



ANALYSIS OF THE WORLD TRADE ORGANIZATION PANEL DECISION BETWEEN INDONESIA AND THE EUROPEAN UNION IN CASE NUMBER DS592 OF 2022 CONCERNING RESTRICTIONS ON EXPORTS OF LOW-GRADE NICKEL ORE

Zampara Mernissi

University of Mataram
zamparamernissi89@gmail.com

Muh. Risnain

University of Mataram
risnain82@gmail.com

Diva Pitaloka

University of Mataram
diva.pitaloka@gmail.com

Abstract

The purpose of this study is to analyze the suitability of Indonesia's nickel export restriction policy to international trade rules at the WTO and examine the actions taken by the Indonesian Government following the WTO Panel Decision regarding the nickel export restriction policy. The research method used is normative-legal research. The legal approach methods involve statutes, cases, international agreements, and conceptual approaches. The sources of legal materials include primary and secondary legal materials, collected through library data. The analysis of legal materials includes a review of statutory regulations and international agreements. The study's findings revealed that the panel determined that Indonesia violated Article XI:1 of GATT 1994, thus Indonesia's policy cannot be justified by Articles XI:2 (a) and XX of GATT 1994. Indonesia subsequently appealed the WTO Panel Report Number DS592. Researchers suggest considering the use of the Principles of Permanent Sovereignty over Natural Resources and Special and Different Treatment as a defense for the Indonesian Government. Furthermore, Indonesia can align the policy of limiting nickel ore exports with the Net Zero Emissions mission. Retaliation against the EU could be an alternative solution, with the caveat that the Indonesian Government must ensure that the retaliation is precise and does not harm the country's economy and politics.

Keywords: nickel, panel, policy, PSNR, retaliation

INTRODUCTION

The current membership of the World Trade Organisation (WTO) consists of 154 member countries, 117 of which are developing countries or separate customs territories. Indonesia officially became one of the WTO member countries after ratifying the WTO Agreement through Law Number 7 of 1994 concerning the Ratification of the Agreement on Establishing the World Trade Organization.¹ Indonesia as a member of

¹WTO | WTO in Brief., https://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr_e.htm,

the WTO has the responsibility to comply with and implement all agreements made by the WTO. This means that if Indonesia does not implement the results of the verdict, does not comply with existing laws in the WTO or even issues trade policies that are not in accordance with the WTO agreement, then Indonesia as a member of the International Organisation can be sued at the Dispute Settlement Body.

Minister of Energy and Mineral Resources Regulation No. 11/2019 on the Second Amendment to Minister of Energy and Mineral Resources Regulation No. 25/2018 on Mineral and Coal Mining Business, mandates that since 31 December 2019, it sets the basis to stop the export of low-grade nickel by Indonesia. With the enactment of MEMR regulation 11/2019, the European Union, which is a group of countries that import nickel ore from Indonesia, objected to the nickel ore export ban. The EU, which is also a member of the WTO, filed a complaint to the WTO regarding the ban on nickel ore exports from Indonesia. The EU stated that nickel ore imported from Indonesia is used as raw material for the smelter industry.² The EU claimed that Indonesia intended to boost its economy in the smelting and stainless steel industries by banning its nickel ore exports. Indonesia was eventually sued by the EU over the nickel ore export restriction policy imposed by the Indonesian government through Minister of Energy and Mineral Resources Regulation Number 11 of 2019 concerning the Second Amendment to Minister of Energy and Mineral Resources Regulation Number 25 of 2018 concerning Mineral and Coal Mining Business. The lawsuit went through a panel by the Dispute Settlement Body in April 2021 under dispute number DS592: Indonesia - Measures Relating to Raw Materials. The main points of the lawsuit filed by the European Union against Indonesia in dispute number DS592 are as follows:³

1. Measures implemented by Indonesia, including export restrictions on certain raw materials with domestic processing requirements, domestic marketing requirements, and export licences, appear to violate Article XI:1 of the GATT 1994;
2. The subsidy schemes provided, while prohibited, do not comply with Article 3.1(b) of the Subsidies and Countervailing Measures Agreement (SCM Agreement); and
3. The failure to expeditiously publicise the regulations prohibiting exports appears to be inconsistent with Article X:1 of the GATT 1994.

Against the main points of the European Union's lawsuit against Indonesia, there are legal gaps that can be used as arguments by Indonesia to answer the European Union's lawsuit, namely:

- i. first, in the main claim of the European Union which states that the actions taken by Indonesia violate the provisions of Article XI: 1 of the GATT 1994, it creates a horizontal norm conflict with the provisions stipulated in Article XX of the GATT 1994 which basically regulates the protection of the interests of a country in protecting and exporting natural resources;
- ii. second, the subsidy scheme accused by the European Union in Article 3.1(b) of the Subsidies and Countervailing Measure Agreement (SCM Agreement) creates a norm conflict between the United Nations Charter and the Subsidies and Countervailing Measure Agreement, because in the provisions of Article 2 paragraph (1) of the

²Anisyah Al Faqir, "Mengupas Larangan Ekspor Nikel Indonesia ke Uni Eropa.," <https://www.merdeka.com/uang/mengupas-larangan-ekspor-nikel-indonesia-ke-uni-eropa.html?page=2>.

³WTO | DS592: Indonesia – Measures Relating to Raw Materials.

UN Charter states in essence that every country has equal sovereignty so that other countries do not have the right to intervene physically/non-physically or directly/indirectly in the sovereign affairs of other countries. This means that the provisions of Article 2 paragraph (1) of the UN Charter recognise the sovereign rights of the state over its natural resources, which is a fundamental principle in international legal instruments. This is in line with the principle of permanent sovereignty over natural resources (PSNR principle) which recognises respect for state sovereignty over natural resources;

iii. third, the EU's allegations in Panel WT/DS592/R concluded that Indonesia lost the EU's case and the Panel advised Indonesia to comply with the legal provisions of the GATT 1994. Panel number WT/DS592/R has raised legal issues regarding legal postulates with state sovereignty over natural resources owned by Indonesia;

Based on this background, the author focuses on the study of the analysis of the WTO Panel that granted the European Union's lawsuit against Indonesia in dispute number DS592 nickel export restriction policy can be accepted as a legitimate exception step or understand the existing rules in the WTO. In this case, the author will analyse in terms of state sovereignty over natural resources owned, PNSR principle over Article XI: 2 (a) GATT 1994 and Article XX GATT 1994 and steps that Indonesia should take to follow up on the WTO panel's report in dispute number DS592 in order to continue to uphold state sovereignty to protect and maintain the wealth of natural resources owned by Indonesia.

METHODS

The type of research used in this research is normative legal research. Normative legal research is also known as doctrinal legal research. In this type of research, it is often conceptualised by understanding the law as what is written in laws and regulations, or the law is considered a rule or norm that becomes a reference for human behaviour that is considered appropriate. The approach methods used are the statutory approach (statue approach), case approach, international treaty approach and conceptual approach. The sources of legal materials used consist of primary legal materials and secondary legal materials. The legal material collection technique used is library data. The analysis of legal materials used is a qualitative analysis method and deductive conclusions are drawn through legal interpretation of laws and international agreements.

ANALYSIS

1. Nickel Export Restriction Policy as a Legitimate Exception Measure Under International Law and WTO Principles

The Indonesian government's desire to process low-grade nickel domestically has become more serious since Indonesia was sued by the European Union to the WTO regarding the Indonesian government's policy to ban Indonesian nickel exports. The Indonesian government issued regulations relating to export licences, processing and refining of mining materials, increasing investment opportunities in line with the nickel ore export ban amidst domestic and international political changes. The implementation

of the Indonesian government's policy will require a number of processes involving various parties involved in careful decision-making.⁴ Various elements of the policy will be thoroughly considered, including the calculation of costs and benefits to the national interest. Decisions taken by policy makers will be based on rational considerations in the national interest to maintain state sovereignty. Researchers will analyse that there is a legal loophole to maintain the country's sovereignty over its natural resources through regulations issued by the Indonesian government regarding the nickel export ban policy to counter the EU lawsuit at the WTO.

a. Indonesia's Nickel Export Restriction Policy

The basis for the implementation of the ore export ban refers to Article 33 of the 1945 Constitution of the Republic of Indonesia, which is known as the Article that regulates the economy and natural resource management in Indonesia. The mandate of Article 33 of the 1945 Constitution requires that the production process sourced from the natural resources of the Indonesian state should be processed and refined domestically. Therefore, according to the Ministry of Energy and Mineral Resources of the Republic of Indonesia, Article 33 of the 1945 Constitution of the Republic of Indonesia and Law Number 11 of 1967 concerning Basic Mining Provisions are the basis of all export bans on raw materials and mining materials. The ban on nickel ore exports came into effect on 1 January 2020, the regulation of which took five decades to update a number of policies, including Law No. 4/2009 on MINERBA which was later amended to Law No. 3/2020 on Amendments to Law No. 4/2009 on Mineral and Coal Mining.⁵

A number of related ministerial regulations prohibiting the export of Indonesian raw materials and mining materials were issued as legal instruments to serve as the basis for the Indonesian government's policy to prohibit the export of Indonesian raw materials and mining materials such as PERMEN ESDM Number 7 of 2020 jo. PERMEN ESDM Number 16 of 2021 jo. PERMEN ESDM Number 10 of 2022, PERMENDAG Number 19 of 2021 jo. PERMENDAG Number 8 of 2022 jo. PERMENDAG Number 2 of 2022 jo. PERMENDAG Number 12 of 2022, PERMEN ESDM Number 23 of 2021 concerning Management of Oil and Gas Working Areas for Cooperation Contracts that will Expire, and PERMEN ESDM Number 11 of 2019 jo. PERMEN ESDM Number 17 of 2020.

The constitutional mandate of Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia, the consideration of the nickel ore export ban aims to: (1) Ensure that natural resource management contributes to improving the welfare of the Indonesian people; 2) Supporting national capabilities in competition; 3) Increasing state revenue; 4) Supporting national economic growth, as well as strengthening the industrial and trade sectors. domestic, and; 5) Preventing the potential misuse of natural resources that can endanger environmental sustainability in Indonesia. The five objectives based on Article 33 of the 1945 Constitution of the Republic of Indonesia carry out the principles of industrial implementation as set out in the provisions of Article 2 of Law No. 3 of 2014 concerning Industry, which states that Industry shall be

⁴WTO | DS592: Indonesia – Measures Relating to Raw Materials., Op Cit.,

⁵Ibid

organised based on the principles of national interest; economic democracy; business certainty; equitable distribution; and industrial linkages.

b. Analysis of the WTO Panel Report on Dispute Number DS592

1) EU Arguments in the WTO Panel on Dispute Number DS592

Firstly, the EU disputes the inconsistency of Indonesia's measures with Article XI:1 of the GATT 1994, which includes the prohibition or restriction of exports of nickel ore, iron ore, chromium, and coal under certain conditions.⁶ Quantitative restrictions on the export of nickel ore, iron ore, chromium, and coal by the Indonesian government is one of the main points of contention argued by the European Union in its lawsuit against Indonesia, specifically that the ban on nickel ore exports has been in place since 2014, although there was some relaxation in 2017 for nickel ore with a grade of < 1.7%, but not for those exceeding 1.7%.⁷

Secondly, the EU also sued Indonesia under Article 3 paragraph (1) letter (b) of the Agreement on Subsidies and Countervailing Measures (SCM Agreement), which states that subsidies depend on the use of domestic goods over imported goods.⁸ This refers to the Indonesian government's policy of providing special import duty exemptions for companies that invest in the construction or modernisation of factories using local products, such as machinery, installations, equipment and tools.⁹ In this regard, the EU highlights the prohibited subsidy scheme imposed by the Indonesian Ministry of Finance for import duty exemptions applicable to companies building or modernising factories. The EU argued that minerals, coal, and their derivative products must be authorised for export by Indonesian authorities, and thus must be subject to an export licence.¹⁰

Third, the EU also filed a claim against Indonesia under Article X:1 of the GATT 1994, which requires the prompt publication of all regulations relating to duties, tariffs, taxes, other charges, conditions, import-export restrictions or prohibitions, and other trade transactions.¹¹ The EU highlighted Indonesia's delay in publishing those regulations related to export restrictions or prohibitions as well as the issuance of export licences.

The EU in its lawsuit also argues that the regulations proposed by Indonesia do not include steps to obtain export licences, waste export licences, including nickel ore with a grade of < 1.7%, and metal scrap which will be issued by the Ministry of Trade of the Republic of Indonesia.¹² This is because for the export of nickel ore with a grade of less than 1.7%, only companies that have a Production Operation Mining Business Licence (IUP-OP) and absorb at least 30% of nickel ore in their refining facilities are permitted. The EU explained that existing regulations do not explain the process of obtaining such recommendations.

2) Indonesia's Argument in the WTO Panel on Dispute Number DS592

⁶Ibid

⁷Ibid

⁸Ibid

⁹Ibid

¹⁰Ibid

¹¹Ibid

¹²Ibid

Against the EU's claim, Indonesia provided a number of defences by requesting the Panel to confirm to the EU the following: 13 (i) the EU failed to show preliminary evidence that the domestic treatment requirement was inconsistent with Article XI:1 of the GATT 1994, (ii) under Article XI:2(a) of the GATT 1994, temporary export bans or restrictions shall be imposed to prevent or remedy shortages of products of particular importance to Indonesia. (iii) alternatively, if the Panel determines that the measure under consideration does not fall within the scope of Article XI:2(a) of the GATT 1994 and is inconsistent with Article XI:1 of the GATT 1994, then the measure is considered lawful under Article XX(d) of the GATT 1994. This is because, the domestic processing requirements (DPR) and the nickel mineral export ban policy do not conflict with the responsibilities set out in Article XX(d) of the GATT 1994. Indonesia believes that in the context of international trade rules, the policy has a legitimate basis. Some of the defences that Indonesia refers to as legitimate under Article XX (d) of the GATT 1994 are regarding the country's compliance with national laws and regulations.

3) Legal Considerations of the WTO Panel in Dispute No. DS592

The WTO Panel ruled that Indonesia had violated Article XI:1 of the GATT 1994 and that Indonesia's policy could not be justified by Article XI:2 (a) which essentially mandates the permissibility of export bans based on temporary restrictions to alleviate domestic product crises and Article XX of the GATT 1994 which provides for general exceptions to the imposition of certain measures.¹⁴ Article XX of the GATT 1994 provides a legal basis for WTO member countries to implement policies aimed at, among other things, humanitarian interests, the environment, and compliance with national regulations. However, the measures adopted must be non-discriminatory and not aimed at providing hidden protection of trade.¹⁵

In addition, the WTO Panel's ruling was based on a series of considerations, namely:¹⁶ First, the WTO Panel found that there was no adequate explanation of the time limit of the nickel ore export ban stipulated in Minister of Trade Regulation Number 96 of 2019 and MEMR Number 7 of 2020. Second, Indonesia has not been able to prove that there will be a crisis in the supply of nickel ore by providing evidence regarding the level of reserves and projected demand. The following is a graph of the volume of nickel ore production and exports in Indonesia recorded by the WTO in the DSB panel decision with dispute number DS592:

Figure 1: Indonesian nickel ore production and export (2010-2020)

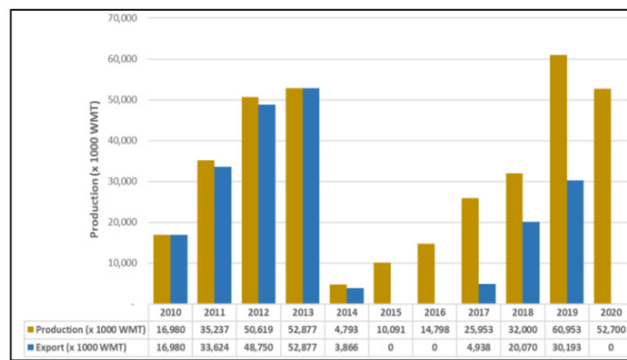


Figure 1: Source of WTO Panel Decision in Dispute Number DS592

The panel concluded that the absence of an adequate balance between supply and demand was not sufficient to be categorised as a critical shortage. This is because Indonesia’s nickel ore export restriction policy cannot be categorised as a shortage that triggers a nickel ore tipping point or crisis due to the absence of sufficient balance between supply and demand of nickel ore in Indonesia.¹⁷ Thus, the Panel finds that Indonesia cannot prove that its temporary measures were implemented to prevent or alleviate a critical shortage of an essential product in accordance with Article XI:2(a) of the GATT 1994.¹⁸

Third, Indonesia did not present any other option than an export ban as part of its efforts to establish sustainable nickel governance.¹⁹ In this context, the WTO DSB Panel agrees with the European Union that proposes the need for the implementation of nickel certification and the establishment of a nickel export authority body as alternatives in sustainable nickel management.

4) Conclusions and Recommendations of the WTO Panel in Dispute No. DS592

The WTO Panel made the following conclusions:²⁰

- i. The nickel mineral export ban in effect since January 2014 and regulated through Law No. 4 of 2009 (partially amended by Law No. 3 of 2020), Minister of Trade Regulation Number 96 of 2019 and MEMR Number 11 of 2019 does not fall under the exception of Article XI:I of GATT 1994. This is because the bans are not temporary measures implemented to prevent or alleviate critical shortages in food or other products vital to Indonesia, in accordance with Article XI:2(a) of the GATT 1994. The export ban was inconsistent with Article XI:1 of the GATT 1994. In addition, the Panel also concluded that the export ban could not be justified under Article XX(d) of the GATT 1994 because it was not necessary to ensure compliance with laws or regulations not inconsistent with the GATT 1994.
- ii. Domestic processing requirements that began in 2012 and are now regulated through Law No. 4 of 2009 (partially amended by Law No. 3 of 2020), MEMR Regulation No. 25 of 2018, and MEMR Regulation No. 7 of 2020, do not fall under the exceptions of Article XI:1 of the GATT 1994. This is because Domestic

¹⁷Ibid

¹⁸Ibid

¹⁹Ibid

²⁰Ibid

Processing Requirements (DPR) are not temporary prohibitions or restrictions imposed to prevent or alleviate critical shortages in food or products of importance to Indonesia, as defined in Article XI:2(a) of the GATT 1994. Domestic PROCESSING REQUIREMENTS (DPR) are considered inconsistent with Article XI: 1 OF THE GATT 1994. The Panel also concludes that the domestic processing requirement (DPR) cannot be justified under Article XX(d) of the GATT 1994 because it is not necessary to ensure compliance with laws or regulations that are not inconsistent with the GATT 1994.

- iii. The Panel also concluded that, pursuant to Article 3.8 of the DSU in the case of a breach of an obligation based on a covered agreement, the measure is prima facie considered a case of cancellation or restriction. The Panel concluded that the measure was not exempt from the obligations set out in Article XI of the GATT 1994.

The recommendation given by the WTO Panel in dispute number DS592 was based on Article 19.1 of the DSU. The WTO Panel recommended that Indonesia adjust its measures in line with its obligations under the GATT 1994.²¹

c. Exceptions in International Law and the WTO: A Review of Applicable Legal Rules and Principles

In the context of international trade, the Indonesian government's policy to ban nickel ore exports is in line with mercantilist theory, which highlights the importance of national interests in managing international trade and investment, while maintaining national economic stability and global interests. The strategy of economic nationalism implemented by President Jokowi emphasises the development of domestic industries and the optimisation of the use of natural resources for national interests and maintaining the sovereignty of the Indonesian state over its natural resources.

By referring to the EU's legal basis in the GATT 1994, Indonesia can consider the exceptions stipulated in international law, as well as the established principles contained in the GATT 1994 and the WTO. These exceptions are intended to show that the nickel ore export restriction policy aims to protect national interests in the field of natural resources without harming the European Union, as nickel suppliers and producers are not only limited to Indonesia. The following are some exceptions that, according to the author, can be an alternative to strengthen the argumentation and defence position at the WTO in dispute number DS592:

Respect for State Sovereignty over Natural Resources based on the Permanent Sovereignty over Natural Resources Principle (PSNR Principle) as an Embodiment of Exceptions to Article XX of the GATT 1994.

Article XX of the GATT 1994 provides an opportunity for Indonesia to justify the export ban policy, especially in the provisions of Article XX letter (g) of the GATT 1994 which reads:²²

(g) "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;"

²¹Ibid

²²Article XX (g) of GATT 1994

The provisions in Article XX (g) of the GATT 1994 provide an opportunity for Indonesia to implement and maintain policies set by the Government to protect the environment and natural resources, including the ban on nickel ore exports. However, for these policies or measures to be authorised in accordance with Article XX(g) of the GATT 1994, there are three requirements that must be met, consisting of:²³ a) the policy objective to be achieved through the measure is the conservation of exhaustible natural resources; b) the measure must be linked to the policy objective; and c) the measure must be effectively applied “concurrently with” a ban on domestic production or consumption.

Regarding “non-renewable natural resources” we know that one of them is minerals (nickel) which is part of non-renewable metallic minerals. Therefore, Indonesia must clearly prove that the policy of banning nickel ore exports transparently fulfils the three conditions of Article XX letter (g) of the GATT 1994 and is supported by strong evidence. Of course, exceptions to Article XX(g) of the GATT 1994 may relate to the Principle of Permanent Sovereignty over Natural Resources (PSNR) recognised in international law in the field of processing, utilisation and regulation of natural resources.²⁴

The consequences associated with state sovereignty over natural resources in the context of WTO law are unclear until today. Although this right is considered an international obligation that states voluntarily undertake, the principle of state sovereignty suggests that this right is always available.²⁵ In fact, the right of a state to manage its natural resources has been recognised as a fundamental right in international law, as stated in Article 2.1, Article 47 of the International Covenant on Civil and Political Rights (ICCPR), and Article 1.2 and Article 25 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which is the implementation of the principle of Permanent Sovereignty over Natural Resources (PSNR). Thus, it can be concluded that the Panel’s statement that member countries must comply with WTO rules seems to deviate from the original purpose of the WTO to promote fair international trade and treat all countries fairly. This is because when a country becomes a member, it is deemed to have agreed that its autonomy in natural resource management is limited by WTO rules.

Article XI:1 of the GATT 1994 is the most influential restrictive rule that prohibits member countries from imposing export restrictions through quotas or non-tariff barriers. Although this rule has some exceptions, none can be used for the purpose of boosting domestic industries. In fact, the PSNR principle cannot be deviated from in international law because it is considered a basic norm or *Jus Cogens*.²⁶ To support and strengthen the principle of PSNR, the UN General Assembly on 12 December 1974 passed Resolution Number 3281 (XXIX) on the Charter of Economic Rights and Duties of States. This resolution allows developing countries to manage their

²³Peter V.D. Bossche, Daniar Natakusumah, Joseph Wira Koesnaidi, *Pengantar Hukum WTO (World Trade Organization)*, Jakarta: Yayasan Obor Indonesia, 2010

²⁴Saru Arifin, “Implementasi Kedaulatan Permanen atas Sumber Daya Alam dalam Aturan investasi Asing di Aljazair dan Indonesia”, *Jurnal Hukum Ius Quia Iustum*, No. 3 Vol. 25 September 2018.

²⁵Hanina Husin Hadad, Helitha Novianty, dan Huala Adolf, *Larangan Ekspor Bijih Nikel Indonesia Diantara Stabilitas Perdagangan Internasional*, *Jurnal Mimbar Hukum Universitas Gadjah Mada* (Vol.34 No.2) Tahun 2022.

²⁶*Ibid*

natural resources independently, utilise them independently, open themselves to foreign capital ownership, or nationalise exploited natural resources.²⁷

Furthermore, when viewed from International Political Economy theory by referring to the concept of the Modern World System, criticism of global injustice, which includes exploitation and domination by central countries against peripheral countries, is a major highlight in modern world system theory. That is, modern world systems theory highlights inequalities in the distribution of wealth, power and influence at the global level. The focus is on the dynamics of exploitation and domination between centre and periphery states. However, when linked to the panel's decision that countries must submit to sovereignty over natural resources in accordance with WTO rules, it appears that the WTO's goal of promoting international trade in a fair manner is misaligned. This gives the impression that the WTO is not living up to its own objectives as it restricts states' rights without considering the differences in economic conditions between member states. This means that the WTO overly promotes the interests of the central countries alone without considering the exploitation and domination that the central countries often exert on the periphery. Therefore, when the panel stated that a country joining the WTO must follow rules that limit its sovereignty over natural resources, it was inconsistent with the principles that should be upheld by the WTO, which in this case is the principle of special exception for developing countries enshrined in Article XXXVI of the GATT 1994 and Article 9 of the WTO Agreement on Special and Different Treatment.

2. Indonesian Government Steps to Follow Up the WTO Panel Decision in Dispute Number DS592

The panel ruled that Indonesia lost the lawsuit filed by the European Union in dispute number DS592 regarding the nickel ore export restriction policy. This caused Indonesia to appeal the decision of WTO Panel number DS592 in the dispute Indonesia - Measures Relating to Raw Materials dated December 8, 2022. Indonesia's Permanent Representative to the UN, WTO, and Other International Organizations, Ambassador Febrian A. Ruddyard, stated that an appeal to the WTO Appellate Body is a legitimate right that Indonesia has in accordance with WTO provisions. [1] However, due to the vacuum of vacancies, a report from the WTO indicates that since no member has been able to establish an appellate division within the Appellate Body to handle Indonesia's appeal at this time, Indonesia is requested to wait for further instructions on the next steps to be taken in accordance with the information reported by the WTO, as currently the WTO Panel Decision Number WT/DS592/R is not final and binding.

Therefore, the author will analyze Indonesia's current policies in the transition period prior to the implementation of the appeal by the Appellate Body at the WTO. This aims to find out the strategic steps taken by Indonesia before the formation of the Appellate Body to follow up on the appeal process filed by Indonesia in dispute number DS592 regarding the nickel ore export restriction policy at the WTO.

a. Attracting Foreign Investors to Support the Industrial Downstreaming Program

²⁷Ibid

Industrialization in Indonesia is still highly dependent on foreign investment, leading to internal contradictions. Although the government implements policies that do not satisfy foreign investors, such as local ownership requirements, value-added enhancement, and export bans, it also simultaneously seeks to attract foreign investors to support the supply of electric vehicle (EV) batteries. industrial chain in Indonesia with a total investment target of US\$30.9 billion.²⁸ In order to attract foreign investment to support the industrial policy, the Indonesian government issued a controversial national regulation known as the Omnibus Law, namely the Job Creation Law Number 11 of 2020, which at the time was declared a law whose validity period was limited to only one year, namely for two years because it was declared unconstitutional with conditions by the Constitutional Court of Republic Indonesia because the requirements for the formation of a law, including formal requirements, were not fulfilled.²⁹

Therefore, in order to sustain the lives of investors by supporting the downstream program, the President finally issued Government Regulation Number 2 Year 2022 on Job Creation, as the government's "final" step to end the issuance process to accelerate the Omnibus Law. In the end, PERPU Number 2 Year 2022 was amended into Law Number 6 Year 2023 on the Stipulation of Government Regulation replacing Law Number 2 Year 2022 on Job Creation to be stipulated into Law. However, the government believes the purpose of the Omnibus Law is to create jobs, improve economic competitiveness, and simplify regulations to support investment and infrastructure development. Although controversial, the Omnibus Law remains in the limelight due to its far-reaching implications on various aspects of social and economic life, aiming to ease foreign investors' access to business licenses, including licenses for access to natural resources and land use.³⁰

Based on a report by the Ministry of Investment/Investment Coordinating Board (BKPM), investment in the downstream process reached Rp375.4 trillion in 2023 or equivalent to 26.5% of the total national investment of Rp1,418.9 trillion. Investment in the downstream sector is spread across several sectors, including minerals (IDR 216.8 trillion), forestry (IDR 51.8 trillion), agriculture (IDR 50.8 trillion), oil and gas (IDR 46.3 trillion), and also in vehicle batteries, electricity (IDR 9.7 trillion). Previously, a report by the Ministry of Investment/BKPM also showed an increasing trend in downstream investment in the basic metal, metal goods, and non-machine tool industry sectors during the 2019-2022 period.³¹ Hasyim Daeng Barang, Director of Mineral and Coal Downstreaming at the Ministry of Investment/BKPM, stated that the increase was largely due to the government's downstreaming policy, so that investment in the downstream process continued to increase every year. Initially, the basic metal, metal products, and non-machinery industry sector ranked fourth. However, since the government banned the export of raw minerals, this sector has continued to grow.³²

²⁸Indonesia y la prohibición de la exportación de minerales en bruto | Transnational Institute. (n.d.). Transnational Institute. <https://www.tni.org/es/art%C3%ADculo/indonesia-y-la-prohibicion-de-la-exportacion-de-minerales-en-bruto?translation=id>

²⁹Putusan Mahkamah Konstitusi RI Nomor 91/PUU-XVIII/2020

³⁰Ibid

³¹Konsulat Jenderal Republik Indonesia DI HONG KONG, MERANGKAP MACAO, WILAYAH ADMINISTRATIF KHUSUS REPUBLIK RAKYAT TIONGKOK Wilayah Administratif Khusus Republik Rakyat Tiongkok. (n.d.). Kementerian Luar Negeri Republik Indonesia. <https://www.kemlu.go.id/hongkong/id/news/26930/hong-kong-konsisten-jadi-investor-terbesar-ketiga-di-indonesia>

³²Ibid

b. Improving Industrial Downstreaming

The nickel ore export ban strategy has been incorporated into the 2020-2024 National Medium-Term Development Plan (RPJMN) by the Indonesian government. The RPJMN is considered an important tool to realize development strategies that generate national benefits, including increasing added value from mineral resources. In the 2020-2024 RPJMN, the government designated nickel as one of the key investment projects for State-Owned Enterprises (SOEs) to increase the added value of nickel ore to achieve National Priority I. National Priority 1 (PN 1) has the main objective of strengthening economic resilience with a focus on quality and equitable growth. The development policies implemented in PN 1 aim to support the recovery of production activities, as well as increase added value and productivity by optimizing the linkages between the primary, secondary, and tertiary sectors. The construction of a nickel and cobalt smelter and refining facility (HPAL) is one of the key projects within the Priority Industrial Estate and Smelter (RKEF).³³

The Indonesian government aims to increase the contribution of downstream industries to GDP through two main measures: increasing exports and reducing imports. The target of industrial exports in 2035 of 78.4% from various sectors is expected to contribute positively to Indonesia's economy and trade balance.³⁴ In 2021, industrial exports accounted for 76.49% of total national exports. In addition, efforts are also being made to reduce raw material imports by 20% by 2035. Both steps are expected to increase economic growth and increase foreign exchange through a trade balance surplus.³⁵ The following are the strategic steps taken by the Ministry of Energy and Mineral Resources as outlined in the Grand Strategy to increase the added value of nickel:³⁶

The first step taken is to increase the resilience of nickel reserves and maximize the production of industrial raw materials. This step aims to ensure the availability of reserves, ensure the accessibility of industrial needs, and extend the life and sustainability of nickel reserves. To extend the life of nickel ore reserves, the Ministry of Energy and Mineral Resources will increase the conversion of resources into reserves. They estimate that more than 1.7% of nickel ore reserves will be exhausted by 2031, and 1.5% by 2036, if no new nickel resources are discovered and ore consumption remains constant.

The second step includes the improvement, optimization and efficiency of the nickel processing and refining industry. Under the plan, the Ministry of Energy and Mineral Resources will focus nickel development on the nickel sulfate industry sector, conduct transactions for Class 2 nickel factories, utilize residual processing products at smelters and HPAL factories, and master technology in improving processing and refining. The Indonesian government plans to add 33 pyrometallurgical processing plants and nine

³³Kementerian Perencanaan Pembangunan Nasional/Badan Perencanaan Pembangunan Nasional. Peraturan Presiden Republik Indonesia Nomor 115 Tahun 2021 tentang Pemutakhiran Rencana Kerja Pemerintah Tahun 2022: Batang Tubuh dan Lampiran I. Jakarta, 2021.

³⁴Ibid

³⁵Pusat Komunikasi Publik Kementerian Perindustrian RI. Rencana Induk Pembangunan Industri Nasional Tahun 2015-2035 (RIPIN 2015-2035)., Jakarta: Kementerian Perindustrian RI, 2015.

³⁶Direktorat Jenderal Mineral dan Batubara. "Grand Strategy Mineral dan Batubara: Arah Pembangunan Hulu Hilir Mineral Utama dan Batubara menuju Indonesia Maju." 2021. <https://www.esdm.go.id/assets/media/content/content-buku-grand-strategy-komoditas-minerba.pdf>.

hydrometallurgical processing plants to improve the optimization of nickel utilization, especially nickel limonite.

The third step includes developing the manufacturing and production industry and increasing the Domestic Component Level (TKDN). This step was taken by the government because nickel in the NPI and FeNi categories is usually exported abroad. This happens because there is a surplus of NPI and FeNi production that is not proportional to the ability of the domestic stainless steel industry to absorb it. Currently, only four factories are capable of absorbing NPI and FeNi production to be processed into 300 series stainless steel, while there are no companies producing 200 series stainless steel.

The fourth step optimizes the use of domestic products and introduces a recycling system. The aim of this initiative is to reduce the trade deficit and strengthen the downstream of the national industry. Through the recycling system development plan, the government aims to reduce dependence on non-renewable natural resources. By 2026, the government aims to establish a nickel-containing used battery collection system, while a 15,000-ton capacity used battery sorting and processing facility is expected to be operational by 2031. Of course, the plan cannot be implemented by the Ministry of Energy and Mineral Resources alone, but the Ministry will collaborate with other ministries.

c. Implementation of Nickel Export Tax

After Indonesia lost the dispute at the WTO regarding the nickel ore export ban, the government felt compelled to prepare instruments and policies related to nickel downstreaming and industrialization. Currently, the government is encouraging the development of a domestic nickel downstream industry to make the most of the potential. The government hopes to take advantage of this potential to strengthen state finances through tax revenue while strengthening Indonesia's economic structure through the downstreaming of the nickel industry.

In terms of benefits, this nickel export tax will help downstream nickel into products such as electric vehicle batteries. The government will continue to support investment in the nickel product industry to concentrate on raw materials from upstream activities, namely processed nickel class II products such as nickel pig iron (NPI) and ferronickel (FeNi), as well as other nickel derivative products. The domestic market bond policy, or DMO, and the application of the nickel export tax will be further evaluated. As the price in the export market is more lucrative-even three times the price in the domestic market-nickel mining businesses tend to choose the export market over the domestic market, said Katrin Lengkey, Secretary General of the Indonesian Nickel Miners Association (APNI).³⁷ As a result, to encourage investment and the development of nickel downstream in the country, a progressive tax policy for nickel and DMO should be implemented. However, regulations regarding taxes on nickel must consider the availability of downstream facilities in Indonesia, namely facilities that process nickel into derivative products such as electric vehicle batteries.³⁸ This is important because if the policy is not adjusted to the availability of facilities, then the tax applied may hinder

³⁷Assiddiq, Maghastria. "Pahami Penerapan Pajak Ekspor Komoditas Nikel!" PAJAK.COM, 28 Nov. 2022, www.pajak.com/komunitas/opini-pajak/pahami-penerapan-pajak-ekspor-komoditas-nikel.

³⁸Ibid

the development of the nickel industry in the country, especially for companies that export processed nickel products.

The government is trying to implement a tax rate of 2% for nickel prices between \$15,000 and \$16,000 per ton. This rate is progressive and will continue to increase as nickel prices rise. With this policy, it is hoped that the public can support the progress of the nickel industry and the economy in Indonesia.³⁹ Teuku Riefky, a Macroeconomist and Financial Market Economist from LPEM FEB University of Indonesia, said that in addition to appealing to the WTO, the government must also prepare additional instruments to reduce raw mineral exports. According to him, the implementation of a nickel ore export tax is a reasonable fiscal strategy as a backup if Indonesia loses the appeal.⁴⁰ The government must ensure that the move will not violate existing trade agreements.

d. Preparing and Strengthening Arguments for the WTO Appeal Process in Dispute No. DS592

Based on the arguments of the WTO DSB Panel that defeated Indonesia in dispute number DS592 at the WTO, the Government of Indonesia can still utilize legal loopholes to strengthen its arguments before the upcoming Appellate Body at the WTO. The author will outline the legal loopholes that can increase Indonesia's chances of facing the appeal process at the WTO, including:

First, the WTO DSB Panel stated that Indonesia did not include an explanation of the "time limit" in the relevant regulations, so in this case the author hopes that in order to strengthen the position of the Government of Indonesia in limiting nickel exports,⁴¹ the Government must be able to include a "time limit" to re-export nickel ore to the European Union. The provisions regarding the time limit must certainly be contained in laws and regulations such as amending Law Number 3 of 2020 concerning MINERBA, amending the Minister of Energy and Mineral Resources Regulation and the Minister of Trade Regulation. This is intended so that nickel ore export restrictions do not violate the provisions of the WTO, especially Article XI: 2 letter (a) GATT 1994, so that the nickel ore export restriction policy still benefits Indonesia.

Second, the WTO DSB Panel in its arguments stated that the evidence submitted by Indonesia regarding nickel stocks going into crisis was not strong enough. This is because the WTO DSB Panel concluded that the imbalance between supply and demand in the data submitted by the Indonesian Government was not categorized as a "crisis point" or an event that would lead to a nickel ore crisis.⁴² Thus, in order to strengthen Indonesia's arguments at the appeal stage with the European Union, the author argues that Indonesia must stitch the nickel demand projection data with the Net Zero Emission (NZE) mission as the main target in the United Nations Climate Change Conference (COP26), namely the use of nickel as a production material for electric vehicles (EV) batteries to make the energy transition. The main goal of COP26 is to

³⁹Kominfo, Pdsi. "[DISINFORMASI] Presiden Jokowi Naikkan Pajak Ekspor Nikel 1.000 Persen." Website Resmi Kementerian Komunikasi Dan Informatika RI, www.kominfo.go.id/content/detail/46068/disinformasi-presiden-jokowi-naikkan-pajak-ekspor-nikel-1000-persen/0/laporan_isu_hoaks.

⁴⁰Ikatan Konsultan Pajak Indonesia. I. (2022, May 12). EKSPOR BIJIH NIKEL Archives - Ikatan Konsultan Pajak Indonesia <https://ikpi.or.id/tag/ekspor-bijih-nikel/>

⁴¹Hanina Husin Hadad, Helitha Novianty, dan Huala Adolf, Larangan Ekspor Bijih Nikel Indonesia Diantara Stabilitas Perdagangan Internasional, *Jurnal Mimbar Hukum Universitas Gadjah Mada* (Vol.34 No.2) Tahun 2022.

⁴²WTO | "DS592: Indonesia – Measures Relating to Raw Materials", Op Cit.

ensure that global temperature rise remains below 1.5 degrees Celsius by mid-century. More than 74 countries and over 600 companies have pledged their commitment to the NZE target.⁴³ As the demand for clean energy increases, it is expected that the demand for several types of metals will increase as they are used in the construction of technological infrastructure that supports clean energy.”⁴⁴

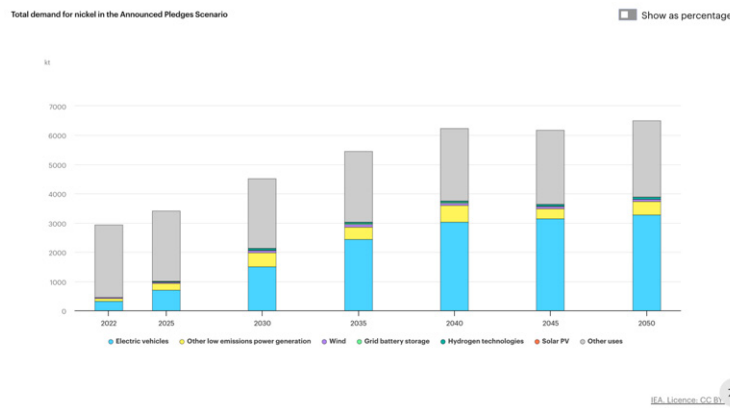


Figure 3, Total Nickel Demand for EV Production

The transition to Net Zero Emission (NZE) is projected to require significant metal consumption. This change will also involve the use of new technologies that utilize different types of mineral metals to achieve the optimal composition for producing clean energy. All of these changes will impact demand and supply in the metals trade.⁴⁵

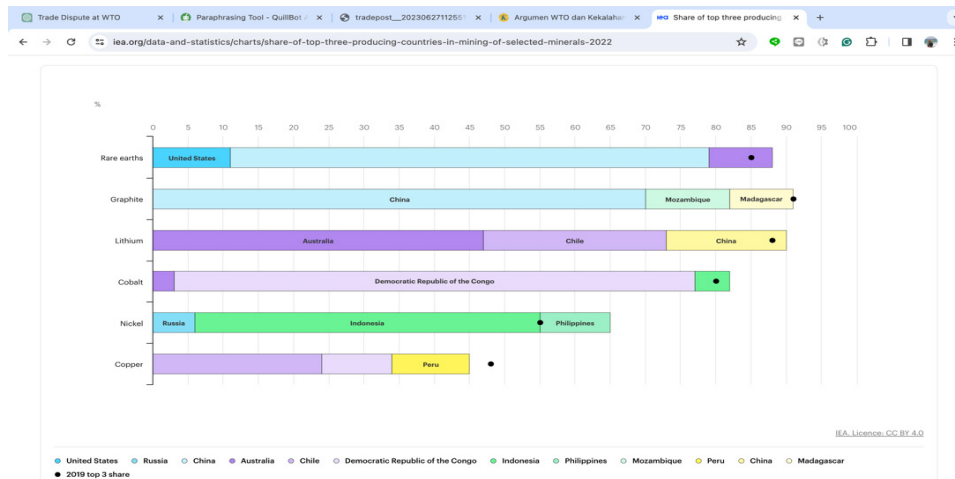


Figure 4, Countries with the Largest Share of Mining Materials Production in the World (IEA Data, 2023)

According to the International Energy Agency (IEA) chart, Indonesia plays an important role in the world’s nickel supply, with a production share of more than 30 % .⁴⁶ This means that it is possible that the demand for nickel in Indonesia will increase every year. If the Indonesian government does not restrict the export of nickel ore(raw

⁴⁶Ibid

materials), it will certainly increase the risk of a domestic nickel crisis. Therefore, to maintain the country's sovereignty over its natural resources, in addition to stitching the Indonesian Government's argument with data on the amount of demand for EV batteries that will increase every year, the Indonesian Government can also stitch its argument using the PSNR Principle. This is intended to strengthen Indonesia's arguments related to the nickel ore export ban policy in supporting domestic needs and processing to achieve the Net Zero Emission mission and protect non-renewable natural resources contained in Indonesia's earth and wealth.

Third, Indonesia can prove that the supply of nickel ore from other countries in the world is also quite large.

Tabel 2: Sumber Daya dan Cadangan Nikel Dunia (dalam Juta Ton)

Sumber Daya Nikel di Dunia			Cadangan Nikel di Dunia		
Negara	Nilai	Persentase	Negara	Nilai	Persentase
Australia	43,4	15%	Indonesia	21,0	23,70%
Indonesia	33,3	11%	Australia	19,0	21,40%
Afrika Selatan	33,2	11%	Brazil	11,0	12,40%
Rusia	24,4	8%	Rusia	7,6	8,60%
Kanada	21,9	7%	Kuba	5,5	6,20%
Filipina	18,0	6%	Filipina	4,8	5,40%
Brazil	16,4	6%	Afrika Selatan	3,7	4,20%
Kuba	16,2	5%	Tiongkok	2,8	3,20%
Kaledonia Baru	15,0	5%	Kanada	2,7	3%
Tiongkok	6,0	2%	Guatemala	1,8	2%
Rest of the World	68,3	23%	Rest of the World	6,5	7,30%
Total	296,2	100%	Total	88,7	100%

Figure 5, World Nickel Resources and Reserves Data (in Million Tons)⁴⁷

According to data from the Nickel Institute in 2021, the ten countries controlled about 77 % of the world's nickel resources and about 90 % of the world's nickel reserves. It is also clear that Indonesia has nickel resources of up to about 11 % and reserves of up to about 23.7 %. However, other countries also have significant nickel resources, such as Australia with 15 %, South Africa with 11 %, Russia with 8 %, Canada with 7 %, Philippines with 6 %, Brazil with 6 %, Cuba with 5 %, New Caledonia with 5 %, and China with 2 %.

Thus, the author concludes that the data can be used as reinforcement of the argument by the Government of Indonesia that its nickel ore export restriction policy does not significantly disrupt the world's nickel ore supply, because there is still sufficient supply from other countries.

In addition to the policies made by the Government of Indonesia, the author is of the view that the Government of Indonesia can take the following steps to prepare an appeal with the European Union at the WTO:

1) Utilize the Political Crisis of the United States to Boost the Nickel Downstream Industry before the Establishment of the Appellate Body in the DS592 Dispute at the WTO

a) Blockade of the formation of an appellate body by the United States

⁴⁷LPEM FEB UI, "Seri Analisis Ekonomi: Trade and Industry Brief", https://www.lpem.org/wp-content/uploads/2021/10/TIB_Oktober_2021_vre.pdf, (Oktober 2021).

The Indonesian government is facing obstacles in its trade-related appeal at the World Trade Organization (WTO) against the European Union (EU). The reason the United States blocked the formation of the appellate body (AB) is because it has a desire to reform the existing rules of the WTO. This is a complex situation as it involves major countries with strong economic interests.⁴⁸ WTO reform is an agenda that has been widely discussed in recent years, with several countries, including the US voicing a desire to update global trade rules. However, the US blockade of the establishment of an appeals chamber could make it difficult for other countries that want to resolve trade disputes through the appeals process at the WTO.⁴⁹ The Indonesian government has firmly affirmed that it has appealed the WTO's decision that the nickel export ban and downstream policy violate international trade rules. However, the United States' blockade of the establishment of the WTO Appellate Body is hampering the appeal process.⁵⁰

The author believes that the blockade of the formation of the appellate body at the WTO carried out by the United States can actually be utilized by the Government of Indonesia in preparing and continuing to improve the nickel downstream industry until before the formation of the appellate body. This is based on the unstable domestic and foreign political environment in the United States, especially with the upcoming presidential and vice presidential elections in November 2024. This means that the domestic political urgency of the United States will be the main focus of the American government to maintain political and economic stability during the campaign process until the election is over. In addition, the author also analyze in terms of the urgency of the foreign policy of the United States, in which the United States currently allies itself as a supplier of Israeli military weapons in the conflict between Israel and Palestine, which is getting worse every day.⁵¹ In addition, the focus of the United States helping Israel as its alliance is not costly. Based on this, the author concludes that the political urgency of the United States should be used as well as possible for the Government of Indonesia in increasing the downstream nickel industry and building sustainable nickel governance as an alternative to strengthen Indonesia's position in pressing the nickel ore export restriction policy.

b) The impact of the blockade of the formation of appeal materials carried out by the United States on the development of the downstream industry

One of the steps taken is through industrial downstreaming to add added value to mining goods such as nickel. The Indonesian government has put controls on the export of raw materials and energy sources to support the national industry. This move aims to increase the contribution of these two aspects to the domestic industry. This program is expected to increase the use of national nickel production, especially in the stainless steel industry. In-depth analysis of BPS data shows that there are several nickel products that contribute negatively to the trade balance, such as stainless steel in the form of pipes

⁴⁸Kementerian Perdagangan, "Setahun Berlalu, Banding RI ke WTO Soal Nikel Terganjil AS!" (13 Desember 2023)., <https://www.kemendag.go.id/berita/pojok-media/setahun-berlalu-banding-ri-ke-wto-soal-nikel-terganjal-as>

⁴⁹Ibid

⁵⁰Ibid

⁵¹The Global Eye News, "Israel-Palestine war: US vows 'rock solid' support, Joe Biden says will never fail to have Israel's back", (Oktober 8, 2023), <https://www.cnbctv18.com/world/israel-palestine-war-us-vows-rock-solid-support-joe-biden-says-will-never-fail-to-have-israels-back-17983991.htm>.

and cables, and nickel-based alloys. In 2020, these three products recorded a negative trade balance of \$213 million.⁵² From Indonesia's nickel export-import balance, it can be concluded that although most of the nickel raw material upstream and medium industries have developed rapidly, the downstream and processing industries are still lagging behind.

The development of the nickel processing and refining industry is included as one of the priority industries in RIPIN 2015-2035. However, several RIPIN targets such as nickel metal production, the target for the 2020-2024 period, have not yet been achieved and no industry has planned its development until 2021.⁵³ Therefore, the author concludes that the actual blockade of the formation of an appellate body carried out by the United States at the WTO provides benefits for the Government of Indonesia to manage mining products by continuing to increase nickel downstreaming which will be able to meet domestic needs independently without having to export raw materials to the European Union. In addition, the granting of additional time before the formation of an appellate body at the WTO can be a field of state revenue and increase bargaining power in the eyes of the world in the national industrial downstream program, especially in the mining sector, contributing to the national economy. This is because mining activities in the upstream and downstream industries will have a multiplier impact on the macro and micro economy both directly and indirectly, including increased tax revenue and national economic growth as a result of industrial downstreaming.

2) Alternative Dispute Settlement through Retaliation

Retaliation is one of the last options in the dispute settlement process where a member state that does not show cooperation can be confronted. Retaliation is usually resorted to after efforts to reach a compensation agreement have been unsuccessful. In this situation, the Dispute Settlement Body (DSB) has the authority to grant permission to implement retaliation or suspension of compensation within 30 days after the expiration of the period, unless the DSB decides otherwise by consensus. Retaliation often takes the form of imposing tariffs or other trade barriers against the losing member state in dispute settlement, as recommended by the DSB.⁵⁴ The settlement of the trade dispute between Indonesia and the European Union has not yet reached an end point. In this context, the author argues that Indonesia, despite being a developing country, should not hesitate to take retaliation. While the use of retaliation is still questionable for developing countries like Indonesia, the potential for greater harm remains a major concern.

Retaliation by developing countries may not be effective enough to force the targeted countries to comply with WTO rules. The biggest challenge for Indonesia is its lack of competitiveness and heavy dependence on the EU in the economic sphere. Therefore, the author concludes that the steps that can be taken by Indonesia are to increase domestic competitiveness by increasing the scale of investment in the nickel downstream industry so that it will increase the domestic mining and processing industry, or the Indonesian Government can also consider cross-retaliation with the European Union. However, the Indonesian government should carefully consider the

⁵²Pusat Komunikasi Publik Kementerian Perindustrian RI. Rencana Induk Pembangunan Industri Nasional Tahun 2015-2035 (RIPIN 2015-2035)., Jakarta: Kementerian Perindustrian RI, 2015

⁵³Ibid

⁵⁴WTO | Dispute Settlement Understanding - Legal Text

advantages and disadvantages of cross-retaliation if it wants to settle its dispute with the European Union. This is because cross-retaliation can exacerbate trade tensions between two countries and trigger a larger trade war if not done properly.

As a result, diplomacy and negotiation efforts often occur to stop the escalation of trade conflicts. So, to be able to retaliate or cross-retaliate, it will take a long time for Indonesia to be able to fight against “strong” countries, especially against the European Union in the dispute over the Indonesian government’s nickel export restrictions. Because, to be able to fight the European Union, Indonesia must at least become a developed country that no longer has to “depend” on other countries’ products. The mental readiness of the Indonesian state to strengthen its international economic and political face must be done carefully and with the right strategy, so it takes a long time to realize.

Implications of Retaliation if Implemented by the European Union

Political issues greatly influence efforts to implement retaliation in resolving international trade conflicts. So, it is difficult to apply in practice when the countries suing are developed and developing countries. Retaliation will be difficult to implement because developing countries are still very strong against developed countries. When reflecting on the case of Indonesia and the European Union in dispute number DS592: Indonesia - Raw Materials, it is possible that the European Union will retaliate against Indonesia for the losses it suffered in obtaining nickel ore. So, if this happens, the main thing that will happen is to disrupt the stability of international trade which has an impact on producers and consumers in both countries. It is possible that the European Union will increase export tariffs or even impose a ban on exports to Indonesia. Although the European Union is not Indonesia’s main import venue, the market for Indonesian imported goods, especially industrial machinery and dairy and processed products, is still very much in demand in Indonesia. This can be seen from the value of Indonesia’s imports from the European Union in 2021 which reached US\$ 11.1 billion (around IDR 173.96 trillion), up 9% from the value in 2020.55 One of the EU countries that made the largest imports to Indonesia according to the Central Statistics Agency (BPS) is Germany. Indonesia’s imports throughout 2021 reached US\$ 3.19 billion (around IDR 49.99 trillion), up 5.41% from US\$ 3.02 billion (around IDR 47.33 trillion) in the previous year. These imports accounted for 2.14% of Indonesia’s imports last year, and 28.73% of overall EU imports. Ancillary machinery for certain industries, chemical additives, and medical devices and equipment are Indonesia’s main imported goods from Germany.⁵⁶

Therefore, the potential that may occur if the European Union retaliates for losses suffered due to the nickel ore export restriction policy carried out by Indonesia is the loss of suppliers of industrial supporting machinery, and medical devices. This is because the import value from Germany reaches 28.73% of the imports of other countries in the European Union. Moreover, according to data from the Indonesian Ministry of Trade which states basically that Indonesia’s main imports from the European Union in 2022 are iron and steel pipes, medicines, vaccines, pulp making

⁵⁵UKMINDONESIA.ID, Potensi Impor Eropa Ke Indonesia - ukmindonesia.id/baca-deskripsi-posts/potensi-impor-eropa-ke-indonesia.,

⁵⁶Badan Pusat Statistik. “Volume Impor Menurut Negara Asal Utama (Berat Bersih:Ribu Ton), 2000-2022 - Tabel Statistik.” www.bps.go.id/id/statistics-table/1/MTAzNSMx/volume-impor-menurut-negara-asal-utama-berat-bersih-ribu-ton-2000-2022.html.

machines, and paper. Given that Indonesia is still in the status of a developing country, the potential for the European Union to ban exports is very likely. In addition to causing disruption to export-import activities, retaliation can also cause political tensions and long-term economic relations, which in this case if there is political tension between the European Union and Indonesia, the impact can have an impact on education, economy, culture, development assistance, investment, political support, and so on.

CONCLUSION

From the discussion described above, by referring to the problems raised in this thesis, the researcher concludes that Indonesia's nickel export restriction policy violates the provisions of Article XI:1 of GATT 1994, and cannot be justified by Article XI:2 (a) and Article XX of GATT 1994. The WTO Panel ruling in 2022 rejected Indonesia's argument, highlighting that Indonesia failed to provide an adequate explanation for the export ban's deadline, could not prove a crisis in nickel ore supply, presented no alternatives to an export ban for sustainable nickel governance, and must adhere to EU nickel certification standards if managing nickel ore domestically.

In response to the WTO decision, Indonesia took several legal and policy steps. First, it appealed the WTO Panel's decision, although the appellate process is stalled due to vacancies in the Appellate Body and the blockade of the establishment of an Appellate Body by the United States. This delay benefits Indonesia as the panel's decision remains non-binding. Second, Indonesia issued a policy to attract foreign investors to support the downstream industry program, namely President Joko Widodo has established Government Regulation in Lieu of Law (PERPU) Number 2 of 2022 concerning Job Creation to accelerate the implementation of Job Creation Law, focusing on investment, infrastructure, and downstream industry development. Third, Indonesia aims to enhance its downstream industry to boost state revenue and achieve industrial competitiveness, aligning with the Golden Indonesia 2045 vision. Lastly, Indonesia implemented a 2% nickel export tax on low-grade nickel ore and related products, positioning it as a strategic fiscal measure should the legal appeal fail, as it complies with international trade agreements.

The researcher suggest that Indonesia should use the principle of Permanent Sovereignty over Natural Resources (PSRN) as defense in the WTO Appellate Body to justify its nickel export restriction policy, arguing that this basic norm (*jus cogens*) upholds sovereign rights in international law. The government should prepare strong evidence and incorporate international law principles, especially PSNR and Special and Different Treatment under GATT Article XXXVI and WTO Agreement Article 9. Additionally, linking the export restrictions to the Net Zero Emission (NZE) mission from COP26 could strengthen Indonesia's defense. Despite being a developing country, Indonesia could consider using retaliation channels in its dispute with the EU (DS592) to showcase its power over its natural resources. However, any retaliation must be carefully planned to avoid negative impacts on Indonesia's position in global trade. Successfully implementing this strategy could enhance Indonesia's reputation as a bold and powerful nation.

BIBLOGRAPY

- Anisyah Al Faqir, “Mengupas Laranga Ekspor Nikel Indonesia ke Uni Eropa,” <https://www.merdeka.com/uang/mengupas-larangan-ekspor-nikel-indonesia-keuni-eropa.html?page=2>
- Assiddiq, Maghastria. “Pahami Penerapan Pajak Ekspor Komoditas Nikel!” PAJAK.COM, 28 Nov. 2022, www.pajak.com/komunitas/opini-pajak/pahami-penerapan-pajak-ekspor-komoditas-nikel.
- Direktorat Jenderal Mineral dan Batubara. “Grand Strategy Mineral dan Batubara: Arah Pembangunan Hulu Hilir Mineral Utama dan Batubara menuju Indonesia Maju.” 2021
- Djoni Sumardi Gozani, dkk., “Pokok-Pokok Perindustrian” UII Press Yogyakarta, Banjarmasin, Tahun 2020.
- International Energy Agency. Global EV Outlook 2022: Securing supplies for an electric future. International Energy Agency, 2022
- Indonesia y la prohibición de la exportación de minerales en bruto | Transnational Institute. (n.d.). Transnational Institute. <https://www.tni.org/es/art%C3%ADculo/indonesia-y-la-prohibicion-de-la-exportacion-de-minerales-en-bruto?translation=ide>
- Indonesia, Putusan Mahkamah Konstitusi Republik
- Indonesia Ikatan Konsultan Pajak Indonesia. I. (2022, May 12). EKSPOR BIJIH NIKEL Archives - Ikatan Konsultan Pajak Indonesia <https://ikpi.or.id/tag/ekspor-bijih-nikel/>
- International Energy Agency. Global EV Outlook 2022: Securing supplies for an electric future. International Energy Agency, 2022.
- Kementerian Perdagangan, “Setahun Berlalu, Banding RI ke WTO Soal Nikel Terganjil AS!” (13 Desember 2023) <https://www.kemendag.go.id/berita/pojok-media/setahun-berlalu-banding-ri-ke-wto-soal-nikel-terganjal->
- Kominfo, PDSI | “[DISINFORMASI] Presiden Jokowi Naikkan Pajak Ekspor Nikel 1.000 Persen.” Website Resmi Kementerian Komunikasi Dan Informatika RI, www.kominfo.go.id/content/detail/46068/disinformasi-presiden-jokowi-naikkan-pajak-ekspor-nikel-1000-persen/0/laporan_isu_hoaks.
- Konsulat Jenderal Republik Indonesia DI HONG KONG, MERANGKAP MACAO, WILAYAH ADMINISTRATIF KHUSUS REPUBLIK RAKYAT TIONGKOK: Wilayah Administratif Khusus Republik Rakyat Tiongkok. (n.d.). Kementerian Luar Negeri Republik Indonesia. <https://www.kemlu.go.id/hongkong/id/news/26930/hong-kong-konsisten-jadi-investor-terbesar-ketiga-di-indonesia>
- LPEM FEB UI, “Seri Analisis Ekonomi: Trade and Industry Brief”., https://www.lpem.org/wp-content/uploads/2021/10/TIB_Oktober_2021_vre.pdf.
- Peter V.D. Bossche, Daniar Natakusumah, Joseph Wira Koesnaidi, Pengantar Hukum WTO (World Trade Organization), Jakarta: Yayasan Obor Indonesia, 2010
- Saru Arifin, “Implementasi Kedaulatan Permanen atas Sumber Daya Alam dalam

Aturan investasi Asing di Aljazair dan Indonesia”, Jurnal Hukum Ius Quia Iustum, No. 3 Vol. 25 September 2018.

The Global Eye News, “Israel-Palestine war: US vows ‘rock solid’ support, Joe Biden says will never fail to have Israel’s back”, (Oktober 8, 2023), <https://www.cnbctv18.com/world/israel-palestine-war-us-vows-rock-solid-support-joe-biden-says-will-never-fail-to-have-israels-back17983991.htm>.,

UKMINDONESIA.ID, Potensi Impor Eropa Ke Indonesia - ukmindonesia.id/baca-deskripsi-posts/potensi-impor-eropa-ke-indonesia.,

World Trade Organization | DS592: Indonesia – Measures Relating to Raw Materials. https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds592_e.htm#bkmk592r

World Research Institute | COP26: Key Outcomes From the UN Climate Talks in Glasgow, <https://www.wri.org/insights/cop26-key-outcomes-un-climate-talks-glasgow>