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Indonesia's Mineral Export Prohibition and Legality of Export Duties Under the GATT Rules

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| Article | Abstract |
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| <p>Keywords: Article XI GATT 1994; DSB Decisions; Export Ban, Export Quota; Indonesia; The EU.</p> <p>Article History: Received: Jan 13, 2022; Reviewed: Jun 20, 2022; Accepted: Jul 10, 2022; Published: Jul 31, 2022.</p> <p>DOI: 10.28946/slrev.Vol6.Iss2.1661.pp239-253</p> | <p>The development of electric vehicles has been becoming a global trend to tackle worsening air pollution. The rich mineral country desires to reduce greenhouse gas (GHG) through transportation transformation by building a domestic-based battery vehicle industry. The policy resulted in importing export restrictions on nickel ore and bauxite by the Indonesian government. However, the measures are inconsistent with Article XI.1 of the GATT rules, which forbid imposing restrictions on the global market. There are cases in WTO DSB deciding that export restrictions infringe the provision, such as in China – Raw Materials (DS394) and China – Rare Earth (DS431) cases. In such cases, adjudicators also do not justify the imposition of export duties for the members. Meanwhile, Article XI.1 does not prohibit the imposition of export duties as another option to impose export restraints. The Indonesian authority could apply the measures. This Article analyses Indonesia's justification for imposing export control through the GATT rules. The research is conducted based on a normative juridical approach in which the sources come from the rules of GATT and its DSB decision to analyse the extent to which the measures are allowed to take into force for the member regarding the GATT provisions. The Article finds that Indonesia may be justified in the imposition of export duties to control the export of both raw materials. Article XI.1 of GATT justifies the original and accepted members to impose the duties measures as there are unclear provisions on export prohibition, which means Indonesia could enforce the charge of duties implicitly.</p> |

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INTRODUCTION

The global population has gradually increased annually during the current decade. The US Census Bureau records in 2021 that the top ten most populous countries are dominated by developing countries – China, India and Indonesia – located in Asia. Even OECD estimates the world population growth will reach roughly 9 billion people in 2050. At the same time,

consumption of manufacturing goods, particularly electricity products, is expected to rise steadily for years in emerging countries. This situation affects the exploitation of mineral resources as a primary commodity to produce more manufacturing products.

At the same time, trade restrictions on mineral resources commonly take into force in endowed countries which impose trade barriers, such as China adding 15% of export duties for some mineral products and India increasing 7% tax on iron ore export.¹ According to the Annual Report 2019 of the WTO General Director, 102 restricting trade measures were recorded from mid-October 2018 to mid-October 2019. The reasons commonly appear for the measures due to environmental protection and the promotion of downstream industries which benefit from national revenue.²

In another territory, the 2020 US Geological Survey (USGS) Summary reveals Indonesia poses the biggest nickel reserve and top six bauxite reserves.³ Even the Report of the Directorate General of coal and mineral from 2011-2016 under the Ministry of Energy and Mineral Resources presents that the national mineral reserves could be sufficient for more than a century. However, Indonesia imposes measures to tighten the export of both materials as a reason to process the materials become more valuable than the export of raw materials.

The global supercycle commodities phenomenon resulted in the price of raw materials remaining high for the last four years. Statista records the nickel ore price suffered an increased selling price at US\$13.114/Metric Ton in 2018, which was previously at US\$ 10.410/Metric Ton in 2017.⁴ Meanwhile, bauxite import has steadily increased since 2017, reaching 138,093 Metric Tons in 2020.⁵ The figure shows that the demand for raw materials could lead to leverage prices in the global market. Hence, the export restrictions measures may make global trade ineffective, which loses substantial domestic and global welfare.⁶ The measures affect the instability of short-term world prices by discouraging traders' confidence as deficiency materials, particularly the action from major suppliers.⁷

Relating to the concerning issues, the Minister Regulation of Energy and Mineral Resources No. 11/2019 unveils that the Indonesian government imposes export restrictions for nickel ore and washed bauxite. Article 46 (1) of the regulation provides that the government imposes an export quota for washed bauxite, whereas Article 62A regulates the total export ban for nickel ore. The primary legal argumentation of the government governs that Article 33 (3) of the Indonesian Constitution mandates that the government has authority to fully control all kinds of mineral resources which should be utilised for the people's prosperity. Furthermore, Article 5 (1) of Act No. 3/2020 on Mineral Resources, which revises Act No. 4/2009, provides that the government has full authority to prioritise national interest in raw materials. The exact

¹ "Trade in Mineral Resources," WTO iLibrary, 2010.

