



**Padjadjaran Journal of International Law**  
**International Law Departement Universitas Padjadjaran**  
ISSN: 2549-2152, EISSN: 2549-1296  
Volume 6, Number 2, June 2022  
DOI: <https://10.23920/pjil.v6i2.797>

**Re-examining Indonesia's Nickel Export Ban:  
Does it Violate the Prohibition to Quantitative Restriction?**

**Mikaila Jessy Azzahra<sup>1</sup>, Yetty Komalasari Dewi<sup>2</sup>**

**Abstract**

*The fundamental principles adopted by the WTO are free trade and trade liberalization, realized through the reduction of trade barriers like quantitative restrictions. This paper examines the parameters of a measure that can be construed as a quantitative restriction in violation of WTO law. It also examines whether Indonesia's measures in prohibiting the export of nickel ores and imposing domestic processing requirements violate WTO law. The statutory and case study approaches were used to determine and analyze Indonesia's measures. The parameter for quantitative restriction is imposed in Article XI: I of the GATT 1994. The parameter warrants that a measure shall be in the form of prohibitions or restrictions apart from duties, taxes, or charges. The measure must also be enacted through quotas, import or export licenses, or other measures such as import or export prohibitions. Finally, the nature of the measure must be limited in amounts. However, a measure that fulfills such parameters may not violate WTO law if it is justified under exclusionary articles under the GATT 1994. The paper concludes that Indonesia's measures above constitute quantitative restrictions, as they fulfill the parameters above. However, there is a possibility that the measures may not violate WTO law. This is because the measures also fulfil the parameters of justifications under Article XX (g) of the GATT 1994 on general exceptions and to a lesser extent under Article XI: (2)(a) of the GATT 1994 on the exception to quantitative restrictions.*

*Keywords: Nickel Ore Export Prohibition, Quantitative Restriction, World Trade Organization Law.*

**A. INTRODUCTION**

Over the past few decades, globalization has enabled businesses to expand beyond national borders, which has generated a rise

in cross-border transactions.<sup>3</sup> Globalization arises due to the integration between the aspects of countries' economies developed

---

<sup>1</sup> Alumni at the Fakultas Hukum, Universitas Indonesia, Jl. Prof. Mr Djokosoetono, Pondok Cina, Beji, Depok City, West Java 16424 – Indonesia, S.H. (Universitas Indonesia), [mikaila.jessy@ui.ac.id](mailto:mikaila.jessy@ui.ac.id).

<sup>2</sup> Lecturer at Fakultas Hukum, Universitas Indonesia, Jl. Prof. Mr Djokosoetono, Pondok Cina, Beji, Depok City, West Java 16424 – Indonesia, S.H. (Universitas Indonesia), M.L.I. (University of Wisconsin-Madison), PhD (Universitas Indonesia), [yetti.komalasari@ui.ac.id](mailto:yetti.komalasari@ui.ac.id).

<sup>3</sup> Marius-Răzvan Surugiu and Camelia Surugiu, *International Trade, Globalization and Economic Interdependence between European Countries: Implications for Businesses and Marketing Framework*. "Procedia Economics and Finance". 2015. p. 32.

Mikaila Jessy Azzahra, Yetty Komalasari Dewi

through trade.<sup>4</sup> For this reason, a striking feature of the globalized world economy is the elimination of barriers to the flow of goods and services between countries.<sup>5</sup> This reinforces the concepts of trade liberalization and free trade. The former refers to the reduction or elimination of trade barriers or restrictions imposed on the exchange of goods between countries.<sup>6</sup> Trade liberalization works towards efficient allocation of world resources to encourage growth, foster comparative advantage, and improve the overall welfare of states.<sup>7</sup> Correspondingly, free trade refers to the system in which the trade of goods or services flows unhindered with minimum government intervention or restriction.<sup>8</sup>

The concepts of trade liberalization and free trade are viewed in contrast to protectionism. Protectionism is associated with restrictive trade policies, such as import tariffs, taxes, and quotas, intended to assist domestic producers feign predatory foreign producers by limiting foreign producers' access to the domestic markets.<sup>9</sup> For these reasons, protectionism is frowned upon in international trade. As trade liberalization is realized by reducing trade barriers such as tariffs,<sup>10</sup> liberalized trade is necessary for a firm's legal regime's capability in setting

ground rules for lowering trade barriers.<sup>11</sup> This is where international trade law serves to function.

International trade law is the body of rules governing the commercial exchange of goods and services outside of a country's borders.<sup>12</sup> This area of the law serves as an instrument for governments and business practitioners engaging in international trade, especially concerning trade disputes requiring resolution.<sup>13</sup> On this, international institutions impose trade rules to foster transparency, predictability, cooperation, and consultation, encouraging rules-based dispute settlement. These are also intended to reduce the likelihood of conflicts where countries retaliate against one another due to protectionist trade barriers, also commonly referred to as trade wars.<sup>14</sup>

The most prominent institution in the international trade law regime is the World Trade Organization ("**WTO**"), an international organization established in 1995 which is vested with legal personality.<sup>15</sup> The WTO was established following the eight-round of multilateral trade negotiations, known as the

<sup>4</sup> Bernard Hanotiau. *International Arbitration in a Global Economy: The Challenges of the Future*. "Journal of International Arbitration". (2011) p.1.

<sup>5</sup> Merve Demir & Ayce Sepli. *The Effects of Protectionist Policies on International Trade*. "International Journal of Social Sciences" (2017) p. 136-158.

<sup>6</sup> Anna Ivolga and Alexander Trukhachev. *Handbook of Research on Globalized Agricultural Trade and New Challenges for Food Security*. IGI Global, 2019. p. 88 - 104.

<sup>7</sup> Joost Pauwelyn and Andrew Guzman. *International Trade Law (Aspen Casebook)*. Third Edition. Wolters Kluwer, 2016. p. 11-19.

<sup>8</sup> Regine Adele Ngono Fouda. *Protectionism and Free Trade: A Country's Glory or Doom?*. "International Journal of Trade, Economics and Finance." Vol. 3, No. 5 (October 2012) p. 1.

<sup>9</sup> Suhail Abboushi. *Trade protectionism: Reasons and outcomes "Competitiveness Review: An International Business Journal"* (2010) p. 384-394.

<sup>10</sup> United States Government. "Trade Liberalization and Economic Growth", Economic Report of the President, adopted on 1991.p. 233-264.

<sup>11</sup> David Palmeter and Petros C. Mavroidis. *The WTO Legal System: Sources of Law*. "The American Journal of International Law". Vol. 92, No. 3 (1998) p. 331.

<sup>12</sup> Gilbert R. Winham. *Part I The Economic and Institutional Context of the World Trading System, Ch.2 The Evolution of the World Trading System — the Economic and Policy Context*. The Oxford Handbook of International Trade Law: Oxford Handbooks in Law, 2009. p.

<sup>13</sup> Bernard Hanotiau. *International Arbitration in a Global Economy*, p. 28.

<sup>14</sup> Guzman, Andrew T. *Global Governance and the WTO*. "Harvard International Law Journal." Vol. 45, No. 2 (2004) p. 5-8.

<sup>15</sup> Matsushita, Mitsuo, et. al. *The World Trade Organization: Law, Practice, and Policy*. Third Edition. Oxford University Press, 2015.

Uruguay rounds (“Uruguay Rounds”)<sup>16</sup>, to promote trade liberalization between its member states.<sup>17</sup> This is carried out using ensuring the implementation of the Marrakesh Agreement Establishing the WTO and its annexes (“WTO Agreement”),<sup>18</sup> such as through serving as a forum to administer trade dispute settlement between member states.<sup>19</sup> The WTO Agreement incorporates the General Agreement on Tariffs and Trade (“GATT”).<sup>20</sup>

The GATT was initially a failed attempt of states at establishing an International Trade Organization (“ITO”), which the WTO subsequently succeeded.<sup>21</sup> However, the GATT remains an umbrella treaty for the trade of goods in the WTO. Following the creation of the WTO, the GATT 1947 was updated by the currently-prevailing GATT 1994. The GATT altogether principally serves to promote, among others, the creation of a stable, predictable, free, and non-discriminatory trading environment for all nations by virtue of a robust dispute settlement system mechanism.<sup>22</sup> Over the years, the GATT was said to have effectively reduced the global average tariffs on goods by 35 per cent since its first entry into force in 1947.<sup>23</sup>

Under the prevailing GATT 1994, the WTO regime sets out several standard obligations for WTO member states to abide by in

enacting trade measures. This includes provisions on Most-Favored-Nation (MFN) treatment, tariff reduction and bindings, national treatment, and transparency rules. This is in line with WTO’s core principles, namely the opening of trade borders, the guarantee of MFN, non-discriminatory treatment, and transparency in trade.<sup>24</sup>

Notwithstanding the standard obligations mentioned above, the GATT 1994 allows member states to derogate from such obligations that they assume, provided that they meet specific qualifications of the exceptions.<sup>25</sup> First, there are general exceptions that provide exemptions from a wide range of obligations because of public order justifications.<sup>26</sup> Second, some specialized exceptions clauses are exceptions to the whole agreement based on a particular policy objective. Third, exception provisions are set to specific provisions instead of the entire agreement.<sup>27</sup> The existence of these exceptions functions to balance trade liberalization considerations under the GATT 1994 and policy objectives of the member states.

