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Research Article

The Analysis of World Trade Organization Panel Decision of Indonesia Measures Relating to Raw Materials

Daffa Brilliandana Pratama

Universitas Islam Indonesia; daffa.b.pratama33@gmail.com



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Abstract. European Union has requested a panel regarding Indonesia's restriction of exports and downstreaming of raw materials. According to the European Union, Indonesia's export and downstream policies violate World Trade Organization (WTO) provisions, namely Article XI:1 of the General Agreement on Tariffs and Trade (GATT) 1994. In the panel report, the World Trade Organization Dispute Settlement Body (WTO DSB) decided that Indonesia had been proven to have violated these WTO provisions. This thesis examines whether the WTO's ruling on Indonesia's restrictions on raw materials is justified and explores Indonesia's arguments in Appellate Body with the European Union regarding restrictions on nickel ore exports and downstreaming. The research methodology involves normative legal research, analyzing primary legal sources like legislation and secondary sources such as textbooks and case studies. The study delves into Indonesia's challenges in defending its policies at the WTO's Appellate Body. The primary research object is Indonesia's Measures relating to Raw Materials, particularly nickel ore, and relevant agreements like GATT 1994. Legal materials include Indonesian regulations on exports and GATT 1994, while secondary sources

encompass statutory regulations, scientific journals, and related literature. The data collection method relies on library research. Using a qualitative approach, the thesis seeks a deep understanding of the core issues. Analytical methods include statutory interpretation, case studies, and grounded theory. The research finds Indonesia's measures non-compliant with GATT 1994 but suggests leveraging Article XXI, the Security Exception, as a strategic defense in the Appellate Body.

Keywords: Export Restriction, Downstreaming, WTO, GATT 1994.

INTRODUCTION

International trade is unquestionably important to developing countries. These countries contend that developed countries have depleted resources and done things that hurt the environment over the course century in order to achieve unprecedented high standards of living.¹ Therefore, the developing countries are demanding a broad but differentiated duty, and they are looking for open trade as well as compensation for implementing laws that restrain environmental damage.²

Despite the diversity of terms, the WTO generally groups its member countries into two large groups, namely Developed Countries and Developing Countries; the last group is Least-Developed Countries for the poor countries. However, the WTO allows its members to determine their place in one of these categories. This is based on (self-selection), even though most members reject this self-selection method. For instance, the United States of America unilaterally rejects Hong Kong, South Korea, and Singapore as part of the Developing Countries.³

Indonesia absolutely categorized as Developing Countries based on the explanation above from WTO. The Developing Countries for sure got different treatment with the other countries because, it is not fair if Developing Countries got the same treatment with Developed Countries, for that reason of course for instance, the differences in term of economic development, technological development, and many other aspects.

Indonesia as developing countries tremendously needs support for developed countries in managing their natural resources, for those particular reasons in this Circumstance, Indonesia do not have adequate human resources, technology, etc. to manage their natural resources. However, the risk is also high to get exploited by Developed Countries because throughout history, developed countries have always exploited the smaller countries like in Southeast Countries, or in Middle-East Countries, the Developed Countries exploited the natural resources without giving the adequate benefit to the Developing Countries.

¹ Oliver Ruppel, and Emmanuel Yogo, *Droit et politique de l'environnement au Cameroun - Afin de faire de l'Afrique l'arbre de vie: Environmental law and policy in Cameroon - towards making Africa the tree of life* (Baden-Baden: Nomos Verlagsgesellschaft mbH, 2018), 771.

² Goyal, A, *The WTO and international environmental law. Towards conciliation* (Oxford: Oxford University Press, 2006), 11.

³ Nandang Sutrisno, *Pemajuan Kepentingan Negara-Negara Berkembang dalam Sistem WTO* (Cianjur: IMR Press, 2012), 30.

Therefore, Indonesia has failed to manage its raw mineral supply adequately since the Soeharto era and continues to this day. Over time, Indonesia has always received a tiny percentage of ownership over its natural resources. The explanation for this issue is that Indonesia authorizes foreigners to occupy and plunder our natural resources. For example, in the Freeport Limited Company mining industry, Indonesia only makes a tiny profit over 50 years. The Grasberg Mine was the investor who had the rights to mine raw gold in Papua under a contract of work from 1967 to 1991, and the IUPK PT Freeport Indonesia has recently been extended until 2041. For the record, the Grasberg mine is the fifth world's largest gold mining production.⁴

Based on Permanent Sovereignty over Natural Resources (PSNR) principle, Indonesia does not want to be exploited by foreigners over Natural Resources to any further extent. Therefore, Indonesia has prepared the infrastructure and regulations to manage its natural resources and not depend on foreigners. Unfortunately, the Measures taken by the Indonesian Government are violating WTO Law pertaining to Quantitative Restrictions provision; Indonesia has failed to fulfill the PSNR principle and is facing the consequences imposed by the WTO. However, the decision by the Panel was not yet determined and binding; Indonesia still has a chance to appeal in order to get sovereignty over its natural resources.⁵

This research will elaborate whether or not the decision of WTO Panel on the Indonesia – Measures Relating to Raw Materials has been appropriate or not. And second to know the strategy of Indonesia to winning the dispute at the Appellate Body. The research methodology uses normative legal research, focusing on primary legal sources such as legislation and secondary sources like textbooks and case studies. The study examines Indonesia's difficulties in defending its policies at the WTO's Appellate Body. The main focus is Indonesia's Measures relating to Raw Materials, especially nickel ore, and relevant agreements like GATT 1994. Legal materials include Indonesian export regulations and GATT 1994, while secondary sources include statutory regulations, scientific journals, and related literature. The data collection method is library research. Using a qualitative approach, the thesis aims to deeply understand the main issues. Analytical methods include statutory interpretation, case studies, and grounded theory. The research finds that Indonesia's measures do not comply with GATT 1994 but suggests using Article XXI, the Security Exception, as a strategic defense at the Appellate Body.

DISCUSSION

Indonesia's Nickel Ore Export and Downstreaming

The Indonesian government made its first attempt to implement such laws back in 2009. The government established Law No. 4 of 2009 on Mineral and Coal Mining in 2009, and it was later updated by Law No. 3 of 2020 and No. 11 of 2020.

⁴ Nyoman Ary Wahyudi, "Kontrak Freeport Bakal Diperpanjang Usai 2041, Pemerintah Siapkan Aturan", last modified 2023, <https://ekonomi.bisnis.com/read/20230526/44/1659688/kontrak-freeport-bakal-diperpanjang-usai-2041-pemerintah-siapkan-aturan>.

⁵ Muhammad R. S. Zaki, Muhammad H. Armanto, Rafsi A. H. Albar, et al, "Safeguarding Sovereignty: Indonesia's Solution to the Raw Materials Case in WTO." *Indonesian Journal of International Law* 20, no. 4, (2023): 735.

These laws are now generally referred to as the "Mineral and Coal Mining Law." The holders of special operation production mining business licenses (i.e., licenses used for the operation of production in special mining territories, or IUPK) and mining business licenses (IUP) are obligated by Article 103 of the Mineral and Coal Mining Law to conduct the domestic processing and enhancement of mining products.⁶ This means that domestic purifying procedures will be used to nickels as a form of mineral. As a result, this was designed to stop nickel ores from leaving Indonesia without first going through a purification process.⁷

However, as mentioned above, the ban on the export of nickel ore did not come into force until 2020. Therefore, it was only a *mere de jure* prohibition until then. This takes into consideration the fact that Indonesia was still able to export large quantities of nickel ore products up until 2020.⁸ It appears that Indonesia accounted for up to 37,2 percent of the world's nickel commerce in 2019 and was named the nation that exported the most nickel.⁹ This demonstrates that, notwithstanding the rule, the export ban on nickel ore was not in force until 2020.

To support the previously mentioned, the MEMR published Regulation No. 25 of 2018 on May 3, 2018, with the main goal being to promote the growth of coal and mineral-related businesses.¹⁰ Regarding this, the MEMR Regulation 25 of 2018 Article 50 (1) jo. Article 50 (2) states that exports of minerals must first get export authorization from the Ministry of Trade (Export Approval). The adequate party must first obtain a recommendation from the director general to be eligible for such approval. Even with the publication of Law No. 3 of 2020 on Amendments to Law 4/2009 and its implementing rule, i.e., Government rule No. 96 of 2021 regarding the implementation of Mineral and Coal Mining Business Activities, MEMR No. 25 of 2018 remains in effect.¹¹

- a. A third of the physical construction development plan for the smelter should have been finished, computed, and approved by an impartial verifier.
- b. Failure to reach the 90% smelter building plan would result in the following sanctions: (a) a recommendation to the appropriate authority to cancel the export approval; and (b) a penalty equal to 20% of the export cumulative value.

⁶ Law No. 4 of 2009 on Mineral and Coal Mining as amended by Law No. 3 of 2020 and Law No. 11 of 2020 regarding Mineral and Coal Mining, Article 103.

⁷ Mikaila J. Azzahra, and Yetty K. Dewi, "Re-examining Indonesia's Nickel Export Ban: Does it Violate the Prohibition to Quantitative Restriction?", *Padjadjaran Journal of International Law* 6, no. 2 (2022), 184.

⁸ International Energy Agency. "Prohibition of the export of nickel ore", World's Top Exporters, <http://www.worldstopexports.com/topnickel-exporters-by-country/>, last modified 2023, accessed January 18, 2024.

⁹ Vicky Alvian Abdul Azis, and Sharda Abrianti, "Analisis terhadap Larangan Ekspor Bijih Nikel Kadar Renah berdasarkan Prinsip Restriksi Kuantitatif", *Hukum Pidana dan Pembangunan Hukum* 3, no. 2 (2021), 7.

¹⁰ Ministry of Energy Mineral Resources Regulation No. 25 of 2018, Preamble.

¹¹ Endah Sulastri, "Domestic Market Obligation (DMO) and its Role in Securing Domestic Coal Supply", last modified May 12, 2022, accessed January 19, 2024, <https://adcolaw.com/blog/domestic-market-obligation-dmo-and-its-role-in-securing-domestic-coal-supply/>.

- c. The consequences of not paying the penalty are as follows: (a) a temporary suspension of all or a portion of business operations for a maximum of 60 days; and (b) license revocation if payment is not received within that time. The MEMR issued Decree No. 154 of 2019 to clarify these provisions:¹²
- d. Based on the report of an independent verifier, the smelter establishment progress should be at least 90% of the smelter's physical construction development plan every six months.
- e. While this requirement is not met, there will be two consequences: (a) a recommendation for a temporary export suspension will be sent to the appropriate government agencies overseeing international commerce, and (b) a penalty equal to 20% of the total export value over the previous six months will be assessed.
- f. When the fine is not paid, the following actions will take place: (a) a temporary suspension of all or a portion of the business's operations for a maximum of 60 days; (b) license revocation in the event that no payment is received after the temporary suspension for 60 days; and (c) a recommendation to suspend exports will be sent to the appropriate government authorities in charge of international trade.
- g. Mining enterprises must deposit a surety bond equal to 5% of export volume for each shipment multiplied by the export benchmark price in order to ensure the 90% smelter establishment completion progress and penalty payment. If a mining business completes at least 75% of the entire smelter building plan, it will be eligible to have the surety bond withdrawn. In the event that the mining firm defaults on its duties, the government is entitled to the surety bond.

On August 26, 2019, MEMR Decree No. 154 of 2019 went into force. The provisions of MEMR Regulation No. 11 of 2019 will apply to mining businesses exporting nickels with a composition of less than 1.7% Ni until it takes effect on January 1, 2020.¹³ According to the allegations, this effectively resulted in an actual ban on the export of nickel ore starting on January 1, 2020, regardless of the concentration level.

European Union was Issued the Complaint

Due to the existing Indonesian regulations imposing restrictions on exports and an actual ban, the European Union has taken a decisive step to address this matter. In response to the situation, the European Union has formally submitted the Indonesia Measure to the World Trade Organization (WTO) through a Request for Consultation. This strategic move aims to initiate a diplomatic process to resolve the ongoing dispute between the European Union and Indonesia. By seeking consultation at the WTO, both parties anticipate a structured and transparent platform to discuss and find solutions to the issues surrounding export restrictions, fostering a

¹² Ministry of Energy Mineral Resources Decree No. 154 of 2019.

¹³ Kresna Panggabean, "Indonesia Amends Regulation on Nickel Export to Boost Production of Value-added Products", last modified 2019, accessed January 19, 2024, <https://www.nortonrosefulbright.com/zh-hk/knowledge/publications/b571b094/indonesia-amends-regulation-on-nickel-export-to-boost-production-of-value-added-products>.

collaborative approach to trade-related conflicts. Due to restrictions on EU steel makers' access to raw materials needed for the manufacturing of stainless steel, it was claimed that Indonesia's actions had harmed the EU steel sector.¹⁴

The wide variety of actions previously addressed appears to depart from Indonesia's obligations as stated in the relevant agreements. This discrepancy, in particular, calls into question the country's commitment to upholding its end of the bargain in international agreements, in particular:

- a. The General Agreement on Tariffs and Trade (GATT) 1994's Article XI:1 covers issues pertaining to Indonesia's trade policy. The article covers Indonesia's export restrictions on nickel ore and the particular processing criteria that must be met before exporting coal, iron ore, nickel ore, chromium, and coal products. Furthermore, Indonesia restricts access to the international market for these essential raw resources for the manufacturing of stainless steel by requiring the local sale of certain quantities of coal and nickel before permitting exports. An extra layer of restriction is placed on the export of commodities such as nickel ore, scrap metal, coke, coal, and metal waste due to export licensing regulations.¹⁵
- b. Article X:1 of the General Agreement on Tariffs and Trade (GATT) 1994 stipulates that member nations must notify each other as soon as possible of any wide applicability measures related to export permits and export restrictions. However, Indonesia has been determined to be in violation of this clause because it has not promptly announced such measures in a way that keeps entrepreneurs and governments informed. The absence of transparency obstructs the capacity of the appropriate parties to familiarize themselves with the laws, hence impeding the equitable functioning of global commerce. Fostering an atmosphere of transparency and compliance within the global trading community is contingent upon the timely and accessible distribution of information.¹⁶

The EU requested the creation of a panel after the consultations failed to provide a solution to the dispute.¹⁷ The Dispute Settlement Understanding (DSU) serves as the foundation for this proposal.¹⁸ This panel's decision-making function is to render judgments about the legitimacy of Indonesia's trade restrictions.¹⁹ Furthermore, as third parties in the proceedings, other countries impacted by the EU's challenge and having sizable trade interests are referred to as "Claimants." This

¹⁴ World Trade Organization, *Request for Consultation by the European Union*, WT/DS592/1 • G/L/1345 • G/SCM/D127/1, 2019, p. 1.

¹⁵ World Trade Organization, *Op Cit*, p. 4.

¹⁶ *Ibid*

¹⁷ I Gusti Ngurah P. W., "Indonesia's Export Ban on Nickel Ore: Does It Violate the World Trade Organization (WTO) Rules?", *Journal of World Trade* 55, no. 4 (2021), 669.

¹⁸ Meaza Haddis Gebeyehu, "The Impact of Political Decisions within the WTO Dispute Settlement System: Political Negotiations within Adjudication", *Journal of World Trade* 17, no. 1 (2019), 45.

¹⁹ Thomas Riesthuis, "The Legitimacy of Judicial Decision-Making: Towards Empirical Scrutiny of Theories of Adjudication", *Utrecht Law Review* 19, no. 2 (2023), 76.

represents the beginning of a complex legal procedure with several parties involved that aims to be resolved through global trade processes.²⁰

Currently, the Indonesian government's stated objective in imposing the measures was to reduce the mining of nickel reserves to a sustainable rate.²¹ Given this rationale, Indonesia's restrictive measures may potentially fall within the scope of justification provided by Articles XX (d) and/or XI:2 (a) of the GATT 1994. However, in order to ascertain this, the DS592 dispute's merits must be taken into consideration while elaborating on the parameters of quantitative restriction and pertinent exclusions.²²

Analysis on Article XI: I of the GATT 1994

Indonesia as a member of the WTO has made the decision to drop several amounts of its sovereignty in order to take part in a multilateral trading system that involves numerous countries worldwide. This has been demonstrated by Indonesia by the enactment of WTO Law No. 7 of 1994. Indonesia complies with every GATT 1994 requirement.²³ As a result, member states of the WTO agreed to abide by several rules and regulations as part of their obligations. The fundamental guidelines that form the basis of the WTO are:²⁴

1. Institutional and procedural Regulation, like those pertaining to the review of trade policy, WTO decision-making, and dispute resolution.
2. Unfair trade Regulation;
3. Non-discrimination Regulation;
4. Trade liberalization and other societal values and interests;

Market access Regulation;

When discussing export restrictions, or export banned, the regulation that is suitable is the market access regulations, specifically on quantitative restrictions. The regulation regarding the general prohibition of quantitative restrictions is in Article XI:1 of the GATT 1994:²⁵

"No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party."

²⁰ World Trade Organization, *Request for the Establishment of a Panel by the European Union*, WT/DS592/3, p. 2.

²¹ Jason Sappor, "COVID-19 Turns Indonesian Ore Export Ban into Curse for Nickel Market", *S&P Global Market Intelligence*, July 21, 2020.

²² Azzahra, and Dewi, 187.

²³ Muhammad Reza Syariffudin Zaki, Winner Jhonshon, Paramita Glorya Pasaribu, et. al., *Hukum Investasi, Multimoda, dan Perdagangan Internasional di Era Pandemi Covid-19: Investment Law, Multimodal and International Trade in Covid-19 Pandemic* (Jakarta: Publica Indonesia Utama, 2022), 215.

²⁴ Bossche and Zdouc, *The Law and Policy of the World Trade Organization*, 173.

²⁵ The General Agreement on Tariffs and Trade 1994, Article XI: 1.

This prohibition is justified by the fact that quantitative restrictions are more likely to disrupt the pace of free trade than less restrictive measures since WTO has a robust protective effect.²⁶

Import or export permits, as well as quotas, are forms of trade restrictions that are expressly forbidden by Article XI: 1. However, the government is still able to impose export duties in order to break down trade barriers.²⁷ This research strongly emphasizes the prohibition of quotas, which includes an export prohibition that may impact the unfair treatment of WTO members. The Panel in the Turkey-Textiles case explains, "The prohibition on quantitative restrictions reflects those tariffs are the preferred border protection method under the GATT. Tariffs do not set an absolute limit on imports; quantitative restrictions do. Implementing quantitative restrictions can be transparent, but their allocation is challenging, and they often distort trade".²⁸

Members have an obligation to respect these regulations because the members signed and approved the multilateral agreements. As a result, Indonesia's prohibition on the export of raw nickel ore violates the 1994 GATT.²⁹ Indonesia has attempted to defend against the European Union's by adopting GATT 1944 Article XI: 2 (a). According to Article XI: 2 (a), the removal of quantitative restrictions cannot include temporary export restrictions imposed to prevent a critical shortage of essential goods to the contracting party.³⁰ The panel determined that Indonesia wasn't able to explain how restricting nickel exports prevented a significant shortage of essential goods for the contractual party, as claimed in Article XI: 2 (a).

It is worth nothing when a country takes measures such as import tariffs, the contracting party can continue exporting products as long as their products are affordable (price-competitive) to get past the obstacles made by tariffs. On the other hand, regardless of how price-competitive the goods are, import activities are susceptible to limiting barriers (such as import quotas) under quantitative restrictions. Quantitative restriction measures can potentially raise trade barriers and disrupt free trade. Quantitative restriction goes against the WTO's primary objective of encouraging member states to have open trade borders.³¹

The measures that ban or limit the importation or exportation of specific goods are what the Appellate Body defined as "prohibitions" and "restrictions" under the article, respectively, in the China - Raw Materials case. The legal prohibition on trading in a particular good or service is known as prohibition.³² Restriction, defined

²⁶ Cécile Jacob et al. *In-Depth Analysis on Trade-related policy options of a ban on forced labour products*, (Brussels: INTA) 21.

²⁷ Wu, "China's Export Restrictions and the Limits of WTO Law", p. 675.

²⁸ World Trade Organization, *Turkey — Restrictions on Imports of Textile and Clothing Products*, WT/DS34/14, p. 116.

²⁹ Muhammad Reza Syariffudin Zaki et al, "Safeguarding Sovereignty: Indonesia's Solution to the Raw Materials Case in WTO," *Indonesia Journal of International Law* 20, no. 4 (2023): 736.

³⁰ The General Agreement on Tariffs and Trade 1994, Article XI: 2 (a).

³¹ Mikaila J. Azzahra, and Yetty K. Dewi, "Re-examining Indonesia's Nickel Export Ban: Does it Violate the Prohibition to Quantitative Restriction?", 184.

³² World Trade Organization Appellate Body Report, *China - Measures Related to the Exportation of Various Raw Materials*, WTO Docs. WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R, 2012, p. 28.

as an act that constrains an individual or entity from engaging in a particular action, manifests itself through various means, such as the imposition of limiting conditions or regulatory measures.³³

The China - Publications and Audiovisual Products Panel emphasized in its requirements the necessary function dictionaries perform in determining the entire range of the common meaning assigned to a particular term in a particular context, thus assisting in precise interpretation and comprehension.³⁴ According to the dictionary, "quantitative" refers to numbers or amounts with an emphasis on numerical features in relation to measurement and analysis.³⁵ Therefore, it is crucial to determine whether the applicable prohibition or restriction has a constraining impact on quantities or numbers. *The Japan - Trade in Semi-conductors* Panel underscores that this provision encompasses various measures, including laws and regulations, irrespective of their legal standing, emphasizing the need for comprehensive evaluation.³⁶

Similar to China's Raw Materials Measures, which limit the export of nickel ore to the extent that concentration levels must be raised before export, MEMR Regulation Number 11 of 2019 requires that nickel ores have concentration levels of less than 1.7% in order to be exported.³⁷ from the MEMR Regulation Number 11 of 2019 can be concluded as restriction because nickel ore export is substantiated by the stipulation that the concentration levels must not exceed 1.7% for export eligibility, therefore, according to the definition of restrictions MEMR Regulation Number 11 of 2019 Article 46 justified as quantitative restrictions which prohibited in GATT 1994 Article XI:1.³⁸

Analysis on Article XI: I of the GATT 1994.

In order to justify unlawful quantitative restrictions, invoke the exception under Article XI: 2 (a) of the GATT 1994. The exception under Article XI: 2 (a) of the GATT 1994 is one of the exceptions in quantitative restrictions.

Indonesia used this article in *Indonesia - Measures relating to Raw Materials* Cases because Indonesia claims that one of the reasons is that Indonesia wants to protect its natural resources and maintain its shortages for Indonesia's sustainable development. According to Article XI: 2 (a) of the GATT 1994 stated that:³⁹

³³ World Trade Organization Appellate Body Report, *China - Measures Related to the Exportation of Various Raw Materials* 2012, p. 132.

³⁴ World Trade Organization Panel Body Report, *China Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WTO Docs. WT/DS363/R, 2009, p. 414.

³⁵ Cambridge Dictionary "Meaning of Quantitative in English", accessed February 24, 2024, <https://dictionary.cambridge.org/dictionary/english/quantitative>

³⁶ World Trade Organization Panel Body Report, *Japan - Trade in Semi-conductors*, WTO Docs. L/6309 - 35S/116, 1988, p. 28.

³⁷ *Ibid*, p. 132.

³⁸ Mikaila J. Azzahra, and Yetty K. Dewi, p. 193.

³⁹ The General Agreement on Tariffs and Trade 1994, Article XI: 2 (a).

“Export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party”

Based on this article, quantitative restrictions are allowed if the measures implemented temporarily to lessen or mitigate severe shortages of food and/or other goods that are vital to the exporting state. This article does not have a *Chapeau*, so it must be interpreted narrowly in contrast to the general exceptions.

“The term ‘critical shortage’ is considered a Turning point. The noun ‘shortage’ is defined as ‘a lack of quantity; an amount that is lacking,’ and it is qualified by the adjective ‘critical,’ which is defined as ‘of, pertaining to, or constituting a crisis; of decisive importance, crucial; involving risk or suspense.’ ‘[a] turning-point, a vitally important or decisive stage; a time of trouble, danger, or suspense in politics, commerce, etc.’ is what is meant to be described by the term ‘crisis.’ When combined, these limitations in the critical quantity amount to a situation of decisive importance, reach a crucial or decisive stage, or represent a turning point and are referred to as critical shortage.”⁴⁰

First off, Indonesian measures pertaining to raw materials dispute are seen as being permanent since Indonesia doesn't stipulate a temporal frame for their applicability.⁴¹ Second, despite the fact that the Measures were designed to protect Indonesia's finite nickel supply, there isn't any proof that Indonesia is experiencing a severe nickel ore shortage.⁴² Third, it can be argued that nickel has a significant economic impact in Indonesia. According to data from the Indonesian Central Agency on Statistics, as of 2017, nickel contributed Rp 3.138 trillion, or 0.025% of the country's total revenue, to the Indonesian economy. Although this makes a significant contribution, it is by no means necessary for the national economy of Indonesia to survive.⁴³ In any case, given the measure's lack of temporariness, this clause might not be as relevant to Indonesia's defense.

Analysis on Article XI: I of the GATT 1994

Creating free trade is the primary goal of international trade according to the laws and policies of the WTO. WTO member countries are allowed to take actions and policies independently based on national interests in the event of conflicts within society,⁴⁴ provided that they do not violate the agreed-upon international regulations that have been established as laws in international trade. Article XX of the GATT 1994 regulates general exceptions that discuss specific actions allowed within the WTO

⁴⁰ Appellate Body in *China – Raw Materials*, WT/DS394/AB/R; WT/DS395/AB/R; WT/DS398/AB/R, p. 129.

⁴¹ World Trade Organization Panel Report, *Indonesia – Measures relating to Raw Materials*, WT/DS592/R, p. 23.

⁴² *Ibid*, p. 23.

⁴³ Ijang Suherman and Ridwan Saleh., “Supply Chain Analysis for Indonesian Nickel”, *Indonesia Mining Journal* 21, no. 1 (2018): 60.

⁴⁴ Tomi Suryo, *Hukum dan Kebijakan WTO*, (Yogyakarta: Suluh Media, 2021), 241.

framework.⁴⁵ The WTO grants these exceptions for specific conditions in a country that are necessary for its sustainability. Some areas regulated by the exceptions in Article XX (d) stated that:⁴⁶

"Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures."

"Necessary to secure compliance with laws or regulations which are not inconsistent with the provision of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade mark and copyrights, and prevention of deceptive practices."

To determine that Indonesia Measures is legitimate under Article XX (d), Indonesia's must prove that:⁴⁷

- a. The measure is in accordance with the chapeau of Article XX;
- b. It was taken or put into effect in order to achieve the goal stated in the subparagraph, which is to "secure compliance with 'laws or regulation' that are themselves consistent with the GATT 1994"; and
- c. It must be "necessary" in order to achieve that goal, that is, in order to secure such compliance.

As Indonesia "does not reflect any discrimination" because Indonesia "disadvantages domestic mining companies by restricting their ability to compete in foreign markets," Indonesia argues that the measures in question are applied in a way consistent with the requirements in the chapeau of Article XX. The measures "confer any direct or indirect protection to Indonesian nickel producers," as opposed to "disadvantage domestic mining companies." However, the prejudice mentioned in the chapeau encompasses discrimination not only between trading partners but also between foreign and Indonesian producers and other entities. Secondly, just because a policy affects domestic producers negatively does not preclude it from being inconsistent with the chapeau. On the contrary, as Indonesia puts it, the measure may function as a poorly disguised trade restriction by "restricting their ability to compete in foreign markets."⁴⁸

The measures taken by Indonesia not only forbid the export of nickel ore and limit its exportation by placing restrictions on its processing, but also have an impact on nickel buyers and consumers who might be involved in other industries. The Panel should consider the impact of the measures on global commerce as a whole when

⁴⁵ Tomi Suryo, *Hukum dan Kebijakan WTO*, 242.

⁴⁶ *Ibid*, p. 242.

⁴⁷ World Trade Organization, *WTO Analytical Index - Guide to WTO Law and Practice 3rd Edition* (Cambridge: Cambridge University Press, 2012), 562, <https://gatt-disputes.wto.org/sites/default/files/books/GATT%20Analytical%20Index.pdf>.

⁴⁸ World Trade Organization Panel Report, *Indonesia – Measures relating to Raw Materials*, WT/DS592/R, p. 69.

determining whether or not they represent a covert restriction on international trade, rather than only the impact on the nickel trade or on nickel producers.

More important in this dispute, Indonesia's measures must achieve the Member's goal "when there is a genuine relationship of ends and means between the objective pursued and the measure at issue".⁴⁹ According to the Appellate Body, the proposed measure must make a "material" contribution to ensuring compliance with the applicable statute or regulation. "Material" is a term that means "having significance or relevance" or "important or having an important effect".⁵⁰ Thus, no modest or marginally meaningful contribution qualifies for the activity required by Article XX (d). The approach used to analyze a measure's contribution might be quantitative or qualitative, determines whether a measure's contribution is evaluated using a quantitative or qualitative technique.⁵¹

Since Indonesia is the world's largest producer of nickel according to statista, any actions affecting the country's nickel exports and processing—like the ones at stake in this dispute—will also have an impact on the world's stainless steel industry's output and trade.⁵² It is imperative to consider this impact while evaluating Indonesia's actions under the chapeau. Therefore, Indonesia's measures are not consistent with the Chapeau of XX (d) because Indonesia's measures are unjustifiable discrimination against the European Union. The *US - Import Prohibition of Certain Shrimp and Shrimp Products* (US – Shrimp) also uses this article to defend their measure for restricting shrimp export. In the US defense, the measure is for protecting sea turtles. Therefore, the US invoked Article XX to defend its measures, but unfortunately, according to the Panel, their measures were not justified under Article XX because the measures proved unjustified discrimination towards the complaint; the complaint took much loss because of US measures relating to Shrimp Restrictions.⁵³

Another essential aspect to Indonesia defense was proving that Indonesia's regulation was necessary to secure compliance with the GATT 1994. "Laws and regulations" are a general term that can apply to many different types of government measures. Nonetheless, the term must be understood in Article XX's subparagraph (d). Panels and the Appellate Body have concluded that not all laws and regulations are covered by subparagraph (d) for this reason. The Panel believes that previous panels and the Appellate Body have correctly reasoned that the laws and regulations that can be accepted under subparagraph (d) must be those "in respect of which

⁴⁹ World Trade Organization Appellate Body Report, *Brazil – Retreaded Tyres*, WT/DS332/AB/R, p. 57.

⁵⁰ Online Cambridge English Dictionary, Material available at <https://dictionary.cambridge.org/dictionary/english/material> (last accesses March 6, 2024).

⁵¹ World Trade Organization Appellate Body Report, *Brazil – Retreaded Tyres*, WT/DS332/AB/R, p. 57.

⁵² Statista, "Major Countries in Worldwide Nickel Mine Production in 2023", last modified 2023, <https://www.statista.com/statistics/264642/nickel-mine-production-by-country/#:~:text=In%202023%2C%20Indonesia's%20mines%20produced,worldwide%20by%20a%20large%20margin.>

⁵³ World Trade Organization Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/RW, p. 31.

conduct would, or would not, be in 'compliance'" given the obligation that the measures a respondent seeks to justify must be to secure compliance with those laws and regulations.⁵⁴

Unfortunately, Indonesia has failed to prove that 1 of 18 Indonesia regulations, especially in Article 57 of Law Number 32 of 2009, because the regulation does not qualify as a law or regulation. The articles stated that the requirement of IUP and IUPK holders to "make mineral and coal resources conservation efforts". (Emphasis added) Because of the ambiguous wording used to describe the responsibility, this clause is more akin to a legal foundation for action in line with good mining principles than a set code of conduct or course of action. Especially considering that the initiatives mentioned in Article 96 (d) pertain to a relatively wide range of mining operations, specifically the preservation of coal and mineral resources.⁵⁵

Based on all of the above, the Panel concludes that Indonesia has established that Law No. 4/2009's Article 96 (c) is a law or regulation as defined by GATT 1994's Article XX (d). However, Indonesia still needs to establish that Law No. 4/2009's Article 96(d) and Law No. 32/2009's Article 57 fall under the purview of the subparagraph.⁵⁶

Finding and Analysis of Article XXI GATT 1994 regarding Security Exception

Indonesia may utilize article XXI as a tool for defense in the Appellate Body against the WTO Panel. However, the most common and the most discussed national security exception in international trade law is found in Article XXI of the GATT 1994. This Article states:⁵⁷ Nothing in this Agreement shall be construed:

- (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or
- (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests
 - (i) relating to fissionable materials or the materials from which they are derived;
 - (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
 - (iii) taken in time of war or other emergency in international relations; or
- (c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

According to this article, states taking actions that are against the WTO would not be prevented by other states or organizations if the state determined that the

⁵⁴ World Trade Organization Appellate Body Report, *India – Solar Cells*, WT/DS456/AB/R, p. 41.

⁵⁵ World Trade Organization Panel Report, *Indonesia – Measure relating to Raw Materials*, WT/DS592/R, p. 76.

⁵⁶ Ibid

⁵⁷ The General Agreement on Tariffs and Trade 1994, Article XXI.

action was essential to maintaining or safeguarding the nation's security.⁵⁸ The article's tendency to be self-judging is a weakness that governments could exploit to avoid their WTO membership commitments. However, the drafters intentionally left the self-judging aspect open-ended to provide each member state a certain amount of flexibility.⁵⁹ Certain nations, like the United States of America, maintain that Article XXI may be used as an exception that most member states share and that its application is not subject to legal challenge.⁶⁰

Security Exceptions has historically been available to state members since 1948, though it has rarely been used expressly and has rarely been the focus of a court case.⁶¹ Over the course of the WTO's first 20 years, its members were equally hesitant to use Article XXI of the GATT 1994's national security exception and eager to avoid or resolve any related disputes "out of court."

There are three factors in security exception clause which are often the main issues in the WTO Panel Decision. Namely, the definition of "taken in time of ... emergency in international relations"; the definition of "essential security interests"; and the use of the words "it considers necessary". These three factors explain in what situations security exceptions can be applied, what interests can be protected by a security exception clause, and who has the authority to review whether a WTO member's action that violates a right can be considered "necessary."⁶²

Indonesia's defense using Article XXI GATT 1994 regarding Security Exception to Justify the Nickel Ore Measures

The analysis will delve into the intricate interpretation and implementation of the three crucial elements specified in Article XXI of the General Agreement on Tariffs and Trade (GATT) of 1994 regarding Security exceptions. These components include the extent, requirements, and circumstances that a member state may use security measures that might conflict with its duties for international trade. By conducting a thorough analysis, the authors hope to determine whether or not these components are suitable and compatible with Indonesia's raw material measures cases.

The first element of security exception regards those taken in times of war; according to these phrases, "any contracting party can prevent from taking any action which it considers necessary for the protection of its essential security interests if the measures were taken in times of war." Furthermore, "war" according to the Russian Measures cases is "*A state surrounded or engulfed by a state of general instability, heightened tension of crisis, latent armed conflict, or other state surrounding.*" In

⁵⁸ Shin-yi Peng, "Cybersecurity Threats and the WTO National Security Exceptions," *Journal of International Economic Law* 18, no. 2 (2015): 9.

⁵⁹ Raaj Bhala, "National Security and International Trade Law: What the GATT says, and What the US Does," *University of Pennsylvania Journal of International Economic Law* 19, no. 2 (1998): 269.

⁶⁰ Tania Voon, "The Security exception in WTO law: Entering a new era," *AJIL Unbound* 113, (February 2019): 47, DOI: 10.1017/aju.2019.3.

⁶¹ Dapo Akande and Sope Williams, "International Adjudication on National Security Issues: What Role for the WTO," *Virginia Journal of International Law* 43, no. 365 (2002), 373-376.

⁶² Sebastián Mantilla Blanco dan Alexander Pehl, *National Security Exceptions in International Trade and Investment Agreements: Justiciability and Standards of Review* (Cham: Springer International Publishing, 2020), 6-10.

Indonesian measures cases, the measures are not taken in wartime because there is no armed conflict between Indonesia and the European Union, and there is no heightened tension between Indonesia and the European Union. Therefore, the Indonesian Measures are not excusable because there is no heightened tension nor armed conflict between Indonesia and the European Union.

The second element of security exception regards "essential security interests." "Security interests" no longer only refer to military or physical threats to a state's integrity but can also be understood to include non-military threats.⁶³ WTO Members must nevertheless show that the security interests under threat are "essential," which suggests a greater level of interest than regular security interests. The concept of "essential security interests" is distinguished from regular security interests in *Russia - Traffic in Transit*.⁶⁴ For this discussion, "essential security interests" refers to interests about a state's primary functions, which include defending its territory and people from outside threats and upholding internal legal norms and public order.⁶⁵

In Indonesia measures cases, even though the nickel ore are essential goods to Indonesia and nickel are the future of natural resources because of the increase of electric car industry, and is expected there will be an increased in demand for nickel for domestic needs until 2025. However, Indonesians proven in WTO-DSB are not running out of nickel ore reserves or considered essential goods.⁶⁶ Therefore, Indonesian measures are not compliant with these articles because Indonesia failed to prove that Indonesia's nickel ore is essential and under threat.

The last aspect of the GATT 1994's article XXI security exception, regarding "which it considers necessary." Because of the way it is worded, Article XXI has long been seen as "self-judging."⁶⁷ The definition according to Roger P. Alford a Law Professor from Notre Dame University, self-judging in the global context is the authority of member states to decide, at their exclusive discretion, whether the facts fulfill the requirements for the security exception in the specific circumstances.⁶⁸ However, the extent to which Article XXI permits "self-judging" has been passionately contested. Alford elaborated on the various choices in the following ways:

"One interpretation holds that each Member State can choose whether a particular measure relates to one of the listed requirements and is necessary for defending its security interests. An alternative interpretation would acknowledge the authority of a Member State to ascertain the applicability of a security exception on its own. However, it would impose a reasonable faith requirement that is susceptible to court scrutiny. A Member State may determine whether "it considers" a measure to be "necessary for the protection

⁶³ Desierto, *Necessity and National Emergency Clauses*, 146.

⁶⁴ The General Agreement on Tariffs and Trade 1994, Article XXI

⁶⁵ World Trade Organization Panel Report, *Russia – Measures concerning Traffic in Transit*, p. 56.

⁶⁶ Panel Report, *Indonesia – Measures relating to Raw Materials*, p. 66.

⁶⁷ Roger P. Alford, "The Self-Judging WTO Security Exception," *Utah Law Review*, no. 3 (2011): 698.

⁶⁸ Roger P. Alford, "The Self-Judging WTO Security Exception," 702.

of its essential security interests" in accordance with a third interpretation. However, the listed requirements are open to judicial review.⁶⁹

The initial interpretation of Article XXI(b)(iii), also referred to as total self-judging, the phrase "which it considers necessary" means that no member state, panel, or other WTO-affiliated adjudicatory body has the authority to determine whether an action taken by another member complies with the article's requirements. Thus, even under the GATT and the WTO agreements, "national security takes precedence over international trade law."⁷⁰

WTO-DSB clarified the scope of "it considers necessary" in the Russia - Traffic in Transit case. It highlighted that while WTO members have the authority to invoke security exceptions under Article XXI of the GATT 1994, this authority is not absolute. The WTO panel emphasized that member states cannot unilaterally decide on the application of these exceptions without oversight. Despite this, the panel affirmed that WTO members still play a central role in identifying security threats and determining necessary actions under Article XXI, albeit with certain constraints. This ruling underscore the importance of balanced decision-making and collective oversight within the WTO framework.

Therefore, based on the above explanation, the author concludes that Indonesia's measures relating to raw materials cases are not considered necessary. For that particular reason, there is no urgency, or national security is under threat. It is evident in the WTO-DSB that Indonesia's failure to prove or provide adequate evidence that our nickel reserves are short. Because of that, Indonesia cannot be justified that the Nickel or other natural resources need necessary measures in order to save their national security. Nonetheless, Indonesia has the authority to submit a request for security exceptions since, as a WTO member, it plays a crucial role in assessing security risks and deciding what steps are required by Article XXI.

In conclusion, several important issues are made clear by analyzing Indonesia's cases through the World Trade Organization (WTO) lens and the standards outlined in Article XXI of the General Agreement on Tariffs and Trade (GATT) 1994. First, the security exception—which deals with actions conducted during times of war—is no longer applicable because there is neither an armed conflict nor increased tensions between Indonesia and the European Union. Second, although Indonesia's economy may benefit strategically from its nickel ore in the future, the assertion of essential security interests—mandated by the second element of Article XXI—is undermined by the failure to demonstrate the resource's vulnerability and indispensability. Finally, the "self-judging" nature of the third aspect of security exceptions necessitates a balanced approach, wherein member states must demonstrate a genuine threat to their security interests, subject to scrutiny by the WTO.

⁶⁹ Alford, "The Self-Judging," 704.

⁷⁰ Chao Wang, "Invocation of National Security Exceptions under GATT Article XXI: Jurisdiction to Review and Standard of Review," *Chinese Journal of International Law* 18, no. 3 (2019): 698.

In Article XXI does not apply to Indonesia's raw material measures since Indonesia's are insufficiently or sufficiently justified. Indonesia's claim of security exceptions seems unsupported without concrete proof of urgent security threats or necessity. However, Indonesia nevertheless has the right to discuss and present requests for security exceptions as a WTO member, as long as they align with the WTO framework's stipulations regarding balanced decision-making and common scrutiny. In order to maintain the integrity and effectiveness of the multilateral trading system, Indonesia's disputes must ultimately be resolved using a nuanced strategy that strikes a balance between national interests and obligations under international commerce.

CONCLUSION

Due to the existing Indonesian regulations imposing restrictions on exports and an actual ban, the European Union has taken a decisive step to address this matter. In response to the situation, the European Union has formally submitted the Indonesia Measure to the World Trade Organization (WTO). After thorough examination by WTO DSB, the Panel conclude that Indonesia violated Article XI of the GATT 1994 regarding General Elimination of Quantitative Restrictions. And then, after analyzing Indonesia's defense in WTO Panel. Can be concluded that Indonesia measures cannot be justified under Article XI: 2 (a) of the GATT 1994 and Article XX (d) because of several reasons. The reason for Indonesia measures is not compliance with article XI: 2 (a) of the GATT 1994. First, there is no time limit specified in Indonesian policies concerning raw material disputes, implying that Indonesia's measures are permanent. Second. although intended to protect Indonesia's finite nickel reserves, there is not any concrete evidence of Indonesia experiencing a severe nickel or shortage.

Third, the applicability of these measures to Indonesia's defense may be questioned due to their indefinite nature. Therefore, even though nickel is essential to the economy, the policies pertaining to its protection may not be as crucial to Indonesia's general welfare. The reason for Indonesia Measures is not compliance with article XX (d) of the GATT. First, Indonesia's discrimination measures towards European Unions do not comply with the Chapeau of Article XX of the GATT 1994. Second, Indonesia has failed to prove that 1 of 18 Indonesia regulations do not qualify as a law or regulation and are not compliant with the GATT 1994. The Panel concludes that Indonesia has established that Law No. 4/2009's Article 96 (c) is a law or regulation as defined by GATT 1994's Article XX (d). However, Indonesia still needs to establish that Law No. 4/2009's Article 96(d) and Law No. 32/2009's Article 57 fall under the purview of the subparagraph. In Article XXI does not apply to Indonesia's raw material measures since Indonesia's are insufficiently or sufficiently justified. Indonesia's claim of security exceptions seems unsupported without concrete proof of urgent security threats or necessity.

Recommendation

Regardless, Indonesia's raw material measures are unsuitable under Article XXI of the GATT 1994 because of insufficient justification. Without concrete

evidence of an immediate threat to security, Indonesia's claim of security exceptions appears unjustified. As a WTO member, Indonesia is nevertheless free to discuss and submit requests for security exceptions, provided that Indonesia complies with the framework's requirements for impartial decision-making and discussion review. The multilateral trading system's integrity and efficacy ultimately depend on Indonesia's disputes being settled through a nuanced approach that balances its obligations under international commerce with its national interests.

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