² Jane Korinek, "Trade Restrictions on Minerals and Metals," *Mineral Economics* 32, no. 2 (2019): 171–85, <https://doi.org/10.1007/s13563-018-0161-z>.

³ US Geological Survey, "Mineral Commodity Summaries 2020," 2020.

⁴ Aaron O'Neill, "Average Price for Nickel Worldwide from 2014-2025," 2020.

⁵ M. Garside, "Bauxite Imports and Exports Worldwide from 2005 to 2020," 2021.

⁶ I Gusti Ngurah Parikesit Widiatedja, "Indonesia's Export Ban on Nickel Ore: Does It Violate the World Trade Organization (WTO) Rules?," *Journal of World Trade* 55, no. 4 (2021): 668.

⁷ Nabeel A Mancheri et al., "Resources, Conservation & Recycling Effect of Chinese Policies on Rare Earth Supply Chain Resilience," *Resources, Conservation & Recycling* 142, no. July 2018 (2019): 101–12, <https://doi.org/10.1016/j.resconrec.2018.11.017>.

reason is reflected in the preamble of the Energy Minister Regulation prevails the restrictions needed to be implemented as a stock guarantee for domestic processing and purification industries.

However, the General Agreement on Tariffs and Trade (GATT 1994) prohibits the member countries from taking any measures that affect distortion of international trade. According to Article XI. 1 GATT 1994, the discipline does not allow the imposition of export restrictions through banning, quotas, export licenses or other measures. Conversely, Article XI.2 GATT 1994 allows the member party to restrict trade measures while fulfilling some requirements.

The provision becomes the legal basis for the European Union to take legal action against the complaining Indonesia's measures. Under Article 4.7 and 6 of Dispute Settlement Understanding (DSU) and Article XXIII GATT 1994, the EU requested to establish a panel to settle the measures at issue.⁸ The EU deems the Indonesian government stipulates a regime of regulations which apply export restrictions of nickel ore regardless of its concentration since 2014 and fully close for export in 2020. Then, mandatory domestic processing requirements are applied for certain raw materials, including nickel ore.⁹ The government obliges extraction players to enhance the mineral resources' value before allowing them to export.

Previously, research on export duties was conducted by Jeonghoi Kim, who concluded that the kinds of measures might be implemented due to a lack of clarity of WTO rules governing that matter.¹⁰ The same issue has been presented by Jun Kazeki, emphasising economic discussion.¹¹ The research reveals that the export duties impose to increase fiscal revenue and support the development of downstream industries, particularly in developing countries and least developed countries. Moreover, I Gusti Ngurah Parikesit Widiatedja reveals that Indonesian's restrictive measures constitute a violation of Article XI.2(a) and Article XX (b) and (g) of GATT 1994. He argues that the government could not meet the requirement of both articles regarding domestic regulations provided.¹² However, in the context of imposition of export duties in Indonesia remains a need to study more whether the measures are appropriate alternatively legal measures for Indonesia to avoid legal complaints from other member countries in the Dispute Settlement Body (DSB) WTO. The export duties seem appropriate for Indonesia due to the early conclusion in establishing the organisation.

This Article will discuss the issue of mineral export restrictions in Indonesia regarding the rules of the World Trade Organization. It emphasises justification for the country imposing export duties as barriers to prevent exporting raw materials instead of the mineral export ban. Another potential violation of WTO rules would be presented besides the primary issue of Article XI.1 GATT 1994. This Article will begin with a basic understanding of the export restrictions. Detail of the domestic regulations concerning export restrictions is presented as basic regulations of the export ban. Then, it reveals the GATT/WTO provision relating to the prohibition of trade restrictions. WTO judicial decisions become a reference to actual cases

⁸ WHO, "Indonesia – Measures Relating To Raw Materials," World Trade Organization, 2021.

⁹ WHO.

¹⁰ Jeonghoi Kim, "Recent Trends in Export Restrictions," OECD Trade Policy Papers, 2010.

¹¹ Jun Kazeki, "Analysis of Non-Tariff Measures: The Case of Export Duties," OECD Publication, 2002.

¹² Widiatedja, "Indonesia's Export Ban on Nickel Ore: Does It Violate the World Trade Organization (WTO) Rules?"

emerging from the measures. Finally, analysing Indonesia's measures on the probability of export duties imposition on the raw materials regarding the rules of the GATT/WTO.