These justifications aim to uphold the notion of a sovereign state’s right to regulate, such that developing countries need not blindly abide by WTO rules without due regard to other policy objectives

<sup>16</sup> World Trade Organization “Understanding the WTO - The Uruguay Round.” WTO. [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/act5\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/act5_e.htm), accessed December 1, 2021.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Agreement Establishing the World Trade Organization, Marrakesh Agreement*, 1 April 1994, *United Nations Treaty Series*. Article II.1. [hereinafter WTO Agreement], Article III:1.

<sup>19</sup> *Ibid.*, Article III.

<sup>20</sup> *Ibid.*, Annex 1A.

<sup>21</sup> Michael Gavin Johnston. *Meaning of the Terms “Arbitrary or Unjustified Discrimination”* *Global Journal of Politics and Law Research*. Vol. 6, No. 5 (2018) p. 2.

<sup>22</sup> Agnes Forere Malebakeng. *The Relationship of WTO Law and Regional Trade Agreements in Dispute Settlement.*

*From Fragmentation to Coherence.* Kluwer Law International, 2015. p. 3 – 34.

<sup>23</sup> Trade Liberalization and Economic Growth, Economic Report of the President 1991. p. 233.

<sup>24</sup> World Trade Organization “Overview.” WTO. [https://www.wto.org/english/thewto\\_e/whatis\\_e/wto\\_dg\\_stat\\_e.htm#:~:text=The%20WTO's%20founding%20and%20guiding,the%20conduct%20of%20its%20activities](https://www.wto.org/english/thewto_e/whatis_e/wto_dg_stat_e.htm#:~:text=The%20WTO's%20founding%20and%20guiding,the%20conduct%20of%20its%20activities), accessed 8 May 2022.

<sup>25</sup> Zena Prodromou. *The Public Order Exception in International Trade, Investment, Human Rights and Commercial Disputes.* Volume 56. Kluwer Law International, 2020 p. 21.

<sup>26</sup> *Ibid.*, p. 22.

<sup>27</sup> *Ibid.*, p. 23.

Mikaila Jessy Azzahra, Yetty Komalasari Dewi

corresponding to the individual domestic needs of that country.<sup>28</sup> Against this background, this paper examines an international trade law matter relating to a WTO member state, namely Indonesia, and the degree of violation of its measures about the prohibition and restriction in exporting nickel ore.

On this matter, Indonesia's measures were claimed to have violated WTO Law, namely Article XI: I of the GATT 1994 on the prohibition of quantitative restriction. However, this claim is highly polarizing as Indonesia's measures may not fulfill the parameters of a quantitative restriction under WTO Law. Even if they do, they may not be deemed in violation of WTO Law if they fulfill the applicable exemptions to quantitative restriction.

In light of the above issue, this paper begins by discussing Indonesia's measures toward exporting nickel ore, including the export prohibition and domestic processing requirements. Second, it discusses the complaint issued by the EU about these measures. Third, the paper discusses the applicable sources of WTO law. Then, the paper discusses the parameters of quantitative restriction in WTO law, including the parameters of the relevant exceptions. Finally, the parameters discussed are applied to analyze the case of DS592.

## B. INDONESIA'S MEASURES TOWARD THE EXPORT OF NICKEL ORE

Indonesia is the largest archipelagic state by size and population globally, with an abundance of natural resources.<sup>29</sup> One of Indonesia's most prominent natural resources that have recently seen a globally significant rise is nickel. Nickel is a silver-white-colored natural chemical element originating from the earth's core.<sup>30</sup> It is a vital component for producing goods such as stainless steel and electric vehicle batteries.<sup>31</sup> Nickel has been an increasingly valuable commodity for the Indonesian economy. In 2019, a US Geological Survey found that Indonesia accounts for roughly a quarter of the world's nickel production, making Indonesia the world's largest nickel producer.<sup>32</sup> This was further affirmed by a 2020 report issued by the Ministry of Energy and Mineral Resources of the Republic of Indonesia ("MEMR").<sup>33</sup>

This indicates that Indonesia has a significant competitive advantage over nickel resources. However, until recently, Indonesia's mining products have not had a significant added value relative to other countries. This is evidenced by the materials sold by Indonesia in the world market that are only used as supporting or raw materials for reprocessing. This has led the government of Indonesia to enact measures to protect its nickel reserves and ensure that the country's mineral products are manufactured with tangible added value. This includes the steps that prohibit the export of nickel ore and

<sup>28</sup> *Ibid.*, p. 22.

<sup>29</sup> Embassy of the Republic of Indonesia | Washington D.C. "Indonesia Facts & Figures." <https://www.embassyofindonesia.org/basic-facts>, accessed November 21, 2021.

<sup>30</sup> T. Pedersen. "Facts about Nickel." <https://www.livescience.com/29327-nickel.html>, accessed September 5, 2021.

<sup>31</sup> Nickel Institute Knowledge "Nickel in Batteries" <https://nickelinstitute.org/about-nickel/nickel-in-batteries/>, accessed September 5, 2021.

<sup>32</sup> U.S. Geological Survey "Mineral Commodity Summaries 2019". <https://doi.org/10.3133/70202434>, accessed September 5, 2021.

<sup>33</sup> Kementerian ESDM RI "Tugas & Fungsi Kementerian ESDM RI". <https://www.esdm.go.id/id/profil/tugas-fungsi/kementerian-esdm>, accessed December 20, 2021.

mandate domestic processing before said nickel ores undergoing any export activities.<sup>34</sup>

### 1. Indonesia's Measures on the Prohibition to Export Nickel Ore

While the controversy surrounding the alleged nickel ore export prohibition has only begun to build up traction as of late,<sup>35</sup> the government of Indonesia's earliest attempts to enact such measures date back to as early as 2009. In 2009, the government enacted Law No. 4 of 2009 on Mineral and Coal Mining as amended by Law No. 3 of 2020 and Law No. 11 of 2020 (from now on collectively referred to as "**Mineral and Coal Mining Law**"). Article 103 of the Mineral and Coal Mining Law provides that the holders of mining business license ("**IUP**") and special operation production mining business license (i.e., licenses used for the operation of production in special mining territories, "**IUPK**") shall undertake the processing and refinery of mining products domestically.<sup>36</sup> This entails nickels as a form of minerals to be subjected to purification processes domestically. Therefore, this was construed to prevent nickel ores from being exported unless they were first purified in Indonesia.

Prof. Hikmahanto Juwana, S.H., LL.M., Ph.D., an international law

academician who was also involved in the formulation of the Mineral and Coal Mining Law, noted the intentions behind the drafting of the said law. One of them was to mandate PT Freeport Indonesia, a private mining company previously bound by a contract of work with the government of Indonesia, to build smelter facilities within the period of 5 years up to January 12, 2014. The facilities were intended to purify the produced materials and increase their value in the market.<sup>37</sup> PT Freeport Indonesia conveyed that such a period was insufficient to build the necessary smelters. Therefore, three years extension to comply with the requirement was granted by Government Regulation No. 23 of 2010 as amended by Government Regulation No. 1 of 2014 jo. MEMR Regulation No. 1 of 2014.<sup>38</sup>

However, the prohibition above to export nickel ore was not effective until 2020, making it a mere *de jure* prohibition up until its efficacy. This is taking into account that up to 2020, the export of nickel ore products in Indonesia was still able to occur in high amounts.<sup>39</sup> Evidently, Indonesia was deemed the largest nickel-exporting country in 2019, covering up to 37,2 percent of the global trade

<sup>34</sup> Indonesia, Article 102 of Law No. 4 of 2009 on Mineral and Coal Mining as amended by Law No. 3 of 2020 as amended by Law No. 11 of 2020, LN No. 147 of 2020, TLN No. 6525 [from now on Mineral and Coal Mining Law].

