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SAFEGUARDING SOVEREIGNTY: INDONESIA'S SOLUTION TO THE RAW MATERIALS CASE IN WTO

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Abstract

Indonesia's export restriction on raw materials was based upon Law No. 4 of 2009 on Mineral and Coal Mining as amended with Law No. 3 of 2020. On 1 January 2020 marks the date nickel was to be the first mineral affected by the raw mineral export ban policy. This measure has sparked a controversy in the international community, as the European Union deemed that this measure is against the principles of the World Trade Organization of nonrestrictive trade policies. This phenomenon was brought to the Dispute Settlement Body of the WTO as DS592 – Indonesia Measures Relating to Raw Materials. Although the Indonesian government has lost the case against the European Union, the Indonesian government is adamant on proceeding with this measure to further develop the downstream industry of raw minerals in Indonesia. Since then, Indonesia has filed the appeal for the panel report of the DS592 case and shows no sign of stopping the nationwide export ban on raw minerals, with bauxite, copper, and tin on the horizon. Therefore, the invocation of Article XXI GATT could be used as a strategy to avoid scrutiny from the international community, by invoking a national security exception to implement measures inconsistent to the principles of the WTO. Thus, the Indonesian government is able to protect and secure their nation's fundamental principal as a sovereign nation with control over its raw materials.

Keywords: *export restriction, raw materials, security exception, WTO*

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I. INTRODUCTION

Indonesia is a country rich with minerals and natural resources. Currently, the world's nickel resources are estimated at 300 million tons. As much as 50% of them are spread in Indonesia, Australia, Brazil, Russia, and the Philippines. Meanwhile, according to the Nickel Institute, Indonesia's nickel reserves amount to 23,7% of world reserves. Since 2013, several countries including Indonesia have started to build a hydrometallurgical industry that processes nickel into batteries for the future needs of the electric car industry. Indonesia also has an electric

car development policy starting in 2019. The push to accelerate the electric car industry is expected to result in an increase in demand for nickel for domestic needs until 2025. Meanwhile, in 2019, the largest export of nickel ore from Indonesia to China was the largest export compared to Europe and other countries. In 2019, the total export was $ 1.097.013.000. Indonesia's nickel exports are aimed at developed countries with an export value of $ 1.721.000.[1]

Among those resources are nickel, bauxite, copper, and tin, which are crucial minerals for sustainable and renewable energy development. As a developing nation, Indonesia is willing to develop their capacity to process these natural resources to increase their value. This activity is called downstream processing. In order to do this, Indonesia needs to have infrastructure such as refinery and smelter to process the ores into a higher quality and purer version of the minerals.[2] The Indonesian government and legislative body have attempted to accommodate this mission by releasing Law No. 4 of 2009 on Mineral and Coal Mining. Article 102 requires holders of the IUP and IUPK license to add the value of the minerals and/or coal during the process of mining, processing and refining, as well as the utilization of minerals and coal. Meanwhile, Article 103 requires the process to be done domestically, while giving the authority to provide further regulation from a Government Regulation, namely the Government Regulation No. 23 of 2010 on Implementation of Mineral and Coal Mining Business Activities. Indonesian mining companies pursuant to Article 170 of Law No. 4 of 2009 on Oil and Gas Mining were given five years after the law was enacted to prepare for the domestic processing of raw minerals. [3]

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[1] Elisa Sugito, *Nikel Indonesia: Kunci Perdagangan Internasional* [*Indonesian Nickel: The Key of International Trade*] (Jakarta: Kompas Gramedia, 2023), 26-27.

[2] Defri Werdiono, Cyprianus Anto Saptowalyono, Agnes Theodora, "Smelter Development Strengthens Downstream Industry, " *Kompas Online*, 13 October 2021, accessed from 1 May 2023, https://www.kompas.id/baca/english/2021/10/13/smelter-development-strengthens-downstream-industry/.

[3] Yetty Komalasari Dewi and Mikaila Jessy Azzahra, "Re-examining Indonesia's Nickel Export Ban: Does it Violate the Prohibition to Quantitative Restriction?" *Padjadjaran Journal of International Law* 6, no. 2, (2022): 184, DOI: https://10.23920/pjil.v6i2.797.

Five years after the law was enacted, Indonesia prohibited the export of raw nickel ores.[4] This restriction, however, only lasted until 2017 as the downstream processing infrastructure and capacity of the natural resources industry was not ready to process the ores domestically.[5] Indonesia did not have enough smelters and refineries to process all the supply of raw minerals and transform it to make it to a purer form. Consequently, Indonesia had to export the natural resources in its raw form to other countries.

This paradigm shifted in 2019 when Indonesia decided that it was ready to develop the downstream processing industry starting with nickel. By 2019, Indonesia had 27 smelters of different minerals, with the majority being specialized for nickel.[6] Moreover, Indonesia was in the process of amending Law No. 4 of 2009 through their National Legislative Program, with the goal of 2020 being the target of release. Indonesia has also enacted Ministerial Regulation of Energy and Mineral Resources No. 25 of 2018 on Mineral and Coal Mining Business, which provides further regulation on raw mineral exports that are in line with Law No. 4 of 2009. With nickel being ready for downstream processing, Indonesia then enacted Ministerial Regulation of Energy and Mineral Resources No. 11 of 2019, which amends Ministerial Regulation of Energy and Mineral Resources No. 25 of 2018. This regulation rules that the exportation of raw nickel ores (nickel with the purity of less than 1,7%) may only be done until 31 December 2019. Consequently, by 1 January 2020, the exportation of raw nickel ore was then prohibited.

