

<sup>2</sup>*Ibid*, hlm. 187-188.

<sup>3</sup>Holger P. Hester Meyer dan Laura Nielsen, *The Legality of Local Content Measures under WTO Law*, Journal of World Trade 48, no. 3 (2014): 553-592, hlm. 554

<sup>4</sup>Caesar Akbar, "Luhut Sebut Pihak yang Tak Terapkan TKDN Bisa Diberi Sanksi Pencopotan Jabatan", <https://bisnis.tempo.co/read/1460657/luhut-sebut-pihak-yang-tak-terapkan-tkdn-bisa-diberi-sanksi-pencopotan-jabatan> , diakses 9 April

Basically, the World Trade Organization (WTO) stipulates that each member state must create harmonization between the provisions of the WTO and its national regulations in order to minimize the abuse of the law in the interests of the host country.<sup>5</sup> Thus, every member state that has ratified the WTO agreement and becomes a member of it, must automatically harmonize the provisions of the WTO with its national regulations. Regarding investment, the WTO has detailed Trade-Related Investment Measures (TRIMs). Within the TRIMs, the WTO members have agreed to attach an illustrative list in Article 2.1 of the TRIMs that regulates the restrictions on establishing LCR in a country. In addition, there is one of the most important principles in the WTO, the National Treatment, which is written in Article III:4 of the General Agreement in Tariffs and Trade (GATT) that prohibits discrimination against foreign or imported products. This principle generally prohibits WTO member states from treating imported products differently from local products. The purpose of this principle is to ensure that the national regulations of a country do not treat local goods as more privileged than imported goods.

The issue of LCR is not only limited to Indonesia but also prevalent in other countries, especially developing countries. For example, the Brazilian President's policy openly calls for local content requirements of up to 90 percent. There has even been a case of LCR policy that the WTO has ruled: DS412 Canada – Renewable Energy related to the Feed-In Tariff Program (FIT) in Ontario, Canada. In such cases, Canada was found to have violated Article 2.1 of the TRIMs and Article III:4 of the GATT. In addition to Canada, India has also been sued by the WTO in a similar case, namely DS456 India — Certain Measures Relating to Solar Cells and Solar Modules.

From the issues above, the author argues that there are several legal aspects that can be studied in the regulations related to TKDN in the Development of Registration Infrastructure when associated with the obligations of Indonesia as a member state of the WTO bound by the agreements in it. Moreover, Permenperin Infrastruktur Ketenagalistrikan regulates in detail related quantitative measurement of TKDN for each type of plant. Nevertheless, Law No. 30 of 2009 on Ketenagalistrikan states that electricity plays a very important and strategic role in achieving national development goals. The efforts to supply electricity controlled by the state and its supply must be continuously enhanced in line with the development of the country thus that there is sufficient, equal, and qualitative electricity available. Therefore, the need for further examination related to TKDN regulation in the construction of infrastructure is a pure policy for the procurement of government goods and services for the benefit of the Indonesian people.

Based on this description, the author would like to study and give a hypothesis on **The Obligation of the Local Content Requirements (LCR) of Power Plants from The Perspective of the World Trade Organization (WTO).**

## METHOD

The type of research used in this study is normative legal research, i.e., research carried out by studying library materials or secondary data as the basic material to be studied by conducting a search for regulations and literature related to the problem studied, as well as covering the horizontal synchronization of law related to the cases discussed. This method is understood as the study of law within the framework of standards, norms, foundations,

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<sup>5</sup>Peter Van den Bossche dan Werner Zdouc, *The Law and Policy of the World Trade Organization Text, Cases and Materials*, (Cambridge: Cambridge University Press, 2017), hlm. 56

theories, philosophies, and rules of law to find solutions or answers to problems such as legal regulation gaps, conflicting rules, or ambiguity in the regulation of laws and rules. Normative methodology is used in this study to place law as a norm-forming system. The normative methodology of this research will consider the foundations and legal bases, legal foundations, theories, and legal doctrines of the legal experts relevant to the WTO regulations, along with the regulation of the TKDN in the field of electricity infrastructure in Indonesia.

## ANALYSIS AND DISCUSSION

As the main objective of the WTO, which desires free trade without barriers between its member states, one of the principles used to achieve such a primary objective is the Principle of National Treatment contained in Article III of the General Agreement on Tariffs and Trade 1994 (GATT 1994). Simply put, the principle requires Member States to treat imported products equally with their domestic products, especially for similar products. This is because there is still a lot of discrimination against imported products when compared to local products. The purpose of this principle is to ensure that internal provisions are not applied to imported or local goods in a certain way that protects local products.

The WTO, as the world's largest trade organization, wants to create an open and barrier-free market between its member countries. There are barriers that have always emerged in the circulation of commodities, becoming obstacles to the achievement of this goal. Obstacles that may arise can be tariff barriers, such as taxes or customs duties to be paid, or non-tariff obstacles, such as shipping logistics problems that must be faced when marketing a commodity to countries that are difficult to reach geographically. In addition, barriers that often arise and are difficult to break down are provisions that protect domestic industries. Besides tax discrimination, these barriers are often made in the form of local content requirements (LCR) or Tingkat Komponen Dalam Negeri (TKDN).

Permenperin Infrastruktur Ketenagalistrikan sets out in detail the quantitative numbers of TKDN that must be met in the construction of power plants. As regards the infrastructure regulated in this Permenperin, it is listed in Article 5, which is: Steam Power Plant (PLTU), Hydro Power Plant (PLTA), Geothermal Power Plant (PLTP), Gas Power Plant (PLTG), Gas Steam Power Plant (PLTGU), Solar Power Plant (PLTS); and transmission networks, main garda, and electricity distribution networks. This Permenperin also stipulates the related size of the VAT for each type of power plant, such as for PLTAs set out in Article 7, for PLTPs set up in Article 8, for PLTGs set down in Article 9, to PLTGUs set in Article 10, for PLTSs set forth in Article 12 and Article 13, and for Transmission Networks, Substations, and Electrical Distribution Networks set out in Article 15. These provisions are mandatory and have sanctions when not fulfilled by the contractor. Such sanctions are regulated in Article 27, which regulates administrative sanctions and financial sanctions. The obligation to comply with this regulation is for projects that use any infrastructure development carried out by the State Ownership Enterprise Agency (BUMN), Regional Owned Enterprise Authority (BUMD), Private Enterprise Organization or a cooperation at the expense of the State Revenue and Expenditures Budget (APBN) / Regional Revenues and Expenditures Budget (APBD) / Hibah / Foreign Loans. These provisions are contained in Article 2 of the Permenperin Infrastruktur Ketenagalistrikan.



For example, TKDN provisions for PLTU construction with an installed capacity of more than 600 MW per unit, as stated in Article 6, of Permenperin Infrastruktur Ketenagalistrikan namely:<sup>6</sup>

- 1) TKDN Minimum item 36,10% (Thirty-six point ten percent);
- 2) TKDN Minimum Services 71,33% (Seventy-one point thirty-three percent); and
- 3) TKDN Minimum mix of good and services 38,21% (Thirty-eight point twenty-one percent).

The example of quantification above is clear evidence that the Permenperin Infrastruktur Ketenagalistrikan regulates in detail the quantification figures that must be met in the development of electricity infrastructure. In article 2, explains that TKDN goods must be fully manufactured by domestic producers. For provisions and procedures for calculating TKDN for goods, services, and a combination of goods and services for each power plant and transmission network, substation, and electricity distribution network, refer to Peraturan Menteri Perindustrian Number 16/M-IND/PER/2/2011 concerning Ketentuan dan Tata Cara Penghitungan Tingkat Komponen Dalam Negeri. Whereas the provisions and procedures for calculating TKDN for goods, services, and a combination of goods and services for PLTS refer to the Peraturan Menteri Perindustrian Number 04/M-IND/PER/2/2017 concerning Ketentuan dan Tata Cara Penilaian Tingkat Komponen Dalam Negeri untuk Pembangkit Listrik Tenaga Surya. In verifying TKDN content, the Government has issued Peraturan Menteri Perindustrian Number 57 Year 2006 regarding Penunjukkan PT Surveyor Indonesia (PTSI) dan PT Superintending Company of Indonesia (PT Sucofindo) to verify the accuracy of TKDN achievements.

Most of the WTO provisions related to TKDN are regulated by the GATT 1994 rules. As the main objective of the WTO is to promote free trade without barriers between its member countries, the WTO adheres to the principle of National Treatment. TKDN provisions are a form of discrimination between local products and imported products, such as the obligation to use local products compared to products originating from abroad. TKDN policies often violate the provisions of at least one paragraph in Article III of the 1994 GATT because, basically, TKDN policies are actions that benefit local products, therefore they discriminate against imported products within a member country's territory.<sup>7</sup> Article III prohibits de jure and de facto discrimination between local products and imported products. Article III of the GATT consists of several paragraphs that are related to each other, especially provisions related to the principle of National Treatment, so that one paragraph cannot stand alone. The basic analysis for determining whether a TKDN policy violates the provisions of Article III of the GATT is explained in each paragraph of that article.

- a. Article III: 1 GATT regulates the government of a country to create policies that do not differentiate between imported products and local products. This paragraph contains the main principles contained in Article III of the GATT and describes the contents of the following paragraphs.
- b. Article III: 2 GATT regulates if the TKDN provisions regulated by the country provide benefits in the form of taxes.
- c. Article III: 4 GATT emphasizes that imported goods entering the territory of member countries must be treated the same as similar local products. The same treatment specifically relates to the sale, purchase, transportation, distribution process, and use of these products. This article has quite extensive regulations because it also provides protection for imported

<sup>6</sup>Permenperin No. 54/M-IND/3/2012 Tahun 2012 Tentang Pedoman Penggunaan Produk dalam Negeri Untuk Pembangunan Infrastruktur Ketenagalistrikan Article 6 Para (1) c

<sup>7</sup>Holger P. Hester Meyer & Laura Nielsen, *The Legality of Local Content Measures Under WTO Law*, hlm. 566

goods from an administrative and legislative policy perspective.<sup>8</sup> Usually, to see whether a country's internal regulations meet the requirements, a test must be carried out:

- The regulation in question is within the scope of Article III:4 GATT 1994
  - Imported and local goods are similar goods
  - Imported goods received less favourable treatment.
- d. Article III:5 GATT prohibits member countries from creating national policies that require the use of local products with a certain quantification because this provision clearly violates the principle of National Treatment.<sup>9</sup>
- e. Article III:8 of the GATT regulates the exceptions set out in Article III:4 of the GATT. This paragraph states that the National Treatment principle is not applied in the procurement of government goods and services. The procurement in question is procurement carried out by government institutions that have government interests for the welfare of the people and not for commercial purposes. Furthermore, the provisions in this paragraph also override the National Treatment principle in that the government determines subsidies for local products, such as taxes.

The principle of National Treatment is not only applied in the GATT or in the case of goods but also to trade in services. In Article XVII The General Agreement on Trade in Services (GATS) also regulates only in so far as WTO member countries have expressly and clearly committed to providing 'national treatment' to certain service sectors. In principle, each member country is free to decide whether to commit to these principles or not. If a country has committed, then the country must carry out the commitments it has made. Based on the National Treatment provisions regulated in the WTO, it shows that TKDN is not only limited to trade in goods or products in the form of local goods but also includes service commodities carried out by both foreign and local workers. In TKDN practice in Indonesia, TKDN provisions are not limited to goods. For example, in the Permenperin Infrastruktur Ketenagalistrikan, service work consists of Consulting Services (Feasibility Study), Integrated Construction Services (Engineering, Procurement, and Construction), Inspection Services, Shipping Services, Installation Services, Testing, Certification and/or Supporting Services. This provision is, of course, to ensure that local human resources are maintained and jobs are distributed evenly.

In terms of investment, the WTO has put it into TRIMs, which is an effort to prevent policies that limit discrimination against foreign investment. The provisions stipulated in TRIMs cannot be separated from the provisions stipulated in the 1994 GATT, especially when it relates to the National Treatment principle stipulated in Articles III and XI of the 1994 GATT. The obligation of member countries to apply the National Treatment Principle in the implementation of TRIMs is contained in Article 2 of TRIMs.<sup>10</sup> In Article 2, TRIMs regulates the National Treatment and Quantitative Restriction, where it is written:<sup>11</sup>

1. Without prejudice to other rights and obligations under GATT 1994, no Member shall apply any TRIM that is inconsistent with the provisions of Article III or Article XI of GATT 1994.
2. An illustrative list of TRIMs that are inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III of GATT 1994 and the obligation of general elimination of quantitative restrictions provided for in paragraph 1 of Article XI of GATT 1994 is contained in the Annex to this Agreement.

<sup>8</sup>Muh. Risnain, *The Model of Policy and Regulation of Local Content Requirements in Indonesia*, PADJAJARAN Journal of Law Volume 5 Number 3 Year 2018, (2018), hlm 587.

<sup>9</sup>*Ibid*, hlm. 588

<sup>10</sup>Ni Ketut Supasti Dharmawan, Putu Tuni Caka Bawa Landra, *Penjabaran Standar Internasional TRIMS dan OECD dalam Ketentuan Hukum Penanaman Modal Indonesia*, Jurnal Magister Hukum Udayana, September 2015 Vol. 4, No. 3: 550-564, hlm. 551

<sup>11</sup>Trade-Related Investment Measures Article 2

Regarding TRIMs, this provision is an affirmation that, in the case of both foreign and domestic investment, there should be no discriminatory provisions. This provision is to guarantee that foreign investors wishing to invest in the host country will not receive different treatment, especially if the foreign investors have products, machinery, and experts from their home countries. Discrimination in terms of investment usually occurs in the form of the host country's potential to protect investors and local producers in the face of competition from global companies. Regarding the regulation of the obligation to apply National Treatment as stated in Article III:4 GATT and the prohibition on quantification restrictions in Article XI:1 GATT, which are regulated in WTO regulations, in relation to TRIMs, it is stated in more detail in Article 2.1. Furthermore, these settings are contained in an illustrative list which is attached to TRIMs. The purpose of making an illustrative list is to provide boundaries related to regulations governing the mandatory use of local products by member countries. The provisions that are prohibited in the illustrative list of TRIMs are:

1. There is quantification in fulfilling TKDN obligations where the purchase or use of products from within the country or other national sources has been specified by specific products, product volume or value, or volume or value comparisons.<sup>12</sup>
2. Used as one of the conditions that must be met for investors to invest in a country. In the case of investment, these provisions are usually in the form of requirements for investors to purchase or use domestically produced products in a certain percentage or the investor's obligation to use non-national sources in the case of purchases of imported goods.<sup>13</sup>
3. The purchase or use of imported products by a company is limited to a certain amount and is tied to the volume or value of domestic production in the exporting country.<sup>14</sup>
4. Trade balance policies are not permitted under paragraph 1(b) of the TRIMs Agreement if investment activities require restrictions or quotas on the purchase or use of imported goods in a certain amount in relation to the volume or value of local products exported by foreign companies.

Even though the illustrative list is an attachment to the agreement, these provisions must always be considered by member countries when formulating investment policies in their countries. This can also affect the interest of foreign investors in investing in the country. In addition to paying attention to these provisions, it is also necessary to pay attention to several exceptions from the illustrative list, namely:<sup>15</sup>

1. Article VI - Anti Dumping and Countervailing Duties;

In the event of an anti-dumping action by another country, member countries are permitted to impose discriminatory import duties to protect their country's local industry.

2. Article XXIV - Territorial Application Frontier Traffic Custom Union and Free Trade Area;

If a country has joined a Custom Union or Free Trade Area, these countries can apply different provisions between union member countries and countries outside the union members.

3. Article XII:2 – Quantitative Restriction;

Especially in the field of fisheries and agriculture, a country is permitted to impose quantitative restrictions in order to protect the country's domestic market.

<sup>12</sup> Mahmul Siregar, *Perdagangan dan Penanaman Modal : Tinjauan terhadap Kesiapan Hukum di Indonesia dalam Menghadapi Persetujuan Perdagangan Multilateral yang Terkait dengan Peraturan Penanaman Modal* (Medan : Universitas Sumatera Utara, 2005) hlm 76.

<sup>13</sup> Denny Felano, "Analisis Yuridis Penerapan Pasal 2.1 Agreement on Trade-Related Investment Measures (TRIMs) Terhadap Pelaksanaan Persyaratan Tingkat Komponen Dalam Negeri (TKDN) Dalam Sektor Minyak dan Gas Bumi di Indonesia", (Tesis Magister Fakultas Hukum Universitas Indonesia, Jakarta, 2021), hlm. 39

<sup>14</sup> *Ibid*, hlm. 77

<sup>15</sup> Asmah Akbar, La Ode Husen, *Implication of TRIMs Agreement in International Trade and Relationship with Legal Development in Indonesia*, hlm. 1486

#### 4. Article XX – Sanitary and Phytosanitary;

In terms of health, plant quarantine and the environment, a country can impose discriminatory restrictions to protect the health of humans, animals and plants. In addition, this action is also related to the environmental standard provisions of a country which can differ regarding environmental and natural conditions, so that the boundaries between countries can also be different.

The exceptions regulated in TRIMs must be taken into consideration when we determine whether a country's TKDN policy violates WTO provisions or not. Even though it wants the realization of a free market, the WTO still pays attention to the conditions of its member countries, especially developing and underdeveloped countries. These countries need special treatment, which is certainly different from the treatment of developed countries. Developing countries tend to require greater protection for their local industries. This exception concept is also used as a justification in the WTO cases DS412 Canada – Renewable Energy related to the Feed-In Tariff (FIT) Program and DS456 India – Certain Measures Relating to Solar Cells and Solar Modules.

In the case of DS412, the Panel, at the outset of its analysis, addressed the question of whether the FIT Program, FIT Contracts, and associated microFITs fall within the realm of TRIMs within the meaning of Article 1 TRIMs. The Panel found that one of the goals of the FIT Program was to encourage investment in the local production of equipment related to the generation of electricity from renewable energy sources in Ontario. The Panel found that the FIT Program compelled power producers to purchase and use certain types of renewable energy generation equipment supplied in Ontario in the design and construction of their facilities. Based on this, the Panel concludes that the FIT Program and FIT Contracts fall within the realm of TRIMs to the extent that domestic content requirements are considered and applied.<sup>16</sup>

Canada argues that the FIT Program falls within the scope of Article III:8(a).<sup>17</sup> On the other hand, the complaining countries, in this case the European Union and Japan, asked the Appellate Body to confirm the Panel's finding that the FIT Program is not included in the scope of Article III:8(a), so that Canada cannot use these provisions to exclude the application of Article III: 4 GATT 1994. The EU and Japan also support the Panel's conclusion that the FIT Program is not in accordance with Article 2.1 of the TRIMs Agreement and Article III:4 GATT 1994.<sup>18</sup> Conclusions The Appellate Body considers that the FIT Program does not fall within the scope of Article III:8(a) of the GATT 1994. This conclusion is not based on the finding that electricity is procured by the Government of Ontario through the FIT Program for the purpose of commercial sale. Instead, it is based on the finding that Article III:8(a) does not cover discriminatory treatment of equipment used to generate electricity obtained by the Government of Ontario. Given the Appellate Body's finding that LCR is not within the scope of Article III:8(a) and Canada has not appealed the Panel's finding that the FIT Program is not in compliance with Article III:4 of the GATT 1994 and Article 2.1 of the TRIMs Agreement, the Panel's conclusion is that the LCR that stipulated in the FIT Program, FIT Contract, and related microFIT is not in accordance with Article 2.1 of the TRIMs Agreement and Article III:4 of the 1994 GATT remains in effect.<sup>19</sup>

Whereas in DS456, starting on 14 October 2016, the Dispute Settlement Body (DSB) adopted the recommendations and decisions of the Appellate Body report in the case of India – Certain

<sup>16</sup>World Trade Organization, 'Reports of the Appellate Body', Canada – Measures Relating to The Feed-In Tariff Program (DS426), hlm. 81, (World Trade Organization, 2013).

<sup>17</sup>World Trade Organization, 'Reports of the Appellate Body', Canada – Measures Relating to The Feed-In Tariff Program (DS426), hlm. 25, (World Trade Organization, 2013).

<sup>18</sup>*Ibid*, hlm. 48.

<sup>19</sup>World Trade Organization, 'Reports of the Appellate Body', Canada – Measures Relating to The Feed-In Tariff Program (DS426), hlm. 134, (World Trade Organization, 2013).



Measures Relating to Solar Cells and Solar Modules. The Appellate Body responded to India's appeals against several legal issues and legal interpretations developed in a Panel Report (WT/DS456/R of 24 February 2016). The Panel was formed on 23 May 2014 to consider complaints filed by the United States against domestic content requirements imposed by India against solar developers selling electricity to government agencies within the Jawaharlal Nehru National Solar Mission (NSM). The LCR measures mooted in NSM's Phase I (Batch 1), Phase I (Batch 2), and Phase II (Batch 1-A) required that the solar cells and modules used in PLTS by the developer must be fabricated in India.<sup>20</sup>

The Appellate Body accepts and evaluates the validity of the Panel's finding that the domestic content provisions applied by India are inconsistent with Article 2.1 TRIMs and Article III:4 of the GATT 1994. In addition, the policy is deemed invalid as an exception in Article III:8(a) GATT 1994 although it was based on the reason that the procurement of solar cells and modules was not carried out by the government, but by development companies involved in power generation.<sup>21</sup> The Appellate Body concluded that according to Article III:8(a) of the GATT 1994, solar electricity purchased through procurement must be reasonably similar to or directly competitive with, or replaceable by foreign products which are objects of discrimination, namely, solar cells and modules. The Appellate Body also noted the Panel's finding that the LCR measures undertaken fall within the framework of laws, regulations, or requirements governing electricity procurement and that the electricity procurement was carried out by a government agency.<sup>22</sup>

Following the receipt of the Appeals Board Report by DSB on 14 October 2016, India formally issued a communication document to DSB dated 08 November 2016. Subsequently, at the DSB meeting held on 23 November 2016, India announced its intention to implement the DSB's recommendations and decisions in disputes this and stated that India needed a reasonable amount of time to do so. On June 16, 2017, India and the United States notified the DSB that they had agreed to set a reasonable timeframe of 14 months to implement the DSB's recommendations and decisions. Therefore, the reasonable period of time ("RPT") is set to expire on 14 December 2017. On 14 December 2017, pursuant to Article 21.6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), the Indian delegation gave a status report to the DSB stating that India has discontinued the application of measures inconsistent with the recommendations and decisions of the DSB and has complied with those recommendations and decisions.<sup>23</sup> Thus, the current condition in India is that there are no TKDN arrangements for PLTS to comply with the DSB ruling.

From the two cases above, the authors analyse that the TKDN provisions for Power Plants in Indonesia have the potential to violate the provisions stipulated in the WTO, especially the principle of National Treatment. Despite the exceptions in Article III:8 of the GATT, the lessons to be learned in the case of Canada are that Article III:8(a) do not cover discriminatory treatment of equipment used to generate electricity obtained by the Government of Ontario. The Panel found that the FIT Program compelled power producers to purchase and use certain types of renewable energy generation equipment supplied in Ontario in the design and construction of their facilities. Whereas in the case of India, the PLTS TKDN policy is not included in the exceptions stipulated in Article III: 8 (a) GATT 1994 because the procurement of solar

<sup>20</sup>World Trade Organization, 'Report of the Appellate Body', India – Certain Measures Relating to Solar Cells and Solar Module (DS456), hlm. 7, (World Trade Organization, 2016).

<sup>21</sup>*Ibid*, hlm. 11.

<sup>22</sup>*Ibid*, hlm. 51.

<sup>23</sup>World Trade Organization, 'Recourse to Article 21.5 of The DSU by India', India – Certain Measures Relating to Solar Cells and Solar Module (DS456), hlm. 2, (World Trade Organization, 2018).

cells and modules is not carried out directly by the Indian government, but by development companies involved in electricity generation, or Independent Power Producers (IPP).

Suppose the authors take lessons from the cases above. In that case, the TKDN provisions for Power Plants in Indonesia must be studied further because, in practice, the procurement of goods and services for power plants that are required to use TKDN is not directly carried out and will be owned directly by the Government of Indonesia, but is operated by the IPP, which the government then buys electricity from. Furthermore, with the TKDN quantification limits that entrepreneurs must meet, it is possible to violate Article III:5 of the GATT, which prohibits member countries from using the quantification of their country's local products.

As a WTO member country, Indonesia must comply with the provisions set out by the organization. The provisions stipulated in the WTO and TRIMs must be harmonized with the provisions in force in Indonesia. This is also in line with the opinion of Hans Kelsen that national law and international law are an inseparable unity.<sup>24</sup>

## CONCLUSION

Regulations related to TKDN are provisions that are quite commonly used in various countries, especially developing and underdeveloped countries. This is because these countries require stronger protection to protect their local industries when compared to developed countries. There are already several countries that have been sued at the WTO regarding TKDN regulations which are felt to be detrimental to the plaintiff countries, such as in DS412 Canada – Renewable Energy and DS456 India – Certain Measures Relating to Solar Cells and Solar Modules.

Normatively, the TKDN policy is a violation of the National Treatment Principles adopted by the WTO. The TKDN provisions for Power Plants in Indonesia must be studied further because, in practice, the procurement of goods and services for power plants that are required to use TKDN is not directly carried out and will be owned directly by the Government of Indonesia but is operated by IPPs whose electricity is then purchased by the Government. Furthermore, with the TKDN quantification limit that entrepreneurs must meet, it is possible to violate Article III: 5 of the GATT, which prohibits member countries from using the quantification of their country's local products.

TKDN provision can potentially be sued by other countries since there is a potential violation of WTO provisions. In the worst case, if Indonesia is sued, Indonesia has the potential to be found guilty and must abolish its Power Plant TKDN provisions, as was done by India. If this happens, the progress of the local industry will certainly be hampered. Thus, it would be better for the Indonesian government to review the TKDN provisions for Power Plants as an effort to prevent lawsuits that could have worse consequences.

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