<sup>35</sup> Ade Miranti Karunia. "Digugat Uni Eropa Soal Larangan Ekspor Nikel, RI Siapkan Sanggahan" <https://money.kompas.com/read/2021/11/18/090000926/digugat-uni-eropa-soal-larangan-ekspor-nikel-ri-siapkan-sanggahan>, accessed November 20, 2021.

<sup>36</sup> Mineral and Coal Mining Law, Article 103.

<sup>37</sup> Interview Prof. Hikmahanto Juwana, S.H., LL.M., Ph.D., teaching staff of International Law, Faculty of Law, University of Indonesia, December 31, 2021.

<sup>38</sup> Indonesia. *Regulation of the Ministry of Energy and Mineral Resources No. 1 of 2014 on the Enhancement of Value Added of Mineral Through Domestic Mineral Processing and Purification Activities*. BN No. 35 of 2014. Article 12.

<sup>39</sup> Daniel Workman. "Top Nickel Exporters by Country", World's Top Exporters, <http://www.worldstopexports.com/topnickel-exporters-by-country/>, accessed September 21, 2021.

Mikaila Jessy Azzahra, Yetty Komalasari Dewi

in nickel.<sup>40</sup> This highlights that the export prohibition of nickel ore was not in effect regardless of the regulation until 2020.

In furtherance of the above, on May 3, 2018, the MEMR promulgated Regulation No. 25 of 2018 (“**MEMR Reg 25/2018**”), which primarily aims to encourage the development of mineral and coal businesses.<sup>41</sup> In pertaining to this, Article 50 (1) jo. Article 50 (2) of the MEMR Reg 25/2018 provides that exports of minerals must first retrieve export approval from the Ministry of Trade (“**Export Approval**”). Prior to retrieving such approval, the relevant party must obtain a Recommendation from the Director-General as a prerequisite to such approval.

On August 30, 2019, the MEMR amended the aforesaid regulation through the MEMR Regulation No. 11 of 2019 and subsequently amended by MEMR Regulation No. 17 of 2020 (hereinafter MEMR Reg 25/2018 and its amendments collectively referred to as “**MEMR Reg 11/2019**”). Article 62A of the MEMR Reg 11/2019 provides that the Director-General Recommendation for the overseas sales of nickel ore with concentration levels lower than 1,7 per cent granted prior to the regulation remains valid until it expires on 31 December 2019. Additionally, all Recommendations granted subsequent to the promulgation of the MEMR Reg 11/2019 may only be granted no later than 31 December 2019.<sup>42</sup>

Considering the provisions stated above, the MEMR Reg 11/2019 effectively prohibited nickel ore export with concentration levels below 1,7 per cent. Thus, all Recommendations issued as prerequisites to the Export Approval for nickels with concentrations lower than 1,7 per cent were declared invalid as of 31 December 2019. This was alleged to have effectively constituted an actual prohibition on the export of nickel ore as of January 1 2020, regardless of its level of concentration.<sup>43</sup> For these reasons, these measures were claimed to have violated WTO Law, namely Article XI: I of the GATT 1994 on the prohibition to quantitative restriction.

## 2. Indonesia's Measures on Domestic Processing Requirement Prior to Nickel Ore Export

In addition to the nickel ore export prohibition, Indonesia's domestic processing requirements of nickel ore was also alleged to have violated Article XI: I of the GATT 1994 on the prohibition to quantitative restriction.<sup>44</sup> As stated, the obligation to conduct processing was first imposed by the Mineral and Coal Mining Law. In regards to this, Article 102 of the Mineral and Coal Mining Law stipulates that the holders of IUP and IUPK at any stage must increase the added value of minerals in mining business activities through the processing of mining commodities.<sup>45</sup>

Further, Article 103 of the Mineral and Coal Mining Law stipulates that IUP and IUPK holders

<sup>40</sup> Sharda Abrianti. *Analisis Terhadap Larangan Ekspor Bijih Nikel Kadar Rendah Berdasarkan Prinsip Restriksi Kuantitatif*. 2020. p. 7.

<sup>41</sup> MEMR Reg 25/2018, Preamble.

<sup>42</sup> *Ibid*, Article 62A.

<sup>43</sup> World Trade Organization, *Indonesia – Measures Relating to Raw Materials. Request for the Establishment of a Panel by the European Union*.

<sup>44</sup> *Ibid*.

<sup>45</sup> MEMR Reg 11/2019, Article 102.

shall carry out such mineral processing of mining products domestically, in which the government shall ensure the sustainable use in the processing of such products.<sup>46</sup> With respect to this, nickel ore falls within the scope of 'metal mining commodity' under the Mineral and Coal Mining Law that is subjected to the requirement stipulated in Article 103. For this reason, the domestic processing requirement has also allegedly prevented the export of nickel ore to the extent that they have been purified only in Indonesia. This was alleged to have violated Article XI: I of the GATT 1994 on the prohibition to quantitative restriction.<sup>47</sup>

Both of the measures were claimed to have been made in Indonesia's national interest. Prior to this ban, Indonesia was said to have been exporting nickel ore at a significantly lower price despite its high use and value.<sup>48</sup> The Director-General of Mineral and Coal of the MEMR claimed that these measures were also intended to preserve Indonesia's nickel reserve considering the limited mineable pool of the resource.<sup>49</sup> Maintaining the previous rate of export activities may lead to a critical shortage of nickel reserves.<sup>50</sup>

Following their enactment, these measures had a tremendous impact on the global market, with nickel prices reported to have immediately surged by up to 9 per cent globally.<sup>51</sup>

### C. ISSUANCE OF COMPLAINT BY THE EUROPEAN UNION

In response to Indonesia's aforesaid trade measures, the European Union ("EU") sought redress to the WTO to eliminate the restrictions that are allegedly in violation of WTO Law (hereinafter referred to as "DS592"). Indonesia's measures were alleged to have impaired the EU steel industry, as the measures had restricted EU steel producers' access to raw materials necessary for the production of stainless steel.<sup>52</sup> The EU also alleged that the domestic processing requirement of nickel ore further prevents the export of raw nickel ore, as nickel ores are required to first be purified in Indonesia.<sup>53</sup> On this, the EU claimed to have raised the issue to Indonesian authorities for a lengthy period of time; however, their efforts were to no avail.

In response to this issue, as a WTO Member, the EU requested consultations with Indonesia through the Dispute Settlement Body ("DSB") within the WTO. The EU claimed that Indonesia's measures, both in terms of the prohibition to export of nickel

<sup>46</sup> MEMR Reg 11/2019, Article 103.

<sup>47</sup> World Trade Organization, *Indonesia – Measures Relating to Raw Materials. Request for the Establishment of a Panel by the European Union*.

<sup>48</sup> Tirta Citradi "Perhatian! Harga Nikel Makin Dekati US\$ 18.500/Ton," <https://www.cnbcindonesia.com/market/20210211103110-17-222666/perhatian-harga-nikel-makin-dekati-us-18500-ton>, accessed August 21, 2021.

<sup>49</sup> Kementerian ESDM RI "Bijih Nikel Tidak boleh Diekspor Lagi Per Januari 2020" <https://www.esdm.go.id/id/media-center/arsip-berita/bijih-nikel-tidak-boleh-diekspor-lagi-per-januari-2020>, accessed August 21, 2021.

<sup>50</sup> J. Sappor "COVID-19 turns Indonesian Ore Export Ban Into curse for Nickel Market" SP Global Market Intelligence.

<https://www.spglobal.com/marketintelligence/en/news-insights/research/covid19-turns-indonesian-ore-export-ban-into-curse-for-nickel-market>. accessed August 21, 2021.

<sup>51</sup> *Ibid.*

<sup>52</sup> World Trade Organization. *Indonesia – Measures Relating to Raw Materials. Request for Consultations by the European Union*, WTO Docs. WT/DS592/1 (adopted on 27 November 2019).

<sup>53</sup> World Trade Organization. *Indonesia – Measures Relating to Raw Materials. Request for the Establishment of a Panel by the European Union*, WTO Docs. WT/DS592/3 (adopted on 15 January 2021).