RESEARCH METHODS

The research method used in this Article is a legal-descriptive and normative approach applied to analyse the WTO legal instruments, particularly the provisions of the General Agreement on Tariffs and Trade 1994. It also explores other instruments which appear from some relevant cases in WTO Dispute Settlement Body (DSB). The study is library-based research whose data originates from a library literature survey. The data sources used are legal materials, with primary sources taken mainly from the GATT 1994 and DSB decisions. Then, the secondary data sources are accessed from agency reports, books, journals and articles. The tertiary data also become an additional source from mass media to support the main and the secondary sources.

ANALYSIS AND DISCUSSION

General Definition of Export Restrictions

OECD defines export restrictions as a government effort to protect its national interest, such as the conservation of natural resources. Commonly, the effort is conducted to control the distribution of particular goods, which is considered pivotal for the country. The restrictions could occasionally take place voluntarily from an agreement between parties who negotiate for export limitations voluntarily, such as the agreement between Japan and the US for Voluntary Export Restrictions (VER) on automobile products.¹³

Meanwhile, the legal definition of export restrictions is relevant with export restraints based on the same character which retains export. The WTO Panel Report in the case the US – Measures Treating Exports Restraints As Subsidies describes export restraints as border measures that take the form of a government law or regulation which expressly limits the number of the export or places clear conditions on the circumstances under which export are permitted, or that takes off a government-imposed fee or tax on exports of the product calculated to limit the number of exports.¹⁴

Some experts define the measures more broadly as efforts provided by exporting countries to supervise the materials export flows.¹⁵ The measures are typically divided into some government policies, among other things (i) imposing the export tax, which increases the payment price for the export, (ii) quantitative measures, which refer to limiting the allowable amount to be exported; and (iii) administrative measures are license requirements which impose conditions for export of certain products¹⁶ and currently, the export ban is a significantly measures enforced by some developing countries.¹⁷ All kinds of restrictions

¹³ R.S. Khemani and D. M. Shapiro, "Glossary of Industrial Organization Economics and Competition Law," OECD, 1993.

¹⁴ Report of the Panel WTO, "United States – Measures Treating Exports Restraints As Subsidies," WT/DS194/R, 2021

¹⁵ Roy Santana et al., "Trade, Law and Development" IX, no. 2 (2017).

¹⁶ Ilaria Espa, *Export Restrictions on Critical Minerals and Metals – Testing the Adequacy of WTO Disciplines* (Cambridge: International Trade and Economic Law, 2015).

¹⁷ Widiatedja, "Indonesia's Export Ban on Nickel Ore: Does It Violate the World Trade Organization (WTO) Rules?"

purpose to limit the volume of certain products, whether directly with the imposition of export quota measures and export ban or indirectly through burden export tax and export licenses.¹⁸

Practically, the export quota is applied along with export licenses which could determine the minimum selling price. This methodology makes the government may deny export proposal permits from the firm even though the amount of export quota has been stipulated previously. This policy might encourage discretionary opportunities for certain enterprises with a dominant position. In this case, applying the method leads to a chance for monopoly practice to favour the state's own enterprise or cartel practices.¹⁹ These practices bring a situation which might have the exclusive right to the state company through legislation.

In addition, the imposition of an export tax is applied by many developing countries which the purpose of restricting the export of raw materials. The World Trade Organization records that around 65 countries are imposing that measure, dominated by developing and least developed countries. In this situation, the applying countries implement *ad valorem*, in which taxes are added to the value of exported products or a specific levy is counted per unit value of the products. Both countries impose a high duty rate for exporting unprocessed materials, while a low tax rate should be paid for exporting processed minerals. The measures' objections are to push the development of the domestic downstream industry.²⁰ It is also expected that could increase social prosperity begins with income distribution, national revenue and supporting the preservation of environmental protection.²¹

Historically, the export restriction had ever been imposed in the agricultural sector, which resulted in a food crisis in 2008 and 2010 for food security issues. Moreover, the unregularly step measures were caused by the geo-economic changes and financial crisis. Then, the crisis commonly intensifies for emerging restrictive measures, which is peak boom between 2010 and 2011 and spread to the energy sector. This Manifestation led mineral restriction to be known as resource nationalism.²² However, restrictions on mineral resources are supposed to threaten advanced countries' interests, especially the EU, providing the materials as critical resources based on supply risk and importance in use. The EU countries argue the restrictions constitute unfair treatments whereby uneven geographical mineral distribution makes the region obstacle to access to the resources.²³

Indonesia's Imposition on Mineral Export Restrictions

Indonesian Constitutions obviously stipulate that all mineral resources constitute national sovereignty wealth. It is described by Article 33 (3) of the constitution that land, water, and any mineral resources existing within Indonesia's territory belong to the country and are utilised for

¹⁸ Espa, *Export Restrictions on Critical Minerals and Metals – Testing the Adequacy of WTO Disciplines*.

¹⁹ Mark Wu, "China's Export Restrictions and the Limits of WTO Law," *World Trade Review* 16, no. 4 (2017): 675.

²⁰ Korinek, "Trade Restrictions on Minerals and Metals."

²¹ Theo Henckens, "Scarce Mineral Resources: Extraction, Consumption and Limits of Sustainability," *Resources, Conservation and Recycling* 169, no. October 2020 (2021): 105511, <https://doi.org/10.1016/j.resconrec.2021.105511>.

²² M. Fadly Fitri et al., "Policy Renewal of Indonesian Mineral and Coal Smelters for Global Impact," *Technium Social Sciences Journal* 27 (2022): 379–83, <https://doi.org/10.47577/tssj.v27i1.5584>.

²³ Marc Schmid, "The Revised German Raw Materials Strategy in the Light of Global Political and Market Developments," *Review of Policy Research* 38, no. 1 (2021): 49–75, <https://doi.org/10.1111/ropr.12408>.

the people's prosperity. Furthermore, Constitutional Court decided in two cases of judicial review on Act No. 22 of 2001 concerning oil and gas and Act Number 4 of 2009 concerning mineral resources. In the first case, the Judge Verdict No. 36/PUU-X/2012 that Article 33 (2)(3) of the constitution constitutes national wealth owned by the people who are represented by the administration power.²⁴ In the latter Verdict No. 10/PUU-XII/2014, the Panel adjudicators also justify export restrictions on raw materials as long as the measures aim to increase the value of the materials.²⁵

Regarding the constitution, the executive and legislative promulgate Act No. 4 of 2009 on Mineral and Coal, which was recently amended through Act No. 3 of 2020. Article 5(2) clearly expresses that the authority fully controls the mineral resources for domestic interest. The provisions render legality for the government to impose measures restricting extraction and even export restrictions. These mandates open chances for the government to provide the Government Regulation No. 96 of 2021 on Business of Mining Activities. The regulation burdens mandatory orders for mining companies to prioritise fulfilling domestic demand on raw materials as required by Article 157 of the regulation.²⁶

The administration's consistency is shown by the stipulation of Minister of Energy and Mineral Regulation (MEMR) No. 11 of 2019 on Mineral and Coal Business Extraction. The regulation strictly imposes export restrictions on nickel ore with concentrations below 1.7% of processing standard and washed bauxite with concentrations above 42% of processing standard. Article 62A provides export of nickel ore is still allowed until the end of 2019 and *vice versa*. Article 46 expresses export quota on bauxite is accorded until early 2022 with some burden requirements. It means an export ban would be imposed for both minerals. Previously, as a revealed document in the Panel establishment requested by the EU (DS592), export restrictions have been applied since 2017, with some exceptions granted for mining producers desiring export of the commodity below 1.7% of processing standard, whereas higher concentration was prohibited. The measures are contrasting in recent years, which resulted in more protectionism than pro-market access.

However, the government have a reason that the measures need to be taken into force as the acceleration of electric vehicles stipulated by the Presidential Decree No. 55 of 2019. Moreover, the minister's regulation provides that the background of the measures is to guarantee stock for the development of domestic downstream industries. Hence, the mineral seems to be under critical shortages if no tightening measures are applied. Nonetheless, the government does not provide the development of downstream industries that constitute strategic industries which should be protected from lack of material supply.

The World Trade Organization Rules Against Export Restrictions

Legally, the GATT 1994 governs export restrictions are not allowed in the normal situation. Article XI.1 of the GATT 1994 explains prohibitions to any contracting party to maintaining

²⁴ Environmental Science, "Understanding Natural Resources Clause in Indonesia Constitution Understanding Natural Resources Clause in Indonesia Constitution," n.d., <https://doi.org/10.1088/1755-1315/940/1/012040>.

²⁵ Muhammad Siddiq Armia, "The Role of Indonesian In Protecting Energy Security Perlindungan Hukum Terhadap Ketahanan Energi Nasional Melalui Putusan Mahkamah Konstitusi," 2016.

²⁶ Sinta Ana Pramita et al., "Constitutional Development on Mineral and Coal Governance in Indonesia" 583, no. Iceep (2021): 141–45.

internal policies that distort trade flows, such as quotas, import or export licenses or other measures. Even Article XI.1 prohibits taking any measures that ban the export and import of any products among member countries.

Under GATT 1994, article XI.1 is the primary provision regulating the prohibition of restrictions. The exact provision of Article XI.1 GATT 1994 states that:

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

Article XI.1 above clearly prohibits trade restrictions which form quotas, import or export licenses. On the other hand, the government remain free to intervene in trade barriers by imposing export duties.²⁷ According to the Article, the imposition of the export ban has a similar objective to quota prohibition. The member countries are binding with strict limitations to impose restrictions enabling global trade distortion.

The Article emphasises the prohibition of quotas, including an export ban which could affect differential treatment among members of the WTO. The Panel in the case Turkey – Textiles explain, "the prohibition against quantitative restriction is a reflection that tariffs are GATT's border protection of choice. Quantitative restrictions impose an absolute limit on imports, while tariffs do not. The quantitative restrictions usually have a trade-distorting effect, their allocation can be problematic, and their administration may not be transparent".²⁸

Regarding applying the restrictions, the applying member should present evidence that the measures at issue are enforceable. It is referred to as the Panel of India – Quantitative Restrictions case. The Panel examines India's consistency with Article XI.1 and in relation to Article XVIII GATT 1994 concerning governmental assistance for economic development. In this case, the Panel challenges the burden of proof against India, stating, "In all instances, each party has to provide evidence supporting each of its particular assertions. This implies that the United States has to prove any of its claims concerning the alleged violation of Article XI:1 and Article XVIII:11. Similarly, India has to support its assertion that its measures are justified under Article XVIII: B".²⁹ Hence, article XI.1 implies trade restrictions could be applied under some circumstances that exist as requirements.

Furthermore, special provisions are available for the contracting party to impose export restrictions. Under paragraph 2 (a) of Article XI, export prohibition could be imposed in terms as stated below; “Export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party.”

As stipulated by Article XI.2 (a), the member countries are justified to impose export restrictions by meeting three requirements regulated by the concern provision, namely as follows:

Temporarily applied

Appellate Body in case China – Raw Materials defines temporarily applied constitutes a measure which applies for a limited time. The Appellate Panel construes the term temporary as

²⁷ Wu, “China’s Export Restrictions and the Limits of WTO Law.”

²⁸ WTO, “Turkey – Restrictions on Imports of Textile and Clothing Products,” The WTO Panel Report, 1999.

²⁹ WTO, “India – Quantitative Restriction on Imports of Agriculture, Textile and Industrial Products,” The WTO Panel Report, 1999.

lasting or meant to last for a limited time only; not permanent; made or arranged to supply a passing need. Then, the connection between the term applied and temporarily may be defined as measures applied for a limited time to take passing bridge needs. As we see it, the definitional element of supplying a passing need suggests that Article XI:2(a) refers to measures applied in the interim.³⁰

Prevent or relieve critical shortages

The next consideration focus on the availability of the material supposed in critical shortages. The Appellate Body of China – Raw Materials case defines the term shortages and critical separately. The appellate interprets shortages as a deficiency in quantity, an amount lacking. Meanwhile, the term critical also means constituting a decisive, meaningful, and crucial crisis involving risk or suspense. Therefore, the term critical shortages could refer to those deficiencies in a quantity that are crucial, that amount to a situation of decisive importance, or that reach a vitally crucial or decisive stage or a turning point.³¹

Essential products

The Appellate Body interpret the term essential as indispensable. Previously, the Panel described both words have their definition. The Panel interprets the products phrase as a thing generated or produced by, or as if by, nature or a natural process; that which results from the operation of a cause or is produced by a particular set of circumstances; an object produced by a particular action or process; and, an article or substance that is manufactured or refined for sale. At the same time, the Panel defines the essential phrase as affecting the essence of anything; material, significant constituting, or forming part of, the essence of anything, and necessary, indispensable requisite.³²

In addition, Article XX of GATT 1994 provisions also governs general exceptions on export restrictions flexibility for member countries in applying the mineral export ban measures with conditional circumstances requirements. The provision states as bellowed;

“Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: (a) [.....] m; (b) necessary to protect human, animal or plant life or health; (c) [.....]; (d) ; (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.”

According to Article XX GATT 1994, the imposition of export restrictions could be implemented for some reasons. Member countries may adopt a mineral export ban for the right reasons, such as protecting human, animal or plant life or health and conserving exhaustible natural resources. Moreover, the application of Article (b) needs to prove scientific evidence relating that the measures are effective methodology to handle problems threatening health and the environment. Meanwhile, Article XX(g) requires the even-handedness principle to be exited while the export ban applies. The application of the even-handedness principle is required to ensure the balance between domestic production and foreign consumption. The Panel China – Raw Materials case refers to the US – Gasoline case that if no restrictions on

³⁰ WTO, “China - Measures Related to the Exportation of Various Raw Materials,” The WTO Appellate Body Report, 2012.

³¹ WTO.

³² WTO.

domestically produced products are imposed at all, and all limitations are placed upon imported products alone, the measures cannot be accepted as primary or even substantially design for implementing conservationist goals. The measure would be naked discrimination for protecting locally-produced goods.³³

The export restriction might be possibly imposed under Article XXI GATT 1994. The provision provides that member countries could restrict any measures related to internal security. For those reasons, any information barrier may be adopted to prevent domestic defence threats. Furthermore, Article XXI(b) justifies export restrictions on raw materials, which are deemed that the materials could produce derivative products disturbing the essential security of imposing members. Even the member countries are obliged to protect international peace and security under the United Nations Charter, so measures should be taken into force regarding the UN Security Council Resolution.

Judicial Decisions on Export Duties Application

China – Raw Materials

The dispute raises involving the United States, the European Communities, and Mexico as the complainant, while China is standing as the respondent. The dispute emerges as a consequence of China's invoke, which imposes some measures restraints, namely (1) export duties, (2) export quota, (3) export licensing, and (4) minimum export price. The measures are imposed on a few raw material products such as magnesium, manganese, zinc, coke, magnesium metal, manganese, fluorspar, bauxite, yellow phosphorous, lead, silicon metal, and silicon carbide.³⁴ The complainants challenge the existence of these restrictions, including aspects of the allocation and administration procedure for export quota, export licenses and minimum export price, and the alleged non-publication of specific measures. The complainant requests that the Panel recommends that China's measures are inconsistency with Paragraph 11.3 of its WTO Accession Protocol agreed when it ratified as a member country of the WTO regarding export duties and infringe provision of GATT 1994.³⁵

The claimants argue that China's imposition on such raw material is inconsistent with its Accession Protocol signed to conclude accession in the WTO. According to Paragraph 11.3 of its Accession, China shall eliminate all taxes and charges applied to export unless expressly provided in Annex 6 of this Protocol.³⁶ The list mentions that some product items are justifiable to be imposed charges and duties, whereas such raw materials are not included in the list of exemptions. China does not rebut the allegation that the export duties are inconsistent with Paragraph 11.3 of the Protocol and argues that the measures are taken place regarding justification under Article XX (b) or (g) and Article XI.2(a) GATT 1994. China argues that invoking Article XI.2(a) is justified for member countries to impose export restrictions as the foodstuff or essential products are in the condition of critical shortages. Then, Article XX (b)(g) allows the restricting export of certain materials to protect humans, animal or plant life or health and conservation of exhaustible natural resources.

³³ WTO.

³⁴ WTO.

³⁵ WTO.

³⁶ WTO.

The Panel found that China's export duties on those raw materials are inconsistent with Paragraph 11.3 of its Accession Protocol.³⁷ The Panel note that Paragraph 11.3 of China's Accession Protocol does not include any express reference to Article XX GATT 1994. The Panel argues that Paragraph 11.3 does not include an introductory clause, as found in Paragraph 5.1 Protocol. As Appellate Body in *China – Audiovisual Case* interprets the introductory clause to mean that the provision of Article XX is available as a defence to violate Paragraph 5.1 of its Accession Protocol.³⁸ Moreover, the Panel argues that Paragraph 11.3 refers to a specific exception covered by Annex 6 and Article VIII GATT 1994. The Panel adds that Paragraph 11.3 of the Protocol prohibits export duties unless those duties are applied to products expressly set out in Annex 6.³⁹ Hence, the Panel concluded that export duties on raw materials are inconsistent with Paragraph 11.3 of China's Accession Protocol and would not be justified under Article XX GATT 1994.⁴⁰

China – Rare earth

The Emerging case involves the United States, the European Union, and Japan as complainants, contesting China as a Respondent. The dispute is concerning to imposition of export duties and export taxes on various forms of rare earth, tungsten, and molybdenum.⁴¹ The complainant also challenges the issue of procedural administration allocation through export licