

Indonesia's Dispute Against the European Union Related to The Nickel Ore Export: WTO Case Analysis

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Abstract

The purpose of this study is to examine the basis of the World Trade Organization (WTO) decision in favor of the European Union over Indonesia in the case of a ban on nickel ore exports by the Government of Indonesia and the appeal efforts that can be taken by the Indonesian government against the decision. This study uses normative legal research methods with conceptual and statutory approaches. The results of the study show that the basis of the WTO ruling in favor of the European Union over Indonesia in the case of the Indonesian Government's Nickel Seed Export Ban is that the Nickel Processing and Refining policy in Indonesia is proven to violate the provisions of WTO Article XI.1 GATT 1994 and cannot be justified by Articles XI.2 (a) and XX (d) GATT 1994. Indonesia is also deemed to be conducting a prohibited subsidy scheme under Subsidy and Countervailing Measures Agreement Article 3.1



through Minister of Finance Regulation (PMK) No. 76 Year 2012. The appeal has been taken by the Indonesian government officially in December 2022 and is still waiting for the formation of the WTO Appellate Body. Indonesia has a great opportunity to win a dispute at the WTO if Indonesia can prove the existence of national laws governing international trade, especially in the mining sector.

KEYWORDS *Downstream (mining) policy, Appeals, European Union, Nickel Ore.*

I. Introduction

Advancing general welfare is a mandate of the Constitution of the Unitary State of the Republic of Indonesia. All efforts have been made to realize this goal, one of which is by increasing the nickel mineralization in Indonesia. This is in accordance with the mandate of the 1945 Constitution (UUD 1945) article 33 paragraph 3, which reads, '*Earth and water and the natural resources contained therein are controlled by the state and used for the greatest prosperity of the people*'.¹ Nickel is one of the most important metal commodities in Indonesia, apart from gold, silver, copper, tin and aluminum.

Nickel mining activities have been carried out since the Dutch colonial period. In 1901, a Dutch expert named Kruyt discovered the first nickel ore in the Verbeek mountains, Sulawesi. This was followed by the discovery of nickel ore in 1909 in the Pomala area, Kolaka Regency, Southeast Sulawesi by E.C. Abendanon, who is a geologist from the Netherlands. This discovery opens up the opportunity to open a nickel mining industry in Indonesia. Further studies regarding nickel deposits in

¹ Arif Setiawan and Juanita Horman R, "Perkembangan Regulasi Peningkatan Nilai Tambang Nikel Di Indonesia," *INTAN Jurnal Penelitian Tambang* 2, no. 2 (2019): 107.

Indonesia, especially in the Sorowako area, were carried out by Flat Elves who is a geologist from PT Inco Limited, a Canadian mining company.²

The United States Geological Survey (USGS) claims that Indonesia has the world's largest nickel reserves. Indonesia has produced 800 thousand tons of nickel, which is significantly more than the Philippines (420 thousand tons), Russia (270 tons), and New Caledonia (220 thousand tons) combined, out of the 2.67 million tons produced globally. According to information released by the Ministry of Energy and Mineral Resources in 2020, Indonesia's nickel reserves were resilient, totaling 2.6 billion tons with a 27-year reserve age. According to Geological Agency mapping from July 2020, Indonesia has ore reserves of 4,346 million tons (proven 3,360 million tons and estimated at 986 million tons) and nickel ore resources of 11,887 million tons (inferred 5,094 million tons, indicated 5,094 million tons, measured 2,626 tons, and hypothetical 228 million tons).³

The Australian Department of Industry, Innovation and Science stated that global nickel consumption in 2017 was recorded at around 2.1 million tonnes of nickel. As much as 68% is used in making stainless steel, 16% is used as a metal alloy, 9% is used as metal coating, 3% is used in casting, 3% is used as material for making batteries, and 1% is used for other needs. Stainless steel itself is generally used for household needs, construction, motor vehicles and other means of transportation, oil and gas transportation, medical equipment, the pharmaceutical sector, and the food and beverage industry.⁴

A number of laws, including Law Number 4 of 2009 concerning Mineral and Coal Mining, which has been amended by the law's issuance, were issued in an attempt to accommodate Indonesia's abundant nickel resources. These laws served as both the legal framework and the

² Irwandy Arif, *Nikel Indonesia* (Jakarta: Gramedia Pustaka Utama, 2018).

³ Muhammad Agung and E.A Waluyo Adi, "Peningkatan Investasi Dan Hirilisasi Nikel Di Indonesia," *Jurnal Ilmu Sosial Dan Pendidikan JISIP*, n.d., 4009.

⁴ Arif, *Nikel Indonesia*.

foundation for the ban on the export of nickel ore raw materials. "Holders of (Mining license) IUP or (Special Mining Business Permit) IUPK at the Production Operation activity stage are obliged to increase the added value of minerals in mining business activities through processing and refining for metallic mineral mining commodities," states Article 102 of Law Number 3 of 2020 concerning Amendments to Law Number 4 of 2009 concerning Mineral and Coal Mining (Minerba Law). In Article 103, paragraph (1), *"Holders of IUP or IUPK at the Mineral Production Operation activity stage as intended in Article 102 are required to carry out processing and/or purification of minerals resulting from mining domestically..."* while the steps taken to implement the program require there is processing and refining of mining products (smelter) in the country.

Article 170 also requires contract work companies to carry out the obligation to build smelters domestically. To implement this regulation, the government issued two regulations. first, the implementation of coal and mineral mining operations is governed by Government Regulation Number 1 of 2014. The second is the Energy and Mineral Resources Minister's Regulation Number 1 of 2014, which outlines the requirements for raising added value. Contract job holders in line with those governed by Article 170 of the Minerba Law are obliged to refine domestic mining products, according to Government Regulation Number 1 of 2014 Number 1. According to the legislation, within three years of the Minister of Energy and Mineral Resources' legislation Number 1 of 2014 being issued, the sale of raw minerals overseas may be done in specific amounts and through processing.⁵

The European Union subsequently criticized the ban on nickel ore exports, citing the Mineral and Coal Law, Government Regulation Number 1 of 2014 concerning the Implementation of Mineral and Coal

⁵ Sabilla Ramadhani Firdaus, "Pembatasan Ekspor Nikel: Kebijakan Nasional Vs Unfairness Treatment Hukum Investasi Internasional," <https://lan.go.id/?p=10221>, July 26, 2022.

Mining Activities, Regulation of the Minister of Energy and Mineral Resources Number 1 of 2014 concerning Criteria for Increasing Added Value, and various other regulations as the basis. On January 1, 2020, the European Union filed a formal lawsuit against Indonesia at the World Trade Organization (WTO), claiming that it had violated Article XI:1 of the General Agreement on Tariffs and Trade (GATT) 1994, which prohibits WTO member countries from imposing restrictions other than tariffs, taxes, and other duties, but not quotas and import or sales permits.

The export of raw nickel ore, or in this case, restrictions on the export of raw materials, is strictly prohibited by Number 1 of 2014, as explained by Government Regulation Number 1 of 2014 concerning the Implementation of Mineral and Coal Mining Activities. Additionally, the Indonesian government is working to tighten licensing in the management of minerals, particularly nickel, which has raised concerns among the European Union community, which is the world's largest importer of nickel. The nation's extensive smelter development program is another example of the restriction on the quota or quantity of raw nickel ore exports.

The World Trade Organization's (WTO) ban on Indonesian nickel ore raw material exports was successfully challenged by the European Union. Based on this decision, Indonesia has initiated an appeal to actualize the national ideals of nickel recycling, a move that will boost domestic industry, particularly the electric car sector. For example, when the government stopped nickel exports, the value of Indonesia's exports increased to IDR 450 trillion from approximately IDR 17 trillion. Then, 10.5 million jobs were created, and Indonesia's Gross Domestic Product (GDP) jumped to IDR 11,000 trillion.⁶

⁶ Fika Nurul Ulya, "Ri Kalah Gugatan Nikel Di WTO," <https://nasional.kompas.com/read/2023/02/26/13523361/ri-kalah-gugatan-nikel-di-wto-jokowi-jangan-mundur-kalau-ragu-negara-ini-tak.>, 2023.

Based on the above description, there is a growing urgency among academics to conduct studies and research on issues in the mining sector and their relationship to commercial law on an international scale, with the aim of advancing science. This research will begin by taking an inventory of the regulations of the World Trade Organization (WTO) that originate from the principles of the General Agreement on Tariffs and Trade. In addition, to ensure a comprehensive study, we will elucidate the Indonesian legal regulations that serve as the foundation for the prohibition on exporting Indonesian nickel ore, as well as the requirement to process nickel downstream to generate added value from domestic mining products.

Therefore, the purpose of this study is to determine the rationale behind the World Trade Organization's (WTO) ruling in favor of the European Union over Indonesia in the case of the Indonesian government's ban on nickel ore exports, as well as the steps the Indonesian government took to appeal the WTO ruling that favored the Union. When it came to the export prohibition on nickel ore, Europe won out over Indonesia.

This research employs normative legal research, also known as doctrinal legal research or dogmatic study, which views positive legal norms as the outcome of political decisions made either through the legislative or judicial processes.⁷ This research employs a statutory approach, which involves the use of legislation and regulations⁸ The conceptual approach, which refers to legal principles found in scholars' perspectives and legal doctrine, is also present in laws, albeit implicitly.

Both primary and secondary sources of legal information were used in this study. Law Number 3 of 2020 concerning Amendments to Law Number 4 of 2009 concerning Mineral and Coal Mining and other relevant regulations serve as the reference for the main legal substance,

⁷ Bambang Sunggono, *Metodologi Penelitian Hukum* (Jakarta: Raja Grafindo, 2012).

⁸ Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Kencana Prenada Media Group, 2011).

which is statutory regulations. In addition to non-legal materials that are pertinent to the research issue, the secondary legal materials utilized in this study include textbooks, scientific journals, and official articles.

The technique for collecting legal materials is carried out using library research; in this case, document study is used as a data collection tool. The legal material analysis method employs deductive logic as a data analysis technique, which involves explaining a general concept and then formulating a more precise conclusion.

II. The Rationale Behind The World Trade Organization's (Wto) Ruling In Favor Of The European Union Over Indonesia In The Issue Involving The Ban On Nickel Ore Exports By The Indonesian Government

The Agreement of Marrakech The foundation for the World Trade Organization (WTO) was established on January 1, 1995, by the World Trade Organization Establishment Agreement. Non-discrimination, market access, unfair trade, the link between trade liberalization and other social values and interests, and instrument harmonisation are the five main categories into which the World Trade Organisation divides its fundamental laws. National laws in particular domainsThe primary international trade organization, the General Agreement on Tariffs and Trade (GATT), was followed by the World Trade Organization (WTO). Unlike the WTO, the General Agreement on Tariffs (GATT) does not have procedural law rules or an organizational structure. Articles XXII and XXIII of the GATT contain measures pertaining to dispute settlement, but these clauses are ambiguous and even have a tendency to lead to

conflict. On January 1, 1995, following a lengthy journey that started with the Uruguay Round negotiations, 154 countries, including 117 developing countries, formed an international organization specifically to address issues related to international trade.⁹

The WTO is an international organization under the Economic and Social Council of the United Nations that has important duties and roles in international trade. In this era of globalisation, economic activities, particularly in the field of trade, have become the primary means for countries worldwide, both developed and developing, to sustain their economic activities. International trade requires a legal instrument to ensure its continuity and acceptable dispute resolution methods for the global community.

Member nations have decided to use the multilateral system's tenets to resolve disputes at the WTO. This implies that these nations have to abide by established protocols and honor the rulings. The Dispute Settlement Body (DSB) is in charge of resolving disputes. The only organization with the power to assemble an expert panel to consider cases is the DSB. Additionally, the DSB has the authority to accept or reject appellate or panel rulings. If a nation disregards a decision, the DSB has the right to authorize retribution and oversees the execution of rulings and recommendations.¹⁰

A nickel dispute between Indonesia and the European Union is presently being handled by the World Trade Organization (WTO). The World Trade Organization (WTO) Dispute Settlement Body received a lawsuit from the European Union on January 14, 2021, contesting

⁹ Muhammad Irsan, "Sejarah GATT/WTO, Asas Most Favoured Nation Dan National Treatment, Forum Penyelesaian Sengketa Dan Pembentukan Dispute Settelement Body," https://jdih.kemendag.go.id/pdf/Buku/Jurnal/Sejarah_GATT_WTO_Asas_Most_Favoured, 2023.

¹⁰ Thaus Sugihilmi Arya Putra, "Gugatan Uni Eropa Di World Trade Organization (WTO) Mengancam Hilirisasi Industri Pertambangan Di Indonesia," <https://www.djkn.kemenkeu.go.id/kanwil-kalbar/baca-artikel/15503/Gugatan-Uni-Eropa-di-World-Trade-Organization-WTO-Mengancam-Hilirisasi-Industri-Pertambangan-di-Indonesia.html>, 2023.

Indonesia's policy of limiting shipments of nickel ore with a grade below 1.7%. The European Union takes the policy of limiting exports of nickel ore into consideration in the litigation. All WTO member nations are required to abide by the regulations set forth in GATT 1994, which governs multilateral agreements on goods.

The Mineral and Coal Law, which mandates domestic mineral management and refining operations, Government Regulation No. 1 of 2014, which prohibits the export of raw minerals and promotes the establishment of domestic smelters, and other laws, such as the Minister of Energy and Mineral Resources Regulation, serve as the foundation for the European Union's lawsuit. The Minister of Energy and Mineral Resources has made two changes to Regulation Number 25 of 2018, which deals with the coal and mineral mining industry. It also has to do with Minister of Energy and Mineral Resources Regulation Number 7 of 2020, which deals with the granting of areas, licenses, and reports for business activities related to coal and mineral mining, and Regulation Number 96 2019 of the Minister of Trade, which deals with export regulations for processed and refined mining products.

With regard to "Exemption from Import Duty on Imports of Machinery and Goods and Materials for Construction or Industrial Development in the Context of Capital Investment," Minister of Finance Regulation (PMK) no. 76 of 2012, the European Union assumes that Indonesia has implemented a subsidy scheme that is forbidden by the Subsidy and Countervailing Measures Agreement.¹¹ Although it is meant to be a forbidden subsidy, Article 3.1 of the Agreement on Subsidies and Countervailing Measures (ASCM) exempts businesses modernizing, expanding, and constructing new factories—specifically, those located in Potential Industrial Development Areas (WPI) I—from import taxes.

¹¹ Mawla Robby, "Menyoal Gugatan Uni Eropa Atas Pembatasan Ekspor Nikel Indonesia," <https://nikel.co.id/2021/02/05/menyoal-gugatan-uni-eropa-atas-pembatasan-ekspor-nikel-indonesia/>, n.d.

The scheme carries out subsidies by waiving import duties on machinery, goods, and materials for industrial production, with a deadline of two years and an additional year. We can extend the exemption period from import duties to five years and an additional year if we meet the requirements included in WPI Potential II, thereby providing more benefits. The annex to the Agreement on Subsidies and Countervailing Measures (ASCM), including annex point (d);

“If (in the case of products) the terms or conditions are more favorable than those commercially available⁵⁷ on global markets to their exporters, governments or their agencies may, directly or indirectly, through government-mandated schemes, provide imported or domestic products or services for use in the production of exported goods on terms or conditions more favorable than providing like or directly competitive products or services for use in the production of goods for domestic consumption.”

and point (I);

“As long as the import and related export operations take place within a reasonable time frame, not more than two years, a firm may use a quantity of home market inputs equal to, and having the same quality and characteristics as, the imported inputs as a substitute for them. This provision does not apply to import charges⁵⁸ that are greater than those imposed on imported inputs that are consumed in the production of the exported. This item must be read in compliance with Annex II's recommendations for input consumption in the production process and Annex III's guidelines for determining replacement drawback schemes as export subsidies.”

Among the various points outlined in the *Agreement on Subsidies and Countervailing Measures* (ASCM), the European Union's lawsuit focuses on the prohibited subsidies found in article 3.1 of ASCM Annex Points D and I, along with additional points that further elaborate on these prohibited subsidies.

The panel report's final decision on October 17, 2022, based on the aforementioned information, stated that, first, the export policy and Indonesia's obligation to process and refine nickel minerals were deemed to be in violation of WTO regulations Article XI.1 GATT 1994 and could not be justified by Articles XI.2 (a) and XX (d) GATT 1994. The Indonesian government's defense of having small national nickel deposits and using ethical mining methods (environmental problems) was rejected by both of these regulations.¹² The downstream industry referred to is the industry that processes raw materials from other industries into finished goods. The downstream industry for nickel raw materials in Indonesia is the iron industry which in reality has not yet experienced development, so it is categorized as an immature industry.

Aside from that, Indonesia's downstream nickel mining industry's lack of maturity or preparedness was a major element in the European Union's defeat of the country. The strength of nickel processing facilities in Indonesia is gauged by the number of smelters. There were 91 smelters in Indonesia as of February 1, 2023, according to data from the Ministry of Industry; 48 of these were operational, and the remaining ones were either in the visibility research or building stage. Smelters of copper, steel, nickel, and aluminum are included in this figure. In particular, the nickel smelter, which has an investment of IDR 5.55 trillion, can produce 262,660 tons annually. In the meantime, there are 2,337 employees.¹³

III. Indonesia's Appeal Against the World Trade Organisation (Wto) Decision In

¹² Verda Nano Setiawan, "Di Luar Dugaan, Begini Alasan WTO Kalahkan RI Dari Uni Eropa," www.cnbcindonesia.com/news/20230303093450-4-418548/di-luar-dugaan-begini-alasan-wto-kalahkan-ri-dari-uni-eropa, March 3, 2023.

¹³ CNN, "Menperin Klaim RI Sudah Punya 91 Smelter per 1 Februari 2023," <https://www.cnnindonesia.com/ekonomi/20230214184805-92-913040/menperin-klaim-ri-sudah-punya-91-smelter-per-1-februari-2023>, February 15, 2023.

Favour of the European Union on Nickel Ore Export Ban

In order to satisfy domestic interests and promote national development, Indonesia's Mining Law requires that company operations related to coal and mineral mining be prioritized. Radioactive minerals, metallic minerals, non-metallic minerals, and artificial minerals are the four types of mineral mining. In mineral and coal law, the terms IUP, IPR, and IUPK are known. IUP is the abbreviation of (Mining Business Permit), IPR is the abbreviation of (People's Mining Permit), while IUPK is the abbreviation of (Special Mining Business Permit). The distinction between these three terms pertains to the management of mining activities, the designation of mining areas, and the duration of mining permits. IPR is given to local residents who wish to manage minerals found in an area included in the People's Mining Area (WPR).

Article 33 of the 1945 Constitution, which advocates for the maximum utilisation of mineral resources for the prosperity and welfare of the people, serves as the driving force behind efforts to organise community mining. This is also the driving force behind Indonesia's need for nickel extraction, with the aim of leveraging its natural wealth and resources to promote prosperity for its entire population. This aligns with the values outlined in WTO article IX (Publication and Administration), which asserts Indonesia's right to process its own natural resource wealth.

Through smelters, Indonesia aims to increase profit opportunities and create job vacancies in accordance with export and import regulations¹⁴ Nevertheless, the European Union ultimately criticized this

¹⁴ Yehez Kiel, "GUGATAN EU DI WTO TERKAIT KASUS EKSPOR BIJIH NIKEL INDONESIA EU LAW AT WTO REGARDING EXPORT CASE INDONESIAN NICKEL ORE," https://www.researchgate.net/publication/357058015_GUGATAN_EU_DI_WTO_TERKAIT_KASUS_EKSPOR_BIJIH_NIKEL_INDONESIA_EU_LAW_AT_WTO_REGARDING_EXPORT_CASE_INDONESIAN_NICKEL_ORE, n.d.

strategy, leading to a WTO case. The limitations outlined in Article XI of the WTO: I GATT, or the General Agreement on Tariffs and Trade Since the General Agreement on Tariffs and Trades (GATT) contains provisions governing the protection of a nation's interests in order to safeguard its resources, including export activities, there is actually a legal conflict with these provisions. This is the reason why Indonesia.

Only nickel with a grade of less than 1.7% after refining up to 70% in domestic smelters may be exported by production operations activities, according to laws for holders of Mining Business Permits (IUPs). Additionally, until we meet our local needs, we must initially market the smelted products domestically. All of these requirements must be met in order to obtain a recommendation from the Minister of Energy and Mineral Resources. According to Minister of Trade Regulation No. 1 of 2017 about Provisions for the Export of Processed and Refined Mining Products, which reflects Indonesia's downstream nickel mining policy, exporting must comply with this suggestion.

Indonesia has implemented the mandate of the constitution in the form of all efforts and regulations to utilise natural wealth and national natural resources for the benefit of all Indonesian people. However, this sparked criticism and demands from the European Union, which felt disadvantaged by the Indonesian government's regulations. The European Union, as an industrial country, finds it difficult to obtain supplies of nickel raw materials if Indonesia, through the mineral and coal law, has closed access to exports of nickel raw materials, considering that Indonesia is currently the largest nickel supplier country. The European Union filed the lawsuit and received a final verdict in its favor. However, this lawsuit does not deter the Indonesian government, as it consistently makes appeals to maintain justice for all Indonesians who have the right to enjoy national natural wealth.

The fact that the constitution, which is the highest law of the Indonesian state, mandates the policy of banning the export of nickel raw

materials is one of the many attempts and defenses that Indonesia may raise in this case. In addition, the WTO's laws establish a connection between trade liberalization and other social values and interests. These regulations take the shape of extremely expansive deviations from the WTO's core competencies. These exceptions allow WTO members to enact and enforce policies and procedures to protect values and other important social interests in specific circumstances. In this case, the exception pertains to Indonesia's ability to take exceptional actions to uphold these values. The WTO's values and regulations serve social interests by enhancing the community's economy.

The European Union bases its lawsuit on this exception. Apart from that, the European Union is questioning the export restrictions on nickel ore with a grade of <1.7% that is not refined to a minimum grade of 70%, the obligation to use domestic smelters, domestic marketing obligations, and the obligation to fulfil domestic needs as actions that are inconsistent with Indonesia's commitment in GATT 1994.

In 1947, the General Agreement on Tariffs and Trade (GATT) gave rise to the WTO as its successor and complement. As an international trade organization, member countries expect the WTO to bridge all their interests in the trade sector. Van den Bossche said that the ultimate goal of the WTO is to increase living standards, achieve a state of full employment (no unemployment), grow in real income and effective demand, and have full production and trade in goods and services. The Indonesian government's implementation of a ban on the export of raw nickel ore has effectively addressed the noble goal of the WTO's establishment, which is to enhance global living standards and eradicate unemployment, particularly among WTO member countries. In this case, Indonesia has aligned itself with the noble values of the WTO, striving to develop a nickel downstream regulation aimed at reducing unemployment, particularly in light of the country's 4.91 percent Open Unemployment Rate (TPT) as of August 2024. In this case, accusations

from the European Union that Indonesia has been inconsistent with WTO rules have been absolutely refuted.¹⁵

The development of domestic industry, especially nickel, brings new hope for Indonesia amidst the world's movement towards green energy and environmentally friendly industry, where Indonesia actually has all the elements needed to create environmentally friendly transportation, namely electricity-based transportation. Among the important elements needed to create electricity-powered transportation are nickel, cobalt, manganese and titanium. According to the Minister of Investment, Bahlil Lahadalia, he revealed that of all the elements needed to make electric transportation, Indonesia has three of them, namely nickel as the main star, cobalt and manganese. So this is a big motivation for Indonesia to consistently advance the nickel industry in particular and the iron industry in general, this is the first step for competitive industrial competition.

In a similar case related to the ban on exports of natural resources involving China and America, China imposed a ban on the export of rare earth elements to several countries, including America, Japan and the European Union. Rare earth metals are basic metal elements that are usually mixed into 200 minerals. Rare earth metals are crucial to the manufacturing of high-tech items including computers, telephones, energy-efficient lighting, medical equipment, transportation, and military defense. There are a number of reasons why the Chinese government has banned the export of rare earth metals, which is comparable to the Indonesian government's ban on the sale of nickel ore. Some of these factors include environmental factors, environmental damage caused by rare earth metal mining in China has been categorized as dirty, dangerous, destructive, this has become a consideration for China to reduce the amount of exports abroad considering that all mining activities have a huge impact on the environment. The next factor is the economic factor, within

¹⁵ "Tingkat Pengangguran Terbuka (TPT) Sebesar 4,91 Persen.," *Badan Pusat Statistik*, 2024.

a period of 20 years rare earth metals had a very low selling value which was detrimental to China, the impact of such low prices made China implement export restrictions to increase the price of rare earth metals again and increase export duties, and the last factor is the political factor where the Chinese state has planned short and long term programs related to the use of rare earth metals. From the factors described above, it can be concluded that basically the factors behind the Chinese government's export ban on rare earth metals are similar to the Indonesian government's ban on nickel ore exports, all of which are trying to advance domestic industry and preserve the environment.

GATT/WTO permits its member nations to continue taking acts that are not in compliance with GATT, according to Article XX GATT 1994. This is specifically stated in letter (g), which contains The conservation of finite natural resources is covered by a clause in letter (g) of Article XX GATT 1994, as long as these actions are taken in tandem with limitations on domestic production or consumption. This clause also covers the preservation of potentially depleting natural resources, so long as these actions are successful when combined with limitations on local production or consumption. The clauses in this paragraph may give Indonesia the power to enforce laws enacted by the government to safeguard the environment and natural resources, such as the ban on the export of nickel ore, a non-renewable resource. But according to GATT 1994's Article XX(g), this policy or action must satisfy three requirements in order to be justified.¹⁶

- a) The preservation of non-renewable natural resources (conservation of exhaustible natural resources) must be the policy goal of this activity; given that nickel is a non-renewable natural resource, Indonesia satisfies this requirement.

¹⁶ Erikson Sihotang and I Nyoman Suandika, "Kebijakan Larangan Ekspor Bijih Nikel Yang Berakibat Gugatan Uni Eropa Di World Trade Organization," *Jurnal Ilmiah Raad Kertha* 6, no. 1 (February 27, 2023): 61–70, <https://doi.org/10.47532/jirk.v6i1.826>.

- b) The action must be related to the policy objectives; and
- c) Such measures must be implemented effectively together with prohibitions on domestic production or consumption.

In proving a case at the WTO, both at the panel and appellate body stages, the principle of *prima facie* case, or very clear proof of all accusations and arguments put forward, is used. In the nickel dispute case, the European Union must present *prima facie* evidence demonstrating Indonesia's inconsistency with its commitment to WTO legal instruments. In a similar case involving China and America in 2013, the WTO Appellate Body imposed a burden of proof on America as the plaintiff to show factual data regarding the decline in exports of materials. According to Article 3.1(b) of the SCM Agreement, the European Union must, of course, also provide the same evidence in support of claims of an unlawful subsidy plan. The European Union must demonstrate that PMK No. 105 of 2016 and PMK No. 76 of 2012 meet the requirements for injuring other WTO members. Despite the fact that the European Union bears a greater burden of proof in this case, Indonesia, as the defendant, must present adequate proof and arguments to disprove claims that its export restrictions on nickel ore are inconsistent with its obligations as a WTO member.¹⁷

Trade relations between the two nations may be impacted by Indonesia's appeals procedure in the nickel ore export restriction case. Citing statistics from the Nickel Institute in 2021, which shows that 10 countries control 77 percent of the world's nickel deposits, with Indonesia contributing 11% of these resources, the Indonesian government might make arguments against the European Union's lawsuit. Indonesia ensures that makers of items based on nickel around the world do not lose raw materials and just need to decrease one production chain by not

¹⁷ MNI, "Menyoal Gugatan Uni Eropa Atas Pembatasan Ekspor Nikel Indonesia," <https://nikel.co.id/2021/02/05/menyoal-gugatan-uni-eropa-atas-pembatasan-ekspor-nikel-indonesia/>, February 5, 2021.

prohibiting the export of processed and refined nickel,¹⁸ not breaking all nickel trade chains.

As demonstrated by its defense at the appeal process, the government is still committed to downstreaming the mining sector business by progressively stopping the export of raw materials for mining goods. The government will immediately stop exporting bauxite raw materials after suspending nickel exports. Stopping the export of nickel raw materials can result in substantial added value for the Indonesian people, according to data from the Central Bureau of Statistics.¹⁹

The downstream policy acts as a form of protectionism against Indonesian nickel in global trade, aiming to boost domestic economic growth. The downstream program aims to maximise the processing of nickel into goods with added value. Apart from that, the downstream program also supports the creation of an ecosystem of world-wide electric vehicle battery production centers in Indonesia. In building a battery and electric vehicle production centre, Indonesia has received several investments from foreign companies, with total investment reaching around USD 25 billion. The impact of this investment will create a workforce of 20 thousand.²⁰

The Indonesian government formally filed its appeal against the European Union on December 8, 2022, but it has not yet established a WTO appeals panel. The continued blockage by the United States, which is demanding complete reform at the WTO, is the reason for the challenges, according to Bara Krishna Hasibuan, the Minister of Trade for International Trade Agreements' special staff. Consequently, the WTO

¹⁸ Sihotang and Suandika, "Kebijakan Larangan Ekspor Bijih Nikel Yang Berakibat Gugatan Uni Eropa Di World Trade Organization."

¹⁹ Ridwan Hardiawan and Andri Sutrisno, "KAJIAN YURIDIS KEKALAHAN PEMERINTAH REPUBLIK INDONESIA ATAS GUGATAN UNI EROPA TERHADAP PENGHENTIAN EKSPOR BIJIH NIKEL PADA SIDANG WTO," *Journal Evidence Of Law* 2, no. 2 (2023): 153–65.

²⁰ Dicky Dwi Radicha and Raden Arya Ambara Wibisana, "Proteksionisme Nikel Indonesia Dalam Perdagangan Dunia ," *Journal of Trade and Development and Studies* 7, no. 1 (2023): 74–84.

Appellate Body is now awaiting the processing of 25 appeal cases, including those from the European Union and Indonesia. According to experts, a new appeals panel will be established in the middle of 2024,²¹ however, until the end of 2024, a WTO appeals panel has not yet been formed.

The Appellate Body, which has been an appeals court for the WTO settlement system since 2019, has been deemed ineffective in settling international disputes by Fabby Tumiwa, Executive Director of the Institute for Essential Services Reform (IESR). This is because the United States is preventing the appointment of new judges and trial judges are vacancies. To fill the existing Appellate Body void, institutional changes are being made, and the two-level adjudication system may be replaced with a one-level adjudication system.

WTO rules stipulate specific criteria for nominating and becoming members of the body, thereby prolonging the process of selecting judges. One could argue that the current state of this trade dispute case represents the status quo²² Currently, the government is focusing on enhancing its domestic downstream program while refraining from engaging in raw material sales activities. Estimates indicate that in 2022, the export value of nickel products from downstream products will reach USD 33.81 billion, or IDR 504.2 trillion. This figure represents a 745% increase from the 2017 export value, with the export value of downstream nickel products expected to reach USD 11 billion, or IDR 165 trillion, in April 2023.²³

Considering that the Appellate Body, as the official WTO institution that handles disputes at the appellate level, is unable to carry

²¹ Setiawan, "Di Luar Dugaan, Begini Alasan WTO Kalahkan RI Dari Uni Eropa."

²² Kurniawati Hasjanah, "Menanti Putusan WTO Usai Indonesia Ajukan Banding Sengketa Dagang Kebijakan Bahan Mentah," <https://iesr.or.id/menanti-putusan-wto-usai-indonesia-ajukan-banding-sengketa-dagang-kebijakan-bahan-mentah>, 2023.

²³ Eri Sutrisno, "Nilai Ekspor Hilirisasi Nikel Melonjak 745%," <https://indonesia.go.id/kategori/editorial/7255/nilai-ekspor-hilirisasi-nikel-melonjak-745?lang=1>, 2023.

out its functions optimally, in this case Indonesia can use other options in resolving the nickel ore export ban dispute through arbitration as regulated in Article 25 of the WTO Dispute Settlement Understanding, where the WTO then provides alternative dispute resolution solutions with the help of a third party as an arbitrator at an international arbitration body.²⁴

The Singapore International Arbitration Centre (SIAC), the International Centre for Settlement of Investment Disputes (ICSID), the United Nations Commission on International Trade Law (UNCITRAL), and the International Chamber of Commerce (ICC) are a few reputable permanent international arbitration organizations that can handle cases from Indonesia and the European Union. Apart from that, Indonesia and the European Union can also form an ad hoc arbitration panel to handle their cases by appointing trusted arbitrators, where the nature of the arbitration award is final and binding. Arbitration serves as a viable option for dispute resolution due to its simplicity, cost-effectiveness, and closed nature, which preserves the confidentiality of the case between both parties. Apart from that, arbitration can also be a win-win solution. The process of resolving disputes by The arbitration process starts with a request for arbitration and the appointment of an arbitrator, which is then followed by the respondent's response, the formation of an arbitrator panel, the arbitration hearing, the presentation of evidence and conclusions, and finally, the issuance of a decision. sia and the European Union can also use bilateral negotiation or mediation as a means of resolving disputes between them; however, negotiation and mediation usually run tough and are not balanced, so arbitration is the most effective solution in handling international disputes.

The right step that Indonesia can take to strengthen its position in efforts to develop domestic downstreaming and international trade is to form more specific regulations regarding international trade, especially

²⁴ Sutrisno Nandang, "3 Langkah Penyelesaian Sengketa Nikel Indonesia Di WTO," Hukum Online, 2024.

trade in agricultural products and non-renewable natural resources. This strengthens the nickel downstream policy and encourages the trading of purified nickel rather than raw nickel ore. Given the absence of specific international trade regulations in Indonesia, the international trade sector currently faces a legal vacuum. In Indonesia, Trade Law No. 7 of 2014 only regulates consumer protection and e-commerce transactions.

Apart from that, Indonesia can also invite the European Union to invest directly in Indonesia's development of the nickel downstream industry; this provides an opportunity for the European Union to benefit from downstream policies. Both natural persons and legal entities engage in investment activities to enhance and preserve their capital, which could include cash, equipment, immovable assets, intellectual property rights, or expertise. Investment involves the withdrawal of resources (funds) for the purchase of capital goods in the present, which in turn facilitates the production of new products in the future.²⁵ Apart from that, Indonesia can also invite the European Union to invest directly in Indonesia's development of the nickel downstream industry; this provides an opportunity for the European Union to benefit from downstream policies. Both natural persons and legal entities engage in investment activities to enhance and preserve their capital, which could include cash, equipment, immovable assets, intellectual property rights, or expertise. Investment involves the withdrawal of resources (funds) for the purchase of capital goods in the present, which in turn facilitates the production of new products in the future.²⁶ Currently, the downstream industry is dominated by investors from China.

Despite the positive impact of Indonesia's massive nickel downstream efforts, it is undeniable that this policy also impacts the

²⁵ Eny Budi Sri Haryani, *HUKUM INVESTASI INDONESIA: Kajian Atas Harmonisasi Hukum Untuk Mendorong Investasi Agar Eksplorasi Dan Eksploitasi Sumberdaya Alam Di Zona Ekonomi Eksklusif Indonesia Optimal Untuk Kesejahteraan Rakyat*, 2023.

²⁶ Muhammad Agung and Emmanuel Ariananto Waluyo Adi, "Peningkatan Investasi Dan Hilirisasi Nikel Di Indonesia," *JISIP (Jurnal Ilmu Sosial Dan Pendidikan)* 6, no. 2 (2022): 4009–20, <https://doi.org/10.58258/jisip.v6i2.3085>.

investment value of downstream nickel production, necessitating significant and costly expenses. In addition, the production of nickel may result in increased greenhouse gas emissions, which could degrade the quality of the air and water. The acquisition of land for the production of nickel and the handling of mining waste can cause damage to biodiversity. To produce one kilogram of immonite nickel laterite using high-pressure acid leaching (HPAL) technology requires approximately more than 1,700 litres of water, both directly and indirectly.²⁷ So thorough study and preparation are needed from all aspects to optimise nickel downstream policies in Indonesia.

People often view mining activities negatively because they believe they harm the environment, particularly when they use the open-pit method. The large and spacious opening holes clearly demonstrate this. These holes have These holes negatively impact the environment by causing land to open up, displacing forests that serve as wildlife habitats, and disrupting the surrounding water resources. ept of environmental management and mine closure has actually been considered since the early stages of exploration. Mine closure planning from the beginning of the exploration stage to its implementation is an integrated activity between operations and management. The International Council on Mining and Metals (ICMM) provided this explanation. Mine closure activities essentially aim to minimize dangers and impacts on safety, social, and environmental aspects. Regarding the environment, we need to address the requirements of the local people and ecology while upholding agreements and restoring degraded ecosystems and land to its natural function. Meanwhile, the security component aims to provide mine workers with long-term means of subsistence.

²⁷ Anisa Dewi Syafira et al., "ANALISIS PELUANG, TANTANGAN, DAN DAMPAK LARANGAN EKSPOR NIKEL TERHADAP PERDAGANGAN INTERNASIONAL DI TENGAH GUGATAN UNI EROPA DI WTO," *JURNAL ECONOMINA* 2, no. 1 (January 14, 2023): 1125–35, <https://doi.org/10.55681/economina.v2i1.258>.

IV. Conclusion

The World Trade Organization (WTO) found no justification in Article XI.2 (a) and XX (d) GATT 1994 and ruled in favor of the European Union in the Indonesian Government's Nickel Ore Export Ban Case, citing the export policy and the duty to process and refine nickel minerals in Indonesia as violations of WTO Article XI.1 GATT 1994. Nonetheless, Indonesia continues to hold that the WTO's establishment was actually intended to promote wealth among its member nations. WTO so that The WTO allows Indonesia, as a member country, to manage its own natural resources, thereby promoting comprehensive prosperity for all Indonesians and reducing domestic unemployment. effort that was officially taken by the Indonesian government was in December 2022 and is currently still waiting for the formation of an Appellate Body or WTO appeals body, which is hampered by the blockade of the United States.

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