Mikaila Jessy Azzahra, Yetty Komalasari Dewi

ore and domestic processing requirements, have been inconsistent with the obligations imposed by Article XI: I of the GATT 1994 on the prohibition to quantitative restriction.<sup>54</sup> The article essentially provides that WTO member states are prohibited from enacting or maintaining prohibitions on the export or sale for export of any product for any other member state.<sup>55</sup>

The consultations mentioned above took place in January 2020 in Geneva, Switzerland. Despite this, no settlement was reached during the consultations. Consequently, the EU requested for a panel to be established within the WTO DSB based on the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (“DSU”) to rule on the legality of Indonesia’s trade measures.<sup>56</sup> Moreover, other affected countries claiming to have substantive trade interests in the EU’s challenge also partake in the proceedings as third parties (hereinafter collectively referred to as the “Claimants”).<sup>57</sup>

A view of the matter is that Indonesia is within its rights to implement its restriction on the export of nickel ore. Under Article XX (g) of the GATT 1994, WTO members are given the right to enact restrictive measures on the grounds of certain justifications.<sup>58</sup> This includes measures that relate to the conservation of exhaustible natural resources, provided that they are made effective in conjunction with restrictions on domestic production or consumption.<sup>59</sup> In addition, Article XI: 2 (a) of the GATT 1994

stipulates that the prohibition to quantitative restriction does not extend toward export prohibitions or restrictions that are applied temporarily to mitigate or relieve critical shortages of products that are essential to the exporting state.<sup>60</sup>

Presently, the government of Indonesia’s supposed intention in enacting the measures was the effort to reduce the extraction of nickel reserves to a sustainable rate.<sup>61</sup> Considering this rationale, Indonesia’s restrictive measures might potentially fall within the scope of justification provided in Articles XX (g) and/or XI: 2 (a) of the GATT 1994. However, in order to determine this, the parameters of quantitative restriction and relevant exceptions must be elaborated and applied to the merits of the DS592 dispute.

Taking into account the issues addressed above, there are two primary research questions addressed in this paper. This includes “*what are the parameters of a measure which can be construed as a quantitative restriction in violation of WTO law?*” and “*are MEMR Regulation No. 25 of 2018 on Mineral and Coal Mining Business as amended by MEMR Regulation No. 11 of 2019 and MEMR Regulation No. 17 of 2020 which imposes a prohibition to export nickel ore and Law No. 4 of 2009 on Mineral and Coal Mining as amended by Law No. 3 of 2020 and Law No. 11 of 2020 which imposes mandatory domestic processing requirements to nickel ore in violation of WTO Law?*”.

<sup>54</sup> World Trade Organization, *Indonesia – Measures Relating to Raw Materials. Request for Consultations by the European Union*, p. 4.

<sup>55</sup> Article XI, Paragraph 1 letter (c), *General Agreement on Tariffs and Trade 1994*, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) [hereinafter GATT 1994].

<sup>56</sup> World Trade Organization, *Indonesia – Measures Relating to Raw Materials. Request for the Establishment of a Panel by the European Union*.

<sup>57</sup> World Trade Organization. *Indonesia – Measures Relating to Raw Materials. Request to Join Consultations, Communications by the United States*, WTO Docs. WT/DS592/2 (adopted on 11 December 2019). p. 5.

<sup>58</sup> GATT 1994, Article XX (g)

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*, Article XI:2 (a)

<sup>61</sup> J. Sappor “COVID-19 turns Indonesian Ore Export Ban Into curse for Nickel Market” SP Global Market Intelligence.

The objectives of this paper are to elaborate the parameters of a measure that can be construed as a quantitative restriction in violation of WTO law, as well as to analyze whether the MEMR Regulation No. 25 of 2018 on Mineral and Coal Mining Business as amended by MEMR Regulation No. 11 of 2019 and MEMR Regulation No. 17 of 2020 which prohibits nickel ore export and Law No. 4 of 2009 on Mineral and Coal Mining as amended by Law No. 3 of 2020 and Law No. 11 of 2020 which imposes mandatory domestic processing requirements to nickel ore violate WTO Law.

#### D. SOURCES OF WTO LAW

Prior to examining any violation of an obligation, it is important to note the applicable sources of WTO Law. The general source of international law adheres to Article 38 (1) of the Statute of the International Court of Justice ("**ICJ Statute**").<sup>62</sup> The sources include international treaties and conventions, international customs, general principles of law, judicial decisions, and highly-qualified publicists' teachings.<sup>63</sup> It is widely recognized that the above-mentioned WTO Agreement constitutes international conventions within the meaning of Article 38 (1)(a) of the ICJ Statute.<sup>64</sup>

These sources of WTO law are further reinforced by Article XVI of the WTO Agreement. This provides that the WTO must be guided by the decisions, procedures and customary practices abided by the parties to the GATT and the bodies established within

the framework of the GATT.<sup>65</sup> In addition, Article 3.2 of the DSU provides that the purpose of the WTO dispute settlement is purported to elucidate the provisions of the WTO agreements in accordance with customary rules of interpretation of international law.<sup>66</sup> Lastly, Article 7 of the DSU provides that Panels must refer to the covered agreements cited by the disputing parties.<sup>67</sup>

From the above provisions, it can be inferred that the fundamental sources of WTO law are the text of the relevant covered agreement as part of the sources of international law. However, the sources of WTO law are not exhaustive and are not limited to the text of the covered agreement itself. It also incorporates the Panel and Appellate Body reports regardless of whether or not they are adopted. In addition to this, it also encompasses customs, the teachings of highly qualified publicists, and the general principles of international law.<sup>68</sup> All of these sources form part of WTO law (hereinafter collectively referred to as "**WTO Law**").

#### 1. Method of Interpretation of WTO Law

The WTO Law, including the GATT 1994, must be interpreted according to the Vienna Convention on the Law of the Treaties ("**VCLT**") method of interpretation.<sup>69</sup> The VCLT provides that a treaty must be interpreted in good faith and according to its

<sup>62</sup> Article 38 paragraph (1) International Court of Justice. *Statute of the International Court of Justice*, 18 April 1946, United Nations.

<sup>63</sup> Hugh Thirlway. *The Sources of International Law*. Oxford University Press, 2014. p. 7-8.

<sup>64</sup> Palmetier and Mavroidis. *The WTO Legal System: Sources of Law*. p. 398-413.

<sup>65</sup> WTO Agreement. Article XVI.

<sup>66</sup> *Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes*,

Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994), [hereinafter DSU] Article 3.2.

<sup>67</sup> DSU, Article 7.

<sup>68</sup> Palmetier and Mavroidis. *The WTO Legal System: Sources of Law*. p. 399.

<sup>69</sup> Prodromou. *The Public Order Exception in International Trade, Investment, Human Rights and Commercial Disputes*. p. 29.

Mikaila Jessy Azzahra, Yetty Komalasari Dewi

ordinary meaning.<sup>70</sup> It also provides that the circumstances of the treaty conclusion and preparatory work of the treaty, may be regarded to supplement the treaty interpretation.<sup>71</sup> While not the entire WTO membership has ratified the VCLT, the aforementioned Article 3.2 of the DSU provides that international law interpretation rules apply.<sup>72</sup> Therefore, the VCLT interpretation method applies to all member states in interpreting the text of the GATT 1994, including the parameters of quantitative restriction set forth therein.

#### E. PARAMETERS OF QUANTITATIVE RESTRICTION UNDER WTO LAW

For a trade measure to constitute a quantitative restriction that violates WTO law, it must fulfil the parameters in Article XI: I of the GATT 1994. It should also not be exempted by Article XX and/or Article XI: I (2) of the GATT 1994. Therefore, the parameters of these provisions are to be further elaborated in the following sections.

##### 1. Parameters of Article XI: I of the GATT 1994 on Quantitative Restriction

A fundamental principle adopted by the GATT 1994 is the prohibition of quantitative restriction. Pursuant to Article XI: I of the GATT 1994, quantitative restriction refers to prohibitions or restrictions apart from duties, taxes or other charges, which are enacted through quotas, import

or export licences or other measures.<sup>73</sup> The rationale behind this prohibition is that, unlike less-restrictive measures, a quantitative restriction has a significant protective effect and, therefore, is more likely to distort the flow of free trade.<sup>74</sup>

It is worth noting that when a country imposes measures such as import tariffs, foreign traders remain capable of exporting goods to the country, provided that their products are sufficiently price-competitive to overcome barriers created by such tariffs. Conversely, in quantitative restrictions, import activities are subject to limiting barriers (e.g., import quotas) regardless of the price competitiveness of products. Evidently, measures of quantitative restrictions may result in the increase of trade barriers and distortion of free trade. This counters the pursuit of trade border openness for member states, the very principle promoted by the WTO.

In respect to the parameters of quantitative restriction, the Appellate Body in the case of *China – Raw Materials* established that the elements of ‘prohibitions’ and ‘restrictions’ in the article, respectively, are those measures that prohibit or restrict the importation or exportation of certain goods. Prohibition is the legal ban imposed on the trade of a specified commodity,<sup>75</sup> whereas restriction is an act which restricts someone or

<sup>70</sup> United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, *United Nations Treaty Series* [hereinafter VCLT], Article 31.

<sup>71</sup> VCLT, Article 31 (3)

<sup>72</sup> DSU, Article 3.2.

<sup>73</sup> GATT 1994, Article XI: I.

<sup>74</sup> Japan Ministry of Economy, Trade and Industry. “Chapter 3 Quantitative Restrictions”. Report on the WTO

consistency of trade policies by major trading partners, adopted on 2000. p. 1.

<sup>75</sup> *World Trade Organization Appellate Body Report, China - Measures Related to the Exportation of Various Raw Materials WTO Docs. WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R (adopted 30 January 2012)*. [hereinafter *China – Raw Materials AB Report*] p. 28..

something to conduct an act, whether in the form of a limiting condition or regulation.<sup>76</sup>

In adopting the VCLT method of interpretation, the *China – Publications and Audiovisual Products* Panel stipulated that dictionaries are helpful aids to determine the range of ordinary meaning of a particular term.<sup>77</sup> On this, the dictionary definition of ‘quantitative’ relates to numbers or in amounts.<sup>78</sup> Thus, emphasis must be made on whether the relevant prohibition or restriction produces an effect that is limiting in terms of number or amounts. Moreover, the *Japan – Trade in Semi-conductors* Panel provided that this provision broadly encompasses measures in the form of laws, regulations, and other measures, regardless of the legal status of the measure.<sup>79</sup>

The second parameter of the provision is that the measure in question must be made effective through quotas, import or export licenses or other measures. The scope of ‘other measures’ in this provision was construed to broadly encompass, among others, measures in the form of import or export prohibitions and import and export restrictions.

Notwithstanding the above, the GATT 1950 Working Party Report also stipulated certain export restrictions that fall outside the scope of the exceptions granted by this provision.<sup>80</sup> This includes restrictions that are imposed on the export of raw materials, which are aimed to safeguard or promote the domestic industry of the concerned state.<sup>81</sup> This is carried out by virtue of decreasing the supply of such materials available to foreign competitors, affording a certain price advantage towards a particular industry to purchase its materials, or through other means.<sup>82</sup> Therefore, a measure must fulfill these two parameters cumulatively for it to be construed as quantitative restriction under WTO Law.

## 2. Parameters of Article XX(g) of the GATT 1994 on General Exceptions

Albeit the above, the GATT 1994 also provides certain exceptions on the prohibition of quantitative restriction.<sup>83</sup> Consequently, if a measure is justified under a valid exception based on this provision, it may not be regarded as an act of quantitative restriction which is in violation of WTO Law.<sup>84</sup> This alleviates the respondent member state from incurring any liability in

<sup>76</sup> China – Raw Materials AB Report. p. 132.

<sup>77</sup> World Trade Organization Panel Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WTO Docs. WT/DS363/R (adopted on Aug. 12, 2009) [hereinafter *China – Publications and Audiovisual Products Panel Report*] .p. 414.

<sup>78</sup> Cambridge Dictionary “Meaning of Quantitative in English” <https://dictionary.cambridge.org/dictionary/english/quantitative>, accessed November 5, 2021.

<sup>79</sup> World Trade Organization Panel Body Report, *Japan – Trade in Semi-conductors*, WTO Docs. L/6309 - 35S/116. (adopted on 4 May 1988).p. 28.

<sup>80</sup> General Agreement on Tariffs and Trade. “The Use of Quantitative Restrictions for Protective and Commercial Purposes,” Sales No. GATT/1950-3, adopted on 28 March 1950.

<sup>81</sup> *Ibid.*, para 2.

<sup>82</sup> *Ibid.*

<sup>83</sup> Japan Ministry of Economy, Trade and Industry. “Chapter 3 Quantitative Restrictions”. Report on the WTO consistency of trade policies by major trading partners, adopted in 2000. para 2.

<sup>84</sup> General Agreement on Tariffs and Trade. “The Use of Quantitative Restrictions for Protective and Commercial Purposes, para 12.

Mikaila Jessy Azzahra, Yetty Komalasari Dewi

connection with the claim.<sup>85</sup> It should be noted that the burden to prove the satisfaction of the exception qualification rests on the respondent of the dispute.<sup>86</sup>

One of the exceptions against the claim of quantitative restriction is Article XX (g) of the GATT 1994 on general exceptions. The provision allows for measures to be taken with a condition that the measure relates to exhaustible natural resources conservation. Further, the measure concerned should also be enacted in conjunction with restrictions enacted on domestic production or consumption. On this, the parameter for an 'exhaustible natural resource' was established by the Panel in the case of *China – Rare Earths*. The Panel ruled that the measure must be made to conserve, directly or indirectly, raw natural resources,<sup>87</sup> including finite rare earths.<sup>88</sup>

Furthermore, the measure must also relate to the conservation of such exhaustible natural resource. The terms 'relating to' in the provision, pursuant to the case of *United States – Standards for Reformulated and Conventional Gasoline ("US-Gasoline")*, requires a substantial relationship between the measure and the conservation cause raised.<sup>89</sup> The *China-Raw Materials* Appellate Body also provided that there must

be a close and genuine relationship of ends and means. In regards to this, scholar Prof. Joel P. Trachtman provided the three types of evidence used in this analysis. This includes the (i) statements of legislative intent; (ii) objective analysis of the design and structure in order to determine intent or likely effect; and (iii) evidence of actual effects of the measure.<sup>90</sup>

On the last prong of the provision, the measure must be enacted in conjunction with restrictions on domestic production or reduction. To meet this requirement, the *China - Raw Materials* Panel emphasized the need for foreign and domestic users to be treated evenly. Thus, the member states invoking the exception must have implemented the restrictions of such natural resources concurrently with domestic restrictions so as to treat domestic and foreign users evenly.<sup>91</sup> This would be the first step to have a member state's trade measure be exempted from liability based on Article XX(g) of the GATT 1994.

**a. The Chapeau of Article XX (g) of the GATT 1994 on General Exceptions**

The second step in the invocation of Article XX of the GATT 1994 is fulfilling the test provided in the introductory part of the provision also

<sup>85</sup> Frieder Roessler et al. *The WTO in the Twenty-First Century: Dispute Settlement, Negotiations, and Regionalism in Asia*. Cambridge University Press, 2007. p. 6.

<sup>86</sup> World Trade Organization Appellate Body Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries EC-Tariff Preferences*, WTO Docs. WT/DS246/10 (adopted 23 April 2004).

<sup>87</sup> World Trade Organization Panel Body Report, *China - Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, WTO Docs. WT/DS431/A/R,

WT/DS432/A/R and WT/DS433/A/R (adopted on 7 August 2014) [hereinafter *China – Rare Earths Panel Report*].

<sup>88</sup> *Ibid.*

<sup>89</sup> World Trade Organization Appellate Body Report, *United States - Standards for Reformulated and Conventional Gasoline*. WTO Docs. WT/DS2/9 (adopted on 20 May 1996). [hereinafter *US-Gasoline AB Report*] p. 19.

<sup>90</sup> Julien Chaisse, and Tsai-Yu Lin. *International Economic Law and Governance: Essays in Honour of Mitsuo Matsushita*. Oxford University Press, 2016. p.60.

<sup>91</sup> *Ibid.*

known as the Chapeau.<sup>92</sup> The Chapeau requires measures taken in pursuance of the exceptions not to be arbitrary, unjustly discriminatory for member states where the same conditions prevail, or a disguised restriction in international trade.<sup>93</sup>

In the case of *U.S.-Turtle/Shrimp*, arbitrary discrimination relates to the requirement for due process. Further, for a measure to not be unjustifiable discrimination, states must take into account the circumstances surrounding the affected countries. According to the *U.S.-Turtle/Shrimp* Appellate Body, a measure constitutes unjustifiable discrimination if it is applied differently to similarly-situated countries. Third, with respect to the test of disguised restriction on international trade, a measure is considered as one if it is essentially protectionist in nature.<sup>94</sup> This entails that the measures have a concealed or unannounced nature.<sup>95</sup> Therefore, a measure must have fulfilled the test under the Chapeau to be subject to the general exceptions and be exempt from liability under Article XX of the GATT 1994.