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[4] Sacha Winzeried and Fandy Adhitya, "Export Ban on Unprocessed Minerals Effective 12 January 2014 – Three Year Reprieve for Some, but Uncertainty Remains," PwC Indonesia, accessed 1 May 2023 from https://www.pwc.com/id/en/publications/assets/eumpublications/newsflash/2014/eumnewsflash-50.pdf.

[5] Isabelle Huber, "Indonesia's Nickel Industrial Strategy," Center for Strategic & International Studies, 8 December 21, accessed 1 May 2023 from https://www.csis.org/analysis/indonesias-nickel-industrial-strategy.

[6] "Pembangunan Smelter Capai 27 Buah, Smelter Nikel Terbanyak [Smelter Construction Reaches 27, Most Nickel Smelters]," Press Release from Minister of Energy and Mineral Resources, 11 February 2019, accessed 1 May 2023 from https://www.esdm.go.id/id/media-center/news-archives/pembangunan-smelter-capai-27-buah-smelter-nikel-tempati-urutan-pertama.

This collective investment is also in order to encourage many new inventions that contribute to cross border states.[7]

This regulation made a global impact to the nickel industry, as Indonesia was the leading exporter in nickel with 800.000 tons out of 2,67 million tons of nickel produced worldwide.[8] With the regulation in place, countries that were heavily reliant on nickel exports from Indonesia now find themselves in an unfavorable situation. One party that was heavily impacted by this was the European Union. The export restriction led to the increase in price of raw nickel ore in the European Union which heavily impacted their stainless-steel industry, as nickel is the primary ingredient for the manufacturing of stainless steel.[9] The European Union responded this action by filing a complaint to the WTO, requesting consultations with Indonesia, and subsequently the formation of a dispute settlement panel. This case, titled *DS592: Indonesia – Measures Relating to Raw Materials*, found Indonesia to have committed WTO inconsistent measures for the GATT 1994 and recommended Indonesia to conform with its obligations under the GATT.[10] The WTO of course pushes the rules of GATT and is in favour of trade liberalization.[11] This stems from the goal of the WTO itself, which is to reduce trade barriers.[12] Indonesia has since then requested

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[7] Muhammad Reza Syariffudin Zaki and Muhammad Farhan Akmal, "Covid-19 Vaccine Legal Protection Through Patent for Public Interest," *Transnational Business Law Universitas Padjadjaran* 2, no. 1 (2021): 52, https://doi.org/10.23920/transbuslj.v2i1.694.

[8] "Hilirisasi Nikel Ciptakan Nilai Tambah dan Daya Tahan Ekonomi [Nickel Downstreaming Creates Added Value and Economic Development]," Minister of Energy and Mineral Resources, accessed 1 May 2023 from https://www.esdm.go.id/id/media-center/arsip-berita/hilirisasi-nikel-ciptakan-nilai-tambah-dan-daya-tahan-ekonomi#:~:text=Berdasarkan%20pemetaan%20Badan%20Geologi%20pada,dan%20terikira%20986%20juta%20ton.

[9] Wilda Asmarini and Bernadette Christina, "Global nickel supply to drop on Indonesia's ore export ban in 2020," *Reuters*, 2 September 2019, accessed 28 April 2023 from https://www.reuters.com/article/indonesia-mining-idINKCN1VN118.

[10] Panel Report, *Indonesia — Measures Relating to Raw Materials*, WTO Doc. WT/DS592/7.

[11] Muhammad Reza Syariffudin Zaki & Abdul Rasyid, *Hukum Pariwisata Syariah di ASEAN* [*Rules for Sharia Tourism in ASEAN*], Jakarta: Prenadamedia, 2021), 97.

[12] Muhammad Reza Syariffudin Zaki, Mursal Maulana, Prita Amalia, and Ardiansyah, *Pengantar Hukum Transaksi Bisnis Transnasional* [*Introduction of Transnational*

for an appeal to the case. In their defense, Indonesia has used Article XX of the GATT to justify their measures. However, this article will discuss the usage of Article XXI to justify the forced export restrictions of raw minerals, specifically nickel. Since WTO is a legally binding international trade organization, it is therefore detrimental for Indonesia to formulate the best defense during the appeals stage.[13] Legally, the State has "sovereignty" over natural resources located in its jurisdiction. This sovereignty brings logical and juridical consequences for the State as the holder of supreme sovereignty over any activities and/or environmental management activities.[14] The things contained in the GATT give every member state the obligation to protect themselves in every activity, and the policies for international trade.[15]

This article will be divided into two sub-chapters. First, Indonesia's reasoning behind the forced export restrictions will be explained and analyzed by the author. Second, the invocation of Article XXI of the GATT itself along with the reasoning why the article is used will be thoroughly elaborated.

Before proceeding to the article, it is important to establish existing research and theories on this matter. Sovereignty is a delicate concept in a post-WTO era. According to Jean Bodin, sovereignty is the supreme power vested in the people and the State without limitations from any laws.[16] That is to say, the characteristics of state sovereignty are singular, original, eternal, and indivisible.[17] It means that in a society, the state possesses the highest authority and is not positioned under any

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Business Transaction Law], Bandung: Penerbit Refika, 2022), 58.

[13] Reza Zaki, *Pemikiran Hukum, Politik, dan Ekonomi Internasional* [*Law, Politics, and International Economy*] Surabaya: Pustaka SAGA, 2020), 9.

[14] Zevia Gustira and Retno Kusniati, "Pengaturan Aspek Lingkungan Hidup dalam Perdagangan Internasional Berdasarkan GATT-WTO [Environmental Protection on International Trade Based on GATT-WTO]," *Uti Possidetis: Journal of International Law* 1, no. 2 (2020): 228, https://doi.org/10.22437/up.v1i2.10717.

[15] Idha Mutiara Sari, "Dispute Settlement of Anti-Dumping Legal Aspect In Indonesia Based On GATT/WTO Provisions (Allegations Case Study Of Dumping Wood Free Copy Paper Between South Korea And Indonesia)," *Lampung Journal of International Law* 2, no. 2 (2020): 89, https://doi.org/10.25041/lajil.v2i2.2034.

[16] M. Laica Marzuki, "Konstitusi dan Konstitusionalisme [Constitution and Constitutionalism]," *Jurnal Konstitusi* 7, no. 4 (2010): 2, DOI: 10.31078/jk741.

[17] *Ibid.*

government or non-government body. The state therefore possesses a substantial monopoly of power as the highest authority in a state.[18] With this perspective, consequently the state also possesses the right not to be intervened by any other party. This understanding of sovereignty is called Westphalian sovereignty.[19]

However, the concept of Westphalian sovereignty was introduced before the era of international organizations and agreements such as the WTO. The understanding of sovereignty after the era of international agreements and organization is called Interdependence sovereignty. It means that although states possesses the highest power to make domestic decisions, said decisions are influenced by external factors.[20] This understanding of sovereignty assesses not just based on power, but also on authority. For instance, states that submit themselves to the international legal regime and bind themselves to such regime, such as through international agreements, theoretically relinquish a portion of their sovereignty to make sovereign decisions.[21]

Consequently, states that are members of the WTO have relinquished a portion of their sovereignty to make sovereign decisions on the matters of international trade. However, it is in our position that there needs to be a balance between safeguarding a state's sovereignty and national interest, as well as adhering to the rules on trade liberalization.

Indonesia is one of many states that sees a separation between domestic law and international law in its legal system.[22] This is in line with the horizontal theory of international law by Jeremy Bentham, which sees domestic/municipal law and international law as two distinct

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[18] Muhammad Bahrul Ulum, "Sovereignty and Legal Personality: A Lesson from European Union Evolution to Supranationalism," *Lampung Journal of International Law* 4, no. 1 (2022): 30, DOI: 10.25041/lajil.v4i1.2517.

[19] Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* (Princeton:Princeton University Press, 1999), 3-4.

[20] *Ibid.*

[21] Andrew Emmerson, "Conceptualizing security exceptions: Legal doctrine or political excuse?" *Journal of International Economic Law* 11, no. 1 (2008): 138, DOI: 10.1093/jiel/jgm046.

[22] Ary Aprianto, "Relevansi Monisme dan Dualisme Bagi Pemberlakuan Perjanjian Internasional di Indonesia [Monism and Dualism on Treaties Implementation in Indonesia," *Jurnal Konstitusi* 19, no. 3 (2022): 582.

legal systems.[23] In its application, international law must be implemented first before it goes into effect, which suggests that it is not one and the same as domestic law. This perspective of the law sees both domestic law and international law as two independent form of law that works in tandem with each other. The same way as it works in tandem with each other, it is also possible for international law and national law to conflict each other.[24] In a national forum, the constitutional law of a state would prevail in a conflict with international law.[25]

However, many international adjudicatory bodies claim that international law precedes all national law including the domestic constitution.[26] With this in mind, such claims of international law having supremacy over domestic constitutional law has been rejected by many constitutional actors.[27] As a state that adopts the dualist perspective in its implementation of the legal system, Indonesia's legal system positions the 1945 constitution as the highest source of law in the hierarchy of laws including international law. Consequently, the 1945 constitution will precede any WTO rules should the two conflict with each other.

This perspective follows the Rule of Law doctrine as propagated by A.V. Dicey. He believes that no man is above the law, including government officials.[28] It suggests that the government is simply bound by the law, in this case, the constitution and to adhere by the provisions found in the constitution. The theory promotes constitutional supremacy, which in our belief should apply to Indonesia's Raw Materials case. Although Indonesia has relinquished a portion of their sovereignty by being a part of the WTO, it should not affect the implementation of the 1945 constitution as the highest source of law in Indonesia.

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[23] Jonathan Turley, "Dualistic Values in the Age of International Legisprudence," *Hastings Law Journal* 44, no. 2, (1993):195.
[24] Rett R. Ludwikowski, "Supreme Law or Basic Law? The Decline of the Concept of Constitutional Supremacy," *Cardozo Journal of International & Comparative Law* 9, (2001): 268.
[25] *Ibid*.
[26] Anne Peters, "Supremacy Lost: International Law Meets Domestic Constitutional Law," *ICL Journal* 3, no. 3, (2009): 183, DOI: 10.1515/icl-2009-0306.
[27] *Ibid.*, 171.
[28] A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, (Indiana: Liberty Classics, 1982), 114.

Any implementation of the constitution, however, does not relieve Indonesia from their obligations as a member state of the WTO.[29] This obligation is still enforceable despite the dualist perspective as the WTO and its subsequent rules has been ratified to the Indonesian legal system. That is wh Indonesia is still bound to adhere to the provisions of the GATT 1994 in the context of their forced export restrictions policy. Consequently, that is also the reason why Article XXI of the GATT 1994 will be the proposed article to be used in defense of the allegations by the European Union. Lastly, Indonesia must take the appellate process with a prudent approach, as the WTO through its DSM has been known to classify discriminatory measures that are done out of national interest as 'arbitrary or unjustified discrimination'.[30] This outlook on said measures will negatively impact the appellate body's final decision on the current case. Thus, Indonesia must be able to prove its legal standing behind the forced export restrictions of nickel as the decision of the appellate body is binding in character.[31]

A. INDONESIA'S REASONS FOR THE FORCED EXPORT RESTRICTIONS OF RAW MATERIALS

Before the reformation era, Indonesia was not optimally managing their supply of raw minerals. During the Soeharto regime, the government was opening their doors to foreign investors to invest in Indonesia through Law No. 1 of 1967 on Foreign Investments. By opening doors to foreign investors, Indonesia would get positive benefits for the economy, among others through increasing the value of trade in goods.[32] Freeport was one of the investors that invested in Indonesia to obtain the rights to mine the raw minerals in the Grasberg mine in Papua through their

[29] Ludwikowski, "Supreme Law or Basic Law?" 268.
[30] I Gusti Ngurah Parikesit Widiatedja, "The Supremacy of the Dispute Settlement Mechanism (DSM) under the World Trade Organization (WTO)," *Brawijaya Law Journal* 6, no. 1 (2019): 68.
[31] Triyana Yohanes, Adi Sulistiyono, M. Hawin, "Legally Binding of the World Trade Organization Dispute Settlement Body Decision," *Hasanuddin Law Review* 3, no. 2 (2017): 161.
[32] Muhammad Reza Syariffudin Zaki, *Pengantar Ilmu Hukum dan Aspek Hukum dalam Ekonomi* [*Introduction to Legal Studies and Legal Aspect on Economic*] (Jakarta: Penerbit Prenadamedia, 2022), 202.

contract of work for the period of 1967-1991.[33] It must be noted that the Grasberg mine is ranked third in the world as the largest gold mine in the world by production.[34] Indonesia's share of the profits of Freeport's mining operation in Indonesia is a pittance compared to the wealth Freeport was extracting. With only 9,36 percent stake of PT Freeport Indonesia, Indonesia was making only a fraction of Freeport's profits for 50 years.[35] This contract of work was initially effective for 30 years and was extended and expanded in 1991 to be effective until 2021. The reformation era adopts a different approach to Soeharto's regime when it comes to mining regulations. The Indonesian government does not want to repeat the mistake that Soeharto made with Freeport, essentially allowing Indonesia to be colonized again by foreign actors. In line with this perspective, the law and regulations enacted by Indonesia in the mining industry adopts a more nationalistic perspective, as seen from Law No. 4 of 2009, and Government Regulation No. 23 of 2010 as the starting law and regulation that adopts this perspective. Those law and regulation have now since been amended with Law No. 3 of 2020 being the first amendment to Law No. 4 of 2009, and Government Regulation No. 96 of 2021 being the fifth amendment to Government Regulation No. 23 of 2010.

The example of nationalistic policies of these laws and regulation can be seen in the new mining license, which are IUP and IUPK, or Mining Business License and Special Mining Business License. These licenses are stricter and favors the Indonesian government more than the old contract of work that was used before the new mining law in 2009. The Indonesian government has also forced companies that were using the old contract of work to switch to the Special Mining Business License to standardize the treatment of mining companies in Indonesia.

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[33] Khamami Zada, M. Mustolih, Muhammad Maksum, & Atep Abdurofiq, "State Sovereignty in Freeport Contract of Work Renegotiation," Proceedings of The 1st International Conference on Recent Innovations (ICRI 2018), 995.

[34] Niccolo Conte, "Mapped: The 10 Largest Gold Mines in the World, by Production," Visual Capitalist, 19 May 2023, accessed 1 August 2023 from https://www.visualcapitalist.com/mapped-the-10-largest-gold-mines-in-the-world-by-production/.

[35] Stefanno Reinard Sulaiman,"A guide to understanding the Freeport divestment deal," *Jakarta Post*, 16 July 2018, accessed 26 April 2023 from https://www.thejakartapost.com/news/2018/07/13/a-guide-to-understanding-the-freeport-divestment-deal.html.

During the reformation era, the Indonesian government has successfully become the majority shareholder of PT Freeport Indonesia in a divestment scheme in 2018.[36] This move marks the end of Indonesia not having full sovereignty over its own natural resources. Therefore, the Indonesian government and its people have now adopted a more sovereign perspective to the management of their own national resources such as raw minerals given their historic background with unfair contract of work agreements and the willingness of the reformation era government to prevent what happened with Freeport from happening again.

With this newfound sovereignty over its own natural resources, Indonesia has prepared both regulatory and physical infrastructure for the development of the downstream processing industry. This nationalistic attitude towards the management of natural resources is not without its legal basis, however. Indonesia's shift to manage its own natural resources is based on Indonesia's own constitution, the 1945 constitution. Article 33 paragraph 3 of the constitution stipulates that:

> Earth, water and natural resources contained therein is controlled by the State and used for the people's welfare.

Article 33 paragraph 3 of the 1945 constitution adopts a Utilitarian point of view in managing the nation's natural resources. The Government of Indonesia is mandated by the 1945 constitution to manage the natural resources of the nation in a way that is for the greatest good for the greatest number of people. The measure done by the Government of Indonesia is conformable to the principles of utility as elaborated by Jeremy Bentham, which stated that:

> A measure of government (which is but a particular kind of action, performed by a particular person or persons) may be said to be conformable to or dictated by the principle of utility, when in like manner the tendency which it has to augment the happiness of the community is greater than any which it has to diminish it.[37]

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[36] "Freeport's divestment deal worth $3.8 billion," *Jakarta Post*, 13 July 2018, accessed 26 April 2023, https://www.thejakartapost.com/news/2018/07/13/freeports-divestment-deal-worth-3-8-billion.html.

[37] Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*

By restricting the export of unprocessed nickel and further developing the downstream processing industry, the Government of Indonesia is maximizing the happiness of the Indonesian people.

With the constitution as their legal grounds, the government of Indonesia has decided that they will develop their own natural resources and stop exporting raw minerals to other countries. This manner of export restriction has been shown by Constitutional Court Decision No. 10/PUU-XII/2014 to be justified as long as the goal is to increase the value of the products.[38] Since the export restriction in 2020, Indonesia has companies committing to 30 billion US Dollar in investments from Chinese companies to develop their physical infrastructure such as smelters and refineries.[39] By developing and adding value to their own natural resources, Indonesia has forecasted that the 2022 export of processed nickel will rise to 27 US Dollar to 30 billion US Dollar, or an 809% increase compared to 2017-2018 export values pre-export restriction.[40] By developing the downstream processing industry for nickel, Indonesia is also preparing itself for their net zero emission plan. The export restriction of nickel provides support for Indonesia, in the development of a domestic integrated battery and electric vehicle supply chain.[41] This is apparent when Indonesia has attracted the likes of BYD Group, Tesla, and Hyundai to invest in Indonesia's battery and EV market.[42]

(Pennsylvania: Hafner Publishing Company, 1781), 15.

[38] Muhammad Siddiq Armia, "The Role of Indonesian In Protecting Energy Security,"*Jurnal Konstitusi* 13, no. 2 (2016): 246.

[39] International Energy Egency, *An Energy Sector Roadmap to Net Zero Emissions in Indonesia*, Report, 2022, 173, availaible at https://www.iea.org/reports/an-energy-sector-roadmap-to-net-zero-emissions-in-indonesia.

[40] Verda Nano Setiawan, "Gak Tanggung Tanggung, Nilai Ekspor Nikel RI Melejit 809% [Indonesia's Nickel Exports Value has Skyrocketed by 809%]" *CNBC Indonesia*, 11 November 2022, accessed 28 April 2023, https://www.cnbcindonesia.com/news/20221111160839-4-387174/gak-tanggung-tanggung-nilai-ekspor-nikel-ri-melejit-809.

[41] Isabelle Huber, "Indonesia's Battery Industrial Strategy," Center for Strategic & International Studies, 4 February 2022, accessed 28 April 2023, https://www.csis.org/analysis/indonesias-battery-industrial-strategy.

[42] "Indonesia close to EV deals with BYD Group and Tesla," *Reuters*, 17 January 2023, accessed 28 April 2023, https://www.reuters.com/business/autos-transportation/indonesia-close-ev-deals-with-byd-group-tesla-minister-2023-01-17.

B. INDONESIA'S ATTEMPTS OF FORCED EXPORT RESTRICTIONS

As a member of the WTO, Indonesia has decided to forgo a portion of its national sovereignty to participate in a multilateral trading system consisting of many different nations around the world. Indonesia has shown this from the ratification of WTO Law itself through Law No. 7 of 1994. Indonesia has compliance with all GATT provisions in the WTO.[43] Consequently, there are certain rules and regulations set by the WTO that was agreed upon by its member states to be a part of its obligations. The basic rules of the WTO that make up for its foundation are:[44]

- Rules of non-discrimination.
- Rules on market access.
- Rules on unfair trade.
- Rules on the balance between trade liberalization and other societal values and interests.
- Institutional and procedural rules, including those relating to WTO decision-making, trade policy review and dispute settlement.

When talking about forced export restrictions, the rule that is in question are the rules on market access, specifically on rules on quantitative restrictions. The WTO law, which includes GATT 1994 and other multilateral agreements has specific rules on quantitative restrictions. Rules regarding the general prohibition of quantitative restrictions can be found in Article XI:1 of the GATT 1994. There, it is stated that:

> No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or

[43] Muhammad Reza Syariffudin Zaki, Winner Jhonshon, Paramita Glorya Pasaribu, et. al., *Hukum Investasi, Multimoda, dan Perdagangan Internasional di Era Pandemi Covid-19* [*Investment Law, Multimodal and International Trade in Covid-19 Pandemic*] (Jakarta: Publica Indonesia Utama, 2022), 215.
[44] Peter van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization*, Fifth Edition (New York: Cambridge University Press, 2022), 173.

other measures, shall be instituted or maintained by any [Member] on the importation of any product of the territory of any other [Member] or on the exportation or sale for export of any product destined for the territory of any other [Member].

Although broad in nature, Article XI:1 of the GATT applies to forced export restrictions as part of the general elimination of quantitative restrictions.[45]

Members are obligated to follow these rules as they have signed and ratified these multilateral agreements. Therefore, it is a fact that Indonesia's measures of prohibiting the export of raw nickel ore are not consistent with WTO rules. During the DS592 case, Indonesia has attempted to use Article XI:2(a) of the GATT in defense of the European Union's complaints. Article XI:2(a) states that the elimination of quantitative restrictions shall not extend to export restrictions that are temporarily applied to prevent a critical shortage of products that are essential to the contracting party.[46] However, the panel has concluded that Indonesia has yet to demonstrate how the restriction of nickel exports were done to prevent a critical shortage of products that are essential to the contracting party pursuant to Article XI:2(a), which was the defense Indonesia resorted to during the panel.

Alternatively, Indonesia used Article XX (d) as an alternative defense if the measure was deemed not consistent with Article XI:2(a). Article XX (d) states that the measures that are necessary to secure compliance with laws or regulations that are not inconsistent with the provisions of the GATT is excluded from the obligations of WTO members.[47] However, the panel has concluded that Indonesia has failed to demonstrate that the measures were necessary within the meaning of subparagraph (d).[48] Consequently, Indonesia's measures were found to be inconsistent with Article XI:1 of the GATT as part of WTO law. In light of this, the panel then recommends the Indonesian government

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[45] *Ibid.*, 506.

[46] General Agreement on Tariffs and Trade, opened for signature on 15 April 1994, 1867 UNTS 190 (entered into force 1 January 1948), Art. XI:2(a).

[47] General Agreement on Tariffs and Trade, art. XX(d).

[48] WTO, *Indonesia — Measures Relating to Raw Materials*.

to adjust its measures to conform with its obligations under the GATT 1994.[49]

C. THE USE OF ARTICLE XXI GATT TO JUSTIFY FORCED EXPORT RESTRICTION

As of writing this paper, Indonesia has successfully submitted an appeal against the report formed by the panel on the DS592 case.[50] Indonesia should approach this appeal differently, as general exceptions using Article XX did not work in Indonesia's favor. Indonesia is in a strategic spot to use Article XXI of the GATT in defense of their raw materials export restriction.

Article XXI of the GATT provides the rules on security exceptions. Article XXI of the GATT states that:

> Nothing in this Agreement shall be construed:
>
> (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or
> (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests
> i. relating to fissionable materials or the materials from which they are derived;
> ii. relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
> iii. taken in time of war or other emergency in international relations; or
> (c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.[51]

This article received no changes from its inception in the old iteration of GATT in 1947. The drafters of this article made this article

[49] *Ibid.*
[50] *Ibid.*
[51] General Agreement on Tariffs and Trade, art. XXI.

to balance international trade with sovereignty.[52] It is a fact that in Article XXI, Article XXI (b), specifically Article XXI (b) (iii) has seen the most use out of the other subparagraphs.[53] The Article itself does not give clarity on the meaning of certain terms, such as 'considers necessary', 'essential security interests', 'time of war', and 'emergency in international relations'. The ambiguity of this article gives a wide array of authority to any state that intends to use this article. The phrase 'considers necessary' has been interpreted by scholars such as Alford that the use of Article XXI relies on a self-judging principle by member states.[54] Self-judging means that it is the authority of the state to decide whether a circumstance or a situation warrants the use of this article.

Using this article, a country that is doing measures that are inconsistent with the agreements of the WTO will not be stopped by any countries or organizations if the state decides that the measure is crucial in preserving or protecting the national security of the state.[55] It may seem that the self-judging nature of this article is a vulnerability where states may use this article to circumvent obligations as a member of the WTO to its rules. However, the self-judging nature was designed that way by the drafters to allow a degree of discretion for each member states.[56] Some countries such as the United States of America believes that the use of Article XXI is non-justiciable and that a country may use the article as an exception for a WTO inconsistent measure, however this is not a perspective that most member states share.[57]

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[52] Chao Wang, "Invocation of National Security Exceptions under GATT Article XXI: Jurisdiction to Review and Standard of Review," *Chinese Journal of International Law* 18, no. 3 (2019): 697, DOI:10.1093/chinesejil/jmz029.

[53] Van den Bossche and Zdouc, *The Law and Policy of the World Trade Organization*, 1664.

[54] Roger P. Alford, "The Self-Judging WTO Security Exception," *Utah Law Review* (2011): 697.

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

[56] Raj Bhala, "National Security and International Trade Law: What the GATT Says, and What the US Does," *University of Pennsylvania Journal of International Economic Law* 19, no. 2 (1998): 269.

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

Historically, during one of the first panel reports of the GATT in the US – Export Restrictions case of 1949, it was stated that:

> Every country must be the judge in the last resort on questions relating to its own security. On the other hand, the Contracting Parties should be cautious not to take any step which might have the effect of undermining the General Agreement.[58]

Based on the self-judging principle, a country is allowed to determine whether a circumstance has fulfilled the threshold of protecting essential security interests. That term may mean economic security and food security, other than the usual idea of national security as military security.[59]

However, international practice has shown that tribunals have found themselves competent to provide ruling on determining security interests. It must be noted that despite its discretionary wording, Article XXI was intended to be interpreted by an independent tribunal in its final decision, and not by the country invoking the article.[60]

The self-judging principle of Article XXI comes with one prerequisite, that it must be used by states in good-faith.[61] This prerequisite was established in the case of *DS512: Russia – Measures Relating to Traffic in Transit*.

D. PANEL RULING ON THE USE OF ARTICLE XXI (DS512 CASE)

The GATT dispute resolution system is generally regarded as the cornerstone of the multilateral trade legal system.[62] The DS512 case was

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[58] Panel Report, *United States — Measures Treating Export Restraints as Subsidies*, WTO Doc. WT/DS194/4.

[59] Daria Boklan & Amrita Bahri, "The First WTO's Ruling on National Security Exception: Balancing Interests or Opening Pandora's Box?," *World Trade Review* 19, no. 1 (2020): 124.

[60] Gabriela Feret, "Invocation of the Gatt Security Exception after the Russia – Traffic in Transit Case," *Acta Iuridica Resoviensia* 35, no. 4 (2021): 39.

[61] Panel Report, *Russia - Measures Concerning Traffic in Transit*, WTO Doc. WT/DS512/7, para. 7.132.

[62] Muhammad Reza Syariffudin Zaki, *Hukum Perdagangan Internasional* [*International Trade Law*] (Jakarta: Penerbit Prenadamedia, 2021), 48.

the first time the use of Article XXI was ever given any ruling by a WTO panel. It created objective standards to be met when using Article XXI as a defense of doing any WTO inconsistent measure.[63] The panel used a two-tier test to determine if the use of Article XXI of a state is justified or not. The two tiers are:

1) are 'taken in time of war or other emergency in international relations'; and
2) are measures 'which [the Member] considers necessary for the protection of its essential security interests"[64]

With regards to the first tier of the test, the panel concluded that an emergency in international relations refers to:[65]

> [A] situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state.

The panel also stated that political or economic differences between members are not sufficient to be used as a reason of using Article XXI. The only reason if those political or economic differences would be sufficient is if they affect defense and military interest, or the maintenance of law and public order interests.[66]

With regards to the second tier of the test, the panel has concluded that essential security may be understood to be:[67]

> Those interests relating to the quintessential functions of the state, namely, the protection of its territory and its population from external threats, and the maintenance of law and public order internally.

The external and internal threats will depend on the state's perception of the situation and may change with different circumstances.[68] The state may provide the reasons to the panel and the panel may decide whether

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[63] I Gusti Ngurah Parikesit Widiateja, "Export Restrictions on COVID-19 V VID-19 Vaccines: What Developing Countries Can Do Under the WTO Law?" *Indonesian Journal of International Law* 19, no. 2 (2022): 281.
[64] Van den Bossche & Zdouc, *The Law and Policy of the World Trade Organization*, 1671.
[65] Russia Traffic in Transit, para. 7.111.
[66] Russia Traffic in Transit, para. 7.75.
[67] Russia Traffic in Transit, para. 7.130.
[68] Russia Traffic in Transit, para. 7.131.

the reasons are sufficient for the use of Article XXI of the GATT. With the objective standards set by the panel in the DS512 case, the use of Article XXI to justify Indonesia's export restraints becomes a potentially concrete strategy in front of the Appellate Body.

The Panel believes that issues of national security are not susceptible to WTO dispute settlement resolutions, and that doing so will undermine the legitimacy of the WTO dispute settlement system.[69] This statement, however, is false as national security concerns can significantly impact the maintenance of law and public order interests.

The panel report on the DS512 case sets out a higher and more objective threshold for a state to use Article XXI of the GATT. It also sets out a non-binding legal precedent that the WTO dispute settlement body and its subsequent panels does have the jurisdiction to review matters relating to the use of Article XXI of the GATT.

E. THE USE OF ARTICLE XXI GATT IN DEFENSE OF INDONESIA'S ACTIONS

Referring to the panel ruling, Article XXI of the GATT has been shown to justify measures that are otherwise inconsistent with the provisions of the WTO. Using the two-tier test provided by the DS512 panel, we can attempt to apply the test used in that case in the DS592 case.

The first tier, which was:

> "(1) are 'taken in time of war or other emergency in international relations" can be elaborated and interpreted as "[A] situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state."[70]

In Indonesia's case, although there is no active nor latent armed conflict, heightened tension or crisis, there is a potential for general instability in Indonesia should the measure was not taken.

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[69] Voon, "The security exception in WTO law," 47.
[70] *Ibid.*

The determination of this tier, however, is not up to the sole discretion of Indonesia, but is subject to an objective determination by a panel.[71] The panel must find the situation to meet the objective standards to pass the first tier of this test.

Referring to Indonesia's situation, Indonesia is a sovereign country with nationalistic tendencies which reflects upon its people. They have a long history of not having sovereignty over their country's own natural resources during the Dutch East Indies colonization up until their independence in 1945. This sentiment was realized in Indonesia's constitution, in the previously mentioned Article 33 paragraph 3 of the 1945 constitution to ensure that Indonesia has total sovereignty over its resources.

Even with the article, Indonesia's history with their national resources was worsened during Soeharto's regime when foreign investment policies allowed investors and irresponsible government officials to siphon resources for their personal economic benefit and not for the prosperity of the state and its people as previously elaborated above.

All of these factors simply explain that the people of Indonesia will not take kindly to the forced exportation of nickel and other scarce natural resources. The 1945 constitution is Indonesia's highest tier of source of law. The measure of forcibly restricting export of raw materials is aligned with Article 33 paragraph 3 of the 1945 constitution. If the Government of Indonesia believes that the forced export restriction will be the optimal way to manage the natural resources for the prosperity of the people, then Indonesia by their constitution has a right to implement that measure.

It must be noted that the scarce natural resources in Indonesia, such as nickel, is deemed scarce due to the limited aspect of the available reserves in Indonesia. Before the context of the forced export restriction, the Ministry of Energy and Mineral Resources has stated that Indonesia's current nickel reserves may only last for 10 years without any further exploration of new reserves.[72] This suggests that Indonesia

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[71] Van den Bossche & Zdouc, *The Law and Policy of the World Trade Organization*, 2008.

[72] "ESDM Taksir Cadangan Nikel RI Hanya Tahan 10 Tahun Lagi [Ministry of

is constrained by time to optimally utilize the nickel reserves in the near future.

In 2015, the data on raw nickel exports saw the value being 31 trillion rupiah. This number is comparatively minuscule compared to the latest data on processed nickel exports being 510 trillion rupiah.[73] The increase in export value meant that the Indonesian government receives more income tax, value added tax, as well as royalties from non-tax state income. Should the government kept exporting nickel in its unaltered form, Indonesia would lose that increased value in state revenue from said taxes and royalties. Therefore, considering Indonesia's current reserves, it is in Indonesia's best interest to maximize the profits of nickel exports by processing the nickel through the downstream industry before exporting them. This argument is aligned with Article 33 paragraph 3 of the 1945 constitution, as it is the Government's obligation to manage the natural resources of Indonesia in a way that maximizes the prosperity of its people.

This also means that revoking said measure will be against the 1945 constitution as it would mean the Government of Indonesia is revoking a measure that was intended for the prosperity of Indonesia and its people. A government revoking a measure such as that increases the likelihood of causing general instability, which may meet the objective criteria of the first tier of the test.

The second tier of the test, namely "(2) are measures 'which [the Member] considers necessary for the protection of its essential security interests".[74] Unlike the first tier of the test, the second tier is not based on objective criteria but rather the judgment of the member country that

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Energy and Mineral Resources Predicts Nickel Stockpile for 10 Years More]," *CNN* Indonesia, 2 October 2019, accessed 26 April 2023, https://www.cnnindonesia.com/ekonomi/20191002185300-85-436200/esdm-taksir-cadangan-nikel-ri-hanya-tahan-10-tahun-lagi.

[73] Emir Yanwardhan, "Setoran Pajak Nikel Bikin Jokowi Kaget: Besar Sekali Angkanya [President Jokowi Got Shocked with Nickel Tax Income," *CNBC Indonesia*, 31 July 2023, accessed 31 July 2023, https://www.cnbcindonesia.com/news/20230731170635-4-458859/setoran-pajak-nikel-bikin-jokowi-kaget-besar-sekali-angkanya.

[74] Van den Bossche & Zdouc, *The Law and Policy of the World Trade Organization*, 2008.

is using Article XXI of the GATT.[75] It means that Indonesia is at the liberty of declaring whether a measure is necessary for the protection of its essential security interests, including what said essential security interests are. However, the provision requires the member country to do it based on good-faith and not to simply circumvent WTO provisions.

Referring to Indonesia's case, said essential security interest was to protect the sovereignty of Indonesia's scarce natural resources from any foreign involvement as well as the potential domestic instability if Indonesia were to allow the export of their scarce natural resources in its raw and unprocessed form. If Indonesia were to claim this, it would have come from good-faith and not just a way to circumvent WTO provisions given Indonesia's history. The Indonesian government could claim that the forced export restriction is based upon two essential security interests, which are to protect Indonesia's scarce natural resources from being exploited by foreign actors, as well as to maintain the stability of public order in Indonesia. Both reasons are to maintain security in Indonesia.

Indonesia's measure is also justified under Indonesia's national legal system. Indonesia has ratified the GATT 1994 through Law No. 7 of 1994 on the Ratification of the Agreement Establishing the World Trade Organization. In Indonesia, ratification of international agreements indicate approval by the House of Representatives. It is a matter of constitutional law and thus the product of ratification follows the hierarchy of rules and regulations in Indonesia.[76] As such, as a Law, Law No. 7 of 1994 is positioned under the UUD 1945 as the Indonesian constitution. In reference to the legal principle of *lex superior derogat legi inferiori,* the superior law must precede the inferior law, which means that in this context, the 1945 constitution takes precedent over Law No. 7 of 1994. The Government of Indonesia therefore has all the legal standing to conduct the forced export restriction to ensure that

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[75] Van den Bossche & Zdouc, *The Law and Policy of the World Trade Organization*, 1991.

[76] Eddy Pratomo and Benny Riyanto, "The Legal Status of Treaty/International Agreement and Ratification in the Indonesian Practice Within the Framework of the Development of the National Legal System," *Journal of Legal, Ethical, and Regulatory Issues* 21, no. 2 (2021): 33.

the constitution of Indonesia is not violated and thus public order is maintained.

Furthermore, Kegel on his work on public order stated that public order is fundamentally what is considered by the system of national law to be 'the untouchable part'. He suggests that these untouchable parts refer to fundamental values and the maintenance of social order. In order to maintain public order, he suggests that any application of the law must not interfere with 'the untouchable part' of the legal system.[77] In reference to that, as WTO provisions are seen as law in Indonesia, any application of such provisions must not interfere with Indonesia's fundamental values and the maintenance of its public order.

Any ruling body in the WTO such as the panel or the Appellate Body must understand that Indonesia values sovereignty over their natural resources as their core foundational principles. It must be understood that the Government of Indonesia did not restrict the export of all nickel, only the raw and unprocessed form of nickel. By doing so, Indonesia is ensuring that they get the most of the value of their natural resources by processing it in a downstream industry, which will then be exported or utilized for domestic use. What the Government of Indonesia doing is following the fundamental value of the 1945 constitution of managing the country's natural resources for the prosperity of the Indonesian population. This means that anything short of that, such as allowing the export of scarce raw materials such as nickel would be against the constitution and potentially disrupt the maintenance of public order in Indonesia.

This stance is aligned with principle number 4 of Lord Bingham's principles on the Rule of Law, which states that:

> "(4) Ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably".[78]

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[77] Bayu Seto Hardjowahono, *Dasar-Dasar Hukum Perdata Internasional Buku Kesatu* [*Introduction to International Private Law*: *First Book*] (Bandung: Citra Aditya Bakti., 2006), 123.

[78] Tom Bingham, *The Rule of Law* (London:Penguin Books, 2011), 56.

Based on the Rule of Law principle, the Government of Indonesia has no choice but to exercise their powers following what was mandated in the 1945 constitution. That is to ensure that its natural resources are managed in such a way that maximizes the prosperity of its people.

Thus, if Indonesia were to use Article XXI GATT in defense of their forced export restrictions, it would be in line with the two-tier test used to determine the validity of the usage of Article XXI GATT in the DS512 case. The invocation of Article XXI would then be invoked based on good faith for the purpose of defending the forced export restrictions in the appeal of DS592 case. It is not done out of malicious intent to circumvent provisions of the WTO, as in this case said provisions are against Indonesia's fundamental principles as a nation as stipulated in the 1945 constitution.

II. CONCLUSION

In conclusion, the Government of Indonesia should consider invoking the provisions of Article XXI of the GATT as a means to defend against the claim from the European Union. Invoking Article XXI would protect Indonesia from WTO sanctions. The forced export restrictions that is otherwise a WTO inconsistent measure would be subject to exception and will not trigger any disputes. This measure does not change Indonesia's position on free trade, as Indonesia is still a member of the WTO and is still an advocate for trade liberalization. However, when it comes to its scarce and raw materials such as its minerals, Indonesia must be increasingly protective over its trade. As a developing nation, Indonesia must be able to utilize all of its natural resources and develop its domestic economy. Indonesia must also be protective over its natural resources as there is a domestic security concern regarding public order if the Government of Indonesia were to allow the export of scarce and raw materials. This might be the case since it would be against the Indonesian constitution, which serves as the highest level of legal instrument in Indonesia that precedes all other legal instruments including the law which ratifies the agreements of under the WTO.

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