

ITI Comments on USTR's GSP Country Practice Review of Indonesia

Indonesia Country Practice Review; Written Comment

Docket Number: USTR 2018-0007

January 17, 2020

Overview

The Information Technology Industry Council (ITI) represents nearly 70 of the world's leading information and communications technology (ICT) companies from all corners of the technology sector, including hardware, software, digital services, semiconductor, network equipment, and internet, as well as "technology-enabled" companies that rely on ICT to transform their businesses. Promoting innovation worldwide, we engage with governments and associations around the globe to share information and work collaboratively to develop effective policy approaches that enhance cybersecurity, protect privacy, and enable businesses to thrive in an ever-changing and dynamic global market. ITI appreciates the opportunity to provide comments in response to USTR's review of Indonesia's Generalized System of Preferences (GSP) eligibility, with a focus on whether Indonesia is providing equitable and reasonable access to its market for U.S. companies.

Indonesia is a fast-developing market for the global tech sector, with many opportunities for U.S. ICT and tech-enabled firms. In recent years, a combination of foreign investment, a nascent startup culture, and widespread mobile and digital connectivity has created a wealth of potential for Indonesia's continued development. The Indonesian government has prioritized ICT and aims to become the largest digital economy in Southeast Asia. However, since USTR's 2018 review of Indonesia's GSP eligibility, the ICT sector has faced continued and emerging market access barriers that limit both the operation and entrance of U.S. companies into the Indonesian market. These barriers have taken the form of digital barriers, opaque local content requirements, country-unique and localized testing requirements, and barriers to investment. Indeed, while there has been limited improvement on certain fronts, market access concerns remain largely unaddressed, and certain Indonesian policies are playing an unhelpful role in broader, international approaches to digital trade.

Several of these barriers are in draft or have been issued without the appropriate stakeholder consultation. While we are concerned with the substance of the measures, the process of issuing them is an additional concern due to inconsistencies in notification. Though the WTO has been notified in some cases, Indonesia has issued some of its implementation rules to the public after they come into effect and with minimal or no consultation of stakeholders. The lack of transparency and consistency over issuance of technical regulations and related provisions serves to close rather than open markets, generating uncertainty within firms and discouraging investment. We appreciate USTR and the Indonesian government's efforts to address issues of the ICT sector in the Indonesian market. We hope for prompt conclusion of the GSP review that will achieve meaningful results reducing trade barriers in Indonesia and allow for continued collaboration and engagement between the two governments.

Digital Barriers

The government of Indonesia has a history of forced localization measures that favor local companies at the expense of foreign competitors. The Indonesian Government [Regulation 82/2012 \(“GR82”\)](#) has been at the center of these concerns, although we have seen some positive progress in the revised edition of GR82 with the recently passed Regulation 71/2019 (“GR71”). GR71 made several apparent improvements to previous data localization provisions contained in GR82, and we commend USTR and the Indonesian government for their extensive work on these issues. The Indonesian government’s action to entirely revoke GR82 has in our view shown clear, positive intent by President Joko Widodo to resolve Indonesia’s eligibility for GSP benefits the United States.

However, the revised GR71 still appears to include data localization requirements for all public sector-related entities, potentially including state-owned enterprises (SOEs). Given the dominance of SOEs in the Indonesian economy, their inclusion in GR71 could have substantial impacts on the economy and business partnerships with foreign firms. In addition, GR71 contains source code disclosure requirements for companies seeking to do business with public sector entities. These provisions present significant concerns, though the extent to which they discriminate against U.S. firms will depend on how GR71 is implemented and the precise scope of the term “public.” We would encourage KOMINFO to engage with U.S. government counterparts and industry stakeholders to clarify implementation of Regulation 71, appropriately scope certain rigid and potentially problematic requirements, and eliminate requirements that discriminate against non-Indonesian firms.

Moreover, we continue to have concerns around discriminatory treatment of U.S. firms as Indonesia seeks to develop cybersecurity policies. Indonesia’s government is drafting a Cybersecurity Law which provides for the possibility of certification schemes that may generate onerous and country-unique requirements that result in the discriminatory treatment of foreign firms operating in Indonesia. Both within and beyond the context of the GSP, we encourage the U.S. government to continue to engage with Indonesia on its cybersecurity and data protection policies to ensure that their implementation does not create barriers to trade.

Indonesia’s Ministry of Finance issued Regulation No.17/PMK.010/2018 (Regulation 17), which amended Indonesia’s Harmonized Tariff Schedule (HTS) Chapter 99 to add: “Software and other digital products transmitted electronically.” Chapter 99 effectively treats an electronic transmission as a customs “import,” which triggers a number of negative implications including: 1) the imposition of customs import requirements (including declaration and other formalities) that will be impossible to meet for certain intangible products; 2) the imposition of import duties and taxes on each electronic transmission; 3) the creation of security risks; and 4) the constraint of information flows into Indonesia. The inclusion of “software and other digital products transmitted electronically” in Indonesia’s HTS skirts Indonesia’s commitment under the World Trade Organization (WTO) Moratorium on Customs Duties on Electronic Transmissions (Moratorium), a commitment that Indonesia reaffirmed as recently December as 2019. While the tariff rates remain at zero, Indonesia’s actions have established a dangerous precedent and will likely have the effect of encouraging other countries to violate the WTO Moratorium. In order to eliminate this barrier, Indonesia must rescind Regulation 17 and remove Chapter 99 from its HTS. We appreciate USTR’s bilateral and multilateral work to address this issue, and we would encourage continued engagement with the Indonesian government to resolve it.

Government Regulation no. 80 of 2019 on e-Commerce (“GR80”) entered into force on November 25, 2019, after having been issued and signed without a transparent opportunity for stakeholders to review and provide comments. The regulation provides economic operators with a two-year transition period to come into compliance, and while we are still seeking to understand the full extent of GR80, we have a number of concerns. First, the language of the regulation appears to impose burdensome licensing requirements on e-commerce operators which may restrict market access for foreign firms seeking to leverage e-commerce platforms to sell into the Indonesian market. It also requires certain entities broadly defined as being incorporated and located outside of Indonesia to establish a local representative and adhere to a host of domestic regulatory requirements that present particular challenges to non-domestic firms. In addition, the regulation appears to give the Indonesian Ministry of Trade discretion in authorizing the transfer of personal information outside of the country, with little clarity on the parameters that would need to be satisfied to ensure that companies can continue to predictably move data across borders. Finally, GR80 may seek to impose an extraterritorial income tax on non-resident firms, creating the potential for both double taxation and discrimination against U.S.-based companies. Given the range of concerns regarding this newly adopted regulation, we urge the U.S. Government to insist that, as a condition of GSP eligibility, Indonesia address the items referenced above prior to the end of the two-year transition period. We likewise urge the Indonesian government to adhere to its WTO commitments by seeking broad stakeholder input to ensure non-discriminatory implementation of GR80.

The *Draft Regulation Regarding the Provision of Application and/or Content Services Through the Internet*, first opened for comments in May of 2016, places vague requirements on providers of over-the-top (OTT) services. The most onerous requirement is that OTT services must “place a part of its servers at data centers within the territory of the Republic of Indonesia.” It is not clear what “part of its servers” means precisely, nor is it clear why this requirement is in the draft regulation—there seems to be a line of rationality drawn between this draft regulation needing to mirror Regulation 82/2012. This law has the potential to cause serious damage U.S. business interests in Indonesia by requiring a level of local presence that is neither beneficial nor necessary. Furthermore, the regulation would impose significant responsibilities on OTT service providers, such as content monitoring and handling that is often beyond their control.

Local Content Requirements

U.S. industry is regularly confronted with country-unique local content requirements in Indonesian ICT product requirements. These requirements are extremely burdensome, and in some cases not clearly articulated in final measures. Regulation No. 29/2017 from the Ministry of Industry requires local content for products produced domestically in Indonesia. Meanwhile, the Ministry of ICT’s Regulation 27/2015, *Technical Requirements of Equipment and Telecommunication Devices Standards-based of Long-Term Evolution (LTE) Technology*, as well as Regulation 65/2016, *Terms and Procedure for Calculating Value of Domestic Component Level of Cellular Phone, Handheld, and Tablet Computer*, impose strict local content rules on 4G LTE smartphones, laptops, tablet computers, and all related equipment. These requirements are being phased in over the next few years, progressively raising costs and pushing out U.S. industry.

Similarly problematic are two regulations recently released by KOMINFO, No. 9 of 2019 (Wavelength Division Multiplexing) and No. 10 of 2019 (Internet Protocol Networks), both of which include a requirement to “meet the Domestic Component Level in accordance with statutory provisions.” No

previous notice was given for this local content requirement, and no specifics are provided on the levels that must be met. In order for manufacturers to meet any sort of local content requirements, notice must be given very early in the process so that manufacturing processes, supply chains, and other necessary accommodations can be established. We continue to seek additional information on the compliance requirements of both measures and anticipate that U.S. companies will face significant additional compliance costs.

In February of 2016, the Ministry of Trade (MoT) held a public hearing to socialize a new draft amendment for MoT Regulation 82/2012. This amendment rolls back many restrictions on investing and importing mobile phones into Indonesia, but it would still bar importers from selling directly to the consumer and would require some importers to obtain a “recommendation” from MoT in order to import. These types of measures will not help Indonesia meet any of its broadband or mobile connectivity objectives and will make it harder for local companies in Indonesia to operate and innovate.

Product Regulatory Compliance

Under Regulation Number 159 of 2019, the Directorate General of Posts and Information Resources & Equipment (SDPPI) has been accepting international test reports on EMC, safety and telecommunications, without a local test and without inclusion of an Indonesia local standard in the test report. However, this has been an interim solution based on the limited number of local labs that can conduct the tests. Currently, the regulation specifies that SDPPI will only accept foreign test reports until January 2020, a deadline that has been extended several times before. Industry has encouraged SDPPI to continue to accept international test reports indefinitely. Absent that change, we have encouraged SDPPI to provide necessary certainty by extending the period during which it will accept international test reports by another 1-2 years.

As a general matter, industry regularly experiences challenges with a lack of notification and compliance timeframes in burdensome regulations issued by SDPPI. Per the WTO TBT Agreement, governments should provide at least 60 days to comment on a draft regulation or standard. Multiple SDPPI final regulations have been published without notification of draft regulation, and we have even seen cases where SDPPI has released regulations with effective dates that occur before the date of release. The most recent example of this is the regulation on wavelength division multiplexing (No. 9, cited above), which was released to the public in October 2019, but had been signed on September 5 and entered into force on September 12. This type of retroactive applicability of regulations makes compliance by industry extremely difficult and costly. We have submitted a request to SDPPI for at least a one-year transition time for any new regulation, a time period that is practical and achievable with reasonable assurance of uninterrupted market access of products. Finally, industry has encountered regulations or standards where the requirements are vague or unclear. Establishment of an inquiry point in SDPPI to field such questions would greatly facilitate industry compliance. Several of these issues have been communicated to the SDPPI via a letter from ITI with no response.

Investment

Finally, Indonesia currently imposes restrictions on foreign direct investment (FDI) related to e-commerce. This impairs the ability of U.S. firms to invest in Indonesia and provide local e-commerce offerings. Non-Indonesian firms are prevented from directly retailing many products through electronic systems and limited to 67 percent of ownership for warehousing, logistics or physical

distribution services provided that each of these services is not ancillary to the main business line. Indonesia should liberalize its FDI restrictions related to e-commerce, which limit the ability of Indonesia to grow its digital economy.

Taxation

Minister of Finance Regulation No 110/PMK.010/2018 Article 22 imposes requirement for the upfront (upon shipment of products to be imported) payment of relevant import duties, value-added tax and withholding tax, providing that any overpayment will be reimbursed by the Indonesian government by the end of the financial year. However, all tax returns filed with a net “refund” position automatically trigger a tax audit by Indonesian tax authorities, and these audits can remain open for years with no resolution. As a result, many foreign firms are accumulating millions of dollars in overpayments with limited and untimely resolution. This lack of clear due process and the increasing financial burden posed by the non-reimbursement of taxes present a significant challenge for U.S. industry operating in and importing into the Indonesian market.

ICT Product Duties

Indonesia is a signatory to Information Technology Agreement 1 (ITA 1), but continues to apply a five percent duty on multi-function printers such as print, fax, scan, ad copy machines, even following specific legal action regarding the repeal of these duties. We hope that the Indonesian government can work to resolve this discrepancy and fulfill its commitments to ITA 1.