### 3. Parameters of Article XI:2 (a) of the GATT 1994 on exceptions to quantitative restriction

Another possible justification against the claim of unlawful quantitative restriction is by invoking the exception under Article XI:2 (a) of the GATT 1994. This exception applies if the measures are applied temporarily to mitigate or alleviate critical shortages of foodstuffs and/or other products that are essential to the exporting state.<sup>96</sup> Unlike the general exceptions, this provision must be interpreted narrowly as it does not have a Chapeau.<sup>97</sup>

On the parameters of this provision, the terms ‘temporarily applied’ suggests that the measure must be non-permanent. Adopting the aforementioned narrow interpretation, the *China-Raw Materials* Appellate Body stipulated that the term temporary entails a measure to be limited and not indefinite in terms of its time period. Furthermore, the measure must be carried out to prevent or relieve a critical shortage of foodstuffs. The term ‘prevents’ herein was intended to enable a member state to take remedial action prior to a critical shortage. The parameter for ‘critical shortage’ was established in *China - Raw Materials*<sup>98</sup> as relating to a lacking amount pertaining to a crisis

<sup>92</sup> Prodomou. *The Public Order Exception in International Trade, Investment, Human Rights and Commercial Disputes* p. 24.

<sup>93</sup> Matsushita et al, *The World Trade Organization: Law, Practice, and Policy*. p. 219.

<sup>94</sup> *Ibid.*, p. 224.

<sup>95</sup> Michael Gavin Johnston. *Meaning of the Terms “Arbitrary or Unjustified Discrimination”* *Global Journal of Politics and Law Research*. Vol. 6, No. 5 (2018) p. 9.

<sup>96</sup> GATT 1994, Article XI: 2 (a).

<sup>97</sup> China – Publications and Audiovisual Products Panel Report. p. 46.

<sup>98</sup> China – Raw Materials AB Report, p.129.

Mikaila Jessy Azzahra, Yetty Komalasari Dewi

of great importance<sup>99</sup> and involving risk.<sup>100</sup> However, the nature of an object as an exhaustible natural resource *per se* is insufficient to demonstrate a critical shortage.<sup>101</sup>

Finally, the last prong requires a measure to be addressed towards a critical shortage of essential products to the invoking member state as an alternative to the second prong. The term 'essential' herein refers to vital, necessary, or indispensable products to the member state or products that act as an input in downstream production. In any event, the circumstances encountered by the concerned member state must be taken into account in the invocation of this justification.<sup>102</sup>

#### F. ANALYSIS OF PARAMETERS OF QUANTITATIVE RESTRICTION IN DS592

Having established the parameters of quantitative restriction under WTO Law, this section analyzes the merits claims contained in the DS592 dispute. From the claims previously mentioned, it can be assessed that the objects of the dispute being the MEMR Reg 11/2019 and the Mineral and Coal Mining Law, are interrelated. Additionally, the former regulation was also derived from the latter as its legal basis. Therefore, these measures will be further analyzed to determine whether they violate WTO Law. For ease of reference and analysis, the MEMR Reg 11/2019 and the

Mineral and Coal Mining Law may hereafter be collectively referred to as the "Measures".

##### 1. Analysis of Applicability of Article XI: I of the GATT 1994 in DS592

The Measures qualify as quantitative restrictions under Article XI: I of the GATT 1994. First, the MEMR Reg 11/2019 imposes a requirement that nickel ores must have concentration levels of above 1,7 per cent for them to be exported. Similar to the standards in *China – Raw Materials*,<sup>103</sup> the regulation restricts nickel ore export to the extent that their concentration levels need to be increased prior to them being exported. Second, referring to the parameters in *Japan – Trade-in Semi-conductors*,<sup>104</sup> the measure's nature, being a legally binding MEMR regulation, may qualify it as a restrictive measure under the definition of the provision. Therefore, it is highly arguable that the MEMR Reg 11/2019 constitutes a restriction under the ambit of the provision.

The same applies to the Mineral and Coal Mining Law. As mentioned, the *China—Raw Materials* Appellate Body ruled that a prohibition refers to the legal ban on the trade of a specific commodity.<sup>105</sup> Presently, the said law imposes nickel ores to be subject to domestic purification activities, which essentially imposes a *de jure* legal ban on nickel ore export until the ban was fully in effect in 2020. Moreover, referring to the *Japan – Trade-in*

<sup>99</sup> *Ibid.*, p. 36.; A. Stevenson Trumble. *Shorter Oxford English Dictionary*. Sixth Edition. Oxford University Press, 2007. p. 2813.

<sup>100</sup> *Ibid.*, p.129; A. Stevenson Trumble. *Shorter Oxford English Dictionary*. Sixth Edition. Oxford University Press, 2007, p. 562.

<sup>101</sup> *Ibid.*, p. 134.

<sup>102</sup> China – Publications and Audiovisual Products Panel Report, para. 7.306.

<sup>103</sup> China – Raw Materials AB Report. p. 132.

<sup>104</sup> World Trade Organization Panel Body Report, *Japan – Trade-in Semi-conductors*, WTO Docs. L/6309 - 35S/116. (adopted on 4 May 1988). p. 28.

<sup>105</sup> *World Trade Organization Appellate Body Report, China - Measures Related to the Exportation of Various Raw Materials* WTO Docs. WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R (adopted 30 January 2012).[hereinafter China – Raw Materials AB Report] p. 28.

*Semi-conductors'* case, the nature of the Mineral and Coal Mining Law, being a legally binding law, qualifies it as a 'prohibition' under the ambit of the provision. Therefore, it is evident that both Measures fulfil the parameters contained in Article XI: I of the GATT 1994 and therefore may constitute a quantitative restriction under WTO Law.

## 2. Analysis of Applicability of Article XX(g) of the GATT 1994 in DS592

Notwithstanding that the Measures may qualify as a quantitative restriction, they may not be in violation of WTO law as the general exceptions under Article XX(g) of the GATT 1994 may be an applicable justification. Referring to the parameters of this provision, the invocation of this provision requires for (i) the measures to concern an exhaustible natural resource; (ii) the fulfilment of the 'relating to' analysis; and (iii) the concurrent domestic application of the measures. First, both Measures concern the trade of nickel ore, which is a finite raw material and therefore an exhaustible natural resource within the meaning of the provision.

With regards to the second parameter, there is some extent of a relationship that exists between the Measures and the conservation cause. Evidently, there is a statement of legislative intent enshrined in the Preambles of the respective Measures and that the Measures' design and structure are binding laws and regulations. In regards to the statement of legislative intent, the MEMR Reg 11/2019 explicitly states in its Preamble that it was

promulgated to ensure the continuity of supply to nickel processing.<sup>106</sup> Similarly, the preamble of the Mineral and Coal Mining Law recognizes sustainable regional development and the nature of minerals as non-renewable natural resources.<sup>107</sup> Thus, it is evident that both Measures expressed intent to conserve nickel supply. However, there is yet any evidence that either of the Measures has yielded any sustainable or conservation results for nickel ore domestically.

Third, the Measures were applied concurrently to domestic users, but only to some extent. The domestic processing requirement mandated by the Mineral and Coal Mining Law is of general application to all IUP and IUPK Production holders. However, the prohibition under the MEMR Reg 11/2019 restricts the nickel ore export with concentration levels less than 1,7 per cent and eventually to all kinds of nickel ore. Therefore, the eventual restriction to access such nickel ore applies to foreign parties and does not extend to domestic users.

In regards to the Chapeau, the elements of arbitrary discrimination, unjustifiable discrimination and disguised restriction on international trade imposed by the Chapeau are absent. The Measures were applied equally to all foreign countries without discrimination, by due process in accordance with the Indonesian law on the formation of laws and regulations, and did not have a concealed nature. Considering the fulfilment of the Chapeau, the general exception may, to a great

<sup>106</sup> MEMR Reg 11/2019, Preamble.

<sup>107</sup> Mineral and Coal Mining Law, Preamble.

extent, be an applicable defence for Indonesia in DS592.

**3. Analysis of Applicability of Article XI:2(a) of the GATT 1994 in DS592**

Unlike the general exceptions, the exception in Article XI:2(a) of the GATT 1994 is less applicable in DS592. According to the parameters of Article XI:2(a) of the GATT 1994, the measures subject to this exception must be (i) temporary or not indefinite; (ii) made to prevent or relieve a critical shortage of foodstuff; or alternatively, (iii) concern products that are essential to the invoking member state.

First, both Measures may be considered indefinite as they do not specify a time period regarding their validity. Second, while the Measures were aimed to preserve Indonesia's limited nickel reserve, there is a lack of evidence showing a critical shortage of nickel ore in Indonesia. Third, nickel arguably contributes substantially to Indonesia's economy. The Indonesian Central Agency on Statistics noted that nickel's contribution to the Indonesian economy is 0,025 per cent of the national revenue or around Rp.3138 trillion as of 2017.<sup>108</sup> While this is a substantial contribution, it is hardly essential to the survival of Indonesia's national economy. In any event, this provision may be less applicable in Indonesia's defense in DS592 considering the lack of temporariness on both Measures.

**G. CONCLUSION**

The main parameters of a measure which is construed as a quantitative restriction in violation of Article XI: I of the GATT 1994 are four, namely the measures must be (i) in the form of prohibitions or restrictions apart from duties, taxes or charges; (ii) be made effective through quotas, import or export licenses; or alternatively, (iii) be made effective through other measures, such as export restrictions or prohibitions; and that (iv) the measure is limiting in quantity or amounts. However, under Articles XX (g) and Article XI: (2)(a) of the GATT 1994, such quantitative restriction is not in violation of WTO law if it (i) relates to the conservation of exhaustible natural resources, including finite raw materials; (ii) be made effective in conjunction with restriction on domestic production or consumption; (iii) is not arbitrary discrimination, unjustifiable discrimination, or a disguised restriction on international trade; or alternatively, it is (iv) temporarily applied and not indefinite; (v) aimed to prevent or alleviate critical shortages of foodstuffs; or (vi) aimed to prevent or alleviate critical shortages other products essential to the invoking state.

The Measures, consisting of the MEMR Reg 11/2019 which imposes a prohibition on to export of nickel ore and the Mineral and Coal Mining Law which imposes mandatory domestic processing requirements for nickel ore, may be considered to be in violation of WTO Law to some extent. This is considering that the Measures constitute export restrictions or prohibitions, which were made effective through export restrictions and prohibitions, and have entirely restricted the quantity of nickel ore exported in Indonesia. In principle, these quantitative restrictions

---

<sup>108</sup> Ijang Suherman and Ridwan Saleh. *Supply Chain Analysis for Indonesian Nickel*. "Indonesia Mining Journal" Vol. 21, No. 1. 2018.

are frowned upon for they distort the free trade of nickel ore and counter the pursuit of trade border openness in terms of the export of nickel ore.

Notwithstanding the above, the Measures may also be construed to not violate WTO Law as they may be exempted by Article XX (g) of the GATT 1994. This is considering that the Measures (i) relate to the conservation of nickel ore which qualifies as an exhaustible natural resource; and (ii) to some extent made effective in conjunction with domestic restrictions, as all IUP and IUPK holders are affected; and (iii) do not constitute as arbitrary discrimination, unjustifiable discrimination, nor a disguised restriction on international trade. Alternatively, the Measures may be to a lesser extent exempted under Article XI: I (2)(a) of the GATT 1994, seeing as (i) the Measures were not temporarily applied; (ii) nickel ore is hardly an 'essential' product to Indonesia's economy, and even if it is, (iii) there lacks a critical shortage of nickel ore in Indonesia.

Therefore, it can be concluded that the Measures have to some extent violate WTO Law for it qualifies as a quantitative restriction but may be exempted by Article XX (g) of the GATT 1994 and to a lesser extent by Article XI: I (2)(a) of the GATT 1994. Therefore, it is advisable for the government of Indonesia to adjust its Measures to be in compliance with WTO Law. This can be conducted by virtue of amending or revoking the aforesaid relevant provisions in the MEMR Reg 11/2019 and the Mineral and Coal Mining Law which can be construed as imposing the quantitative restriction on the export of nickel ore. A possible option is for the government to set a definite time frame with regards to the applicability of the nickel ore export restriction. This will assist the government to build a case that the Measures are non-permanent and therefore subject to the

exception under Article XI: I (2)(a) of the GATT 1994.

## References

### Books

- Chaisse, Julien and Lin, Tsai-Yu. *International Economic Law and Governance: Essays in Honour of Mitsuo Matsushita*. Oxford University Press, 2016. *Oxford Scholarship Online*, <https://oxford.universitypressscholarship.com/view/10.1093/acprof:oso/9780198778257.001.0001/acprof-9780198778257>.
- Ivolga, Anna and Trukhachev, Alexander. *Handbook of Research on Globalized Agricultural Trade and New Challenges for Food Security*. IGI Global, 2019.
- Malebakeng, Agnes Forere. *The Relationship of WTO Law and Regional Trade Agreements in Dispute Settlement. From Fragmentation to Coherence*. Kluwer Law International, 2015.
- Matsushita, Mitsuo, et. al. *The World Trade Organization: Law, Practice, and Policy*. 3rd ed., Oxford University Press, 2015.
- Pauwelyn, Joost and Guzman, Andrew. *International Trade Law (Aspen Casebook)*. 3rd ed., Wolters Kluwer, 2016.
- Prodromou, Zena. *The Public Order Exception in International Trade, Investment, Human Rights and Commercial Disputes*. Kluwer Law International, 2020.
- Roessler, Frieder, et al. *The WTO in the Twenty-First Century: Dispute Settlement, Negotiations, and Regionalism in Asia*. Cambridge University Press, 2007. *Cambridge Core*, <https://www.cambridge.org/core/books/>

Mikaila Jessy Azzahra, Yetty Komalasari Dewi

wto-in-the-twentyfirstcentury/508B3C87190CB0F40E3BB138722E5BD9#fndtn-contents.

Trumble, A. Stevenson. *Shorter Oxford English Dictionary*. 6th ed., Oxford University Press, 2007.

Winham, Gilbert R. *Part I The Economic and Institutional Context of the World Trading System, Ch.2 The Evolution of the World Trading System — the Economic and Policy Context*. The Oxford Handbook of International Trade Law: Oxford Handbooks in Law, 2009. *Oxford Public International Law*, <https://opil.ouplaw.com/view/10.1093/law/9780199231928.001.0001/law-9780199231928-chapter-1>.

#### Journals

Abboushi, Suhail. "Trade protectionism: reasons and outcomes". *Competitiveness Review: An International Business Journal*, vol. 20 no. 5, 2010, pp. 384-394. *Emerald Insight*, DOI: 10.1108/10595421011080760. Accessed 20 August 2021.

Abrianti, Sharda. "Analisis Terhadap Larangan Ekspor Bijih Nikel Kadar Rendah Berdasarkan Prinsip Restriksi Kuantitatif." *Hukum Pidana dan Pembangunan Hukum*, vol. 3, no. 2, 2021, pp. 1-10. *Hukum Pidana dan Pembangunan Hukum*, DOI: <https://doi.org/10.25105/hpph.v3i2.10358>. Accessed 20 August 2021.

Demir, Merve & Seppli, Ayce. "The Effects of Protectionist Policies on International Trade." *PEOPLE: International Journal of Social Sciences*, vol. 3, no. 2, 2017, pp. 136-158. *PEOPLE: International Journal of Social Sciences*,

<https://doi.org/10.20319/pijss.2017.32.136158>. Accessed 21 August 2021.

Guzman, Andrew T. "Global Governance and the WTO." *Harvard International Law Journal*, vol. 45, no. 2, Summer 2004, pp. 303-352. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/hilj45&i=309>. Accessed 21 August 2021.

Hanotiau, Bernard. "International Arbitration in a Global Economy: The Challenges of the Future." *Journal of International Arbitration*, vol. 28, no. 2, 2011, pp. 89 - 103. *Kluwer Law Online*, <https://kluwerlawonline.com/journalarticle/Journal+of+International+Arbitration/28.2/JOIA2011008>. Accessed 21 August 2021.

Johnston, Michael Gavin. Meaning of the Terms "Arbitrary or Unjustified Discrimination." *Global Journal of Politics and Law Research*, vol. 6, no. 5, 2018, pp. 1-15. *European American Journals*, <https://www.eajournals.org/journals/global-journal-of-politics-and-law-research-gjplr/vol-6-issue-5-july-2018/meaning-of-the-terms-arbitrary-or-unjustifiable-discrimination-in-the-chapeau-of-gatt-article-xx/>. Accessed 21 August 2021.

Ngono Fouda, Regine Adele. "Protectionism and Free Trade: A Country's Glory or Doom?" *International Journal of Trade, Economics and Finance*, vol. 3, no. 5, October 2012, pp. 351-355. *International Journal of Trade, Economics and Finance*, DOI: 10.7763/IJTEF.2012.V3.226. Accessed 21 August 2021.

Palmeter, David and Mavroidis, Petros C. "The WTO Legal System: Sources of Law." *The American Journal of International Law*, vol. 92, no. 3, July 1998, pp. 398 - 413.

Cambridge University Press,  
DOI: <https://doi.org/10.2307/2997915>.  
Accessed 21 August 2021.

Surugiu, Marius-Răzvan and Surugiu, Camelia. "International Trade, Globalization and Economic Interdependence between European Countries: Implications for Businesses and Marketing Framework." *Procedia Economics and Finance*, vol. 32, 2015, pp. 131–138. *Science Direct*, DOI: [https://doi.org/10.1016/S2212-5671\(15\)01374-X](https://doi.org/10.1016/S2212-5671(15)01374-X). 2015. Accessed 27 August 2021.

Suherman, Ijang and Saleh, Ridwan. "Supply Chain Analysis for Indonesian Nickel." *Indonesian Mining Journal*, vol. 21, no. 1, 2018, pp. 59 – 76. *Indonesian Mining Journal*, DOI: <https://doi.org/10.30556/imj.Vol21.No1.2018.246>. Accessed 27 August 2021.

#### Online Newspaper

Karunia, Ade Miranti. "Digugat Uni Eropa Soal Larangan Ekspor Nikel, RI Siapkan Sanggahan" *Money Kompas*, 18 November 2021, <https://money.kompas.com/read/2021/11/18/090000926/digugat-uni-eropa-soal-larangan-ekspor-nikel-ri-siapkan-sanggahan>. Accessed 20 November 2021.

Pribadi, Agung. "Bijih Nikel Tidak boleh Diekspor Lagi Per Januari 2020" *Kementerian ESDM RI*, September 2, 2019, <https://www.esdm.go.id/id/media-center/arsip-berita/bijih-nikel-tidak-boleh-diekspor-lagi-per-januari-2020>. Accessed 21 August 2021.

#### Website

Cambridge University Press "Meaning of Quantitative in English" *Cambridge Dictionary*, 2021,

<https://dictionary.cambridge.org/dictionary/english/quantitative>. Accessed 5 November 2021.

Citradi, Tirta. "Perhatian! Harga Nikel Makin Dekati US\$ 18.500/Ton," *CNBC Indonesia*, 11 February 2021, <https://www.cnbcindonesia.com/market/202102111103110-17-222666/perhatian-harga-nikel-makin-dekati-us--18500-ton>. Accessed 21 August 2021.

Indonesian Ministry of Trade "Indonesia Facts & Figures." *Embassy of the Republic of Indonesia | Washington D.C.*, 2017, <https://www.embassyofindonesia.org/basic-facts>. It was accessed 21 November 2021.

Japan Ministry of Economy, Trade and Industry. "1998 Report on the WTO Consistency of Trade Policies by Major Trading Partners." *Ministry of Economy, Trade and Industry (METI)*, 2000, <https://www.meti.go.jp/english/report/downloadfiles/gCT0003e.pdf>. Accessed 1 December 2021.

Kementerian Energi dan Sumber Daya Mineral Republik Indonesia "Tugas & Fungsi Kementerian ESDM RI.", *Kementerian Energi dan Sumber Daya Mineral Republik Indonesia*, 2021, <https://www.esdm.go.id/id/profil/tugas-fungsi/kementerian-esdm>. Accessed 20 December 2021.

Nickel Institute Knowledge "Nickel in Batteries." *Nickel Institute Knowledge*, 2021, <https://nickelinstitute.org/about-nickel/nickel-in-batteries/>. Accessed 5 September 2021.

Pedersen, T. "Facts about Nickel". *Live Science*, 24 September 2016,

Mikaila Jessy Azzahra, Yetty Komalasari Dewi

<https://www.livescience.com/29327-nickel.html>. Accessed 5 September 2021.

Sappor, J. "COVID-19 turns Indonesian Ore Export Ban Into curse for Nickel Market." *SP Global Market Intelligence*, July 21, 2020, <https://www.spglobal.com/marketintelligence/en/news-insights/research/covid19-turns-indonesian-ore-export-ban-into-curse-for-nickel-market>. Accessed 6 September 2021.

Thirlway, Hugh. *The Sources of International Law*. Oxford University Press, 2014. *U.S. Geological Survey "Mineral Commodity Summaries 2019"*. <https://doi.org/10.3133/70202434>. Accessed 5 September 2021.

United States Government. "Economic Report of the President." *Federal Reserve*, 1991, <https://fraser.stlouisfed.org/title/economic-report-president-45?browse=1950s>. Accessed 1 December 2021.

Workman, Daniel. "Top Nickel Exporters by Country", *World's Top Exporters*, 2021, <http://www.worldstopexports.com/topnickel-exporters-by-country/>. Accessed 21 September 2021.

World Trade Organization "Overview." *World Trade Organization*, 2022, [https://www.wto.org/english/thewto\\_e/whatis\\_e/wto\\_dg\\_stat\\_e.htm#:~:text=The%20WTO's%20founding%20and%20guiding,the%20conduct%20of%20its%20activities](https://www.wto.org/english/thewto_e/whatis_e/wto_dg_stat_e.htm#:~:text=The%20WTO's%20founding%20and%20guiding,the%20conduct%20of%20its%20activities). Accessed 8 May 2022.

World Trade Organization "Understanding the WTO - The Uruguay Round." *World Trade Organization*, 2021, [https://www.wto.org/english/thewto\\_e/](https://www.wto.org/english/thewto_e/)

[whatis\\_e/tif\\_e/fact5\\_e.htm](https://www.wto.org/english/whatis_e/tif_e/fact5_e.htm). Accessed 1 December 2021.

## **Treaties**

*General Agreement on Tariffs and Trade*, 30 October 1947, 58 U.N.T.S. 187 (entered into force 1 January 1948) [GATT].

*Statute of the International Court of Justice*, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 933 [ICJ Statute].

*Vienna Convention on the Law of Treaties*, 155 U.N.T.S. 331, 8 ILM 679 (1969), 63 AJIL 875 (1969) (entered into force 23 May 1969) [VCLT].

## **Judgments, Orders and Advisory Opinions**

*China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, Appellate Body Report, [2010] WTO Docs. WT/DS363/AB/R.

*China – Measures Related to the Exportation of Various Raw Materials*, Appellate Body Report, [2012] WTO Docs. WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R.

*European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries* EC-Tariff Preferences, Appellate Body Report, [2004] WTO Docs. WT/DS246/10.

GATT document GATT/CP.4/33 republished as "The Use of Quantitative Restrictions for Protective and Commercial Purposes," [1950] Sales No. GATT/1950-3.

*Law No. 4 of 2009 on Mineral and Coal Mining as amended by Law No. 3 of 2020 as*

*amended by Law No. 11 of 2020, LN No. 147 of 2020, TLN No. 6525.*

*Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (entered into force 15 April 1994) [Marrakesh Agreement].*

*China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum, Panel Body Report, [2014] WTO Docs. WT/DS431/A/R, WT/DS432/A/R and WT/DS433/A/R.*

*Japan – Trade-in Semi-conductors, Panel Body Report, [1988] WTO Docs. L/6309 - 35S/116, WTO Docs.*

*United States - Standards for Reformulated Conventional Gasoline, Panel Body Report, [1996] WTO Docs. WT/DS2/R.*

*Regulation of the Ministry of Energy and Mineral Resources No. 1 of 2014 on the Enhancement of Value Added of Mineral Through Domestic Mineral Processing and Purification Activities, BN No. 35 of 2014.*

*Indonesia – Measures Relating to Raw Materials, Request for Consultations by the European Union, [2021] WTO Docs. WT/DS592/1.*

*Indonesia – Measures Relating to Raw Materials, Request for the Establishment of a Panel by the European Union, [2021] WTO Docs. WT/DS592/3.*

*Indonesia – Measures Relating to Raw Materials, Request to Join Consultations, Communications by the United States, [2019] WTO Docs. WT/DS592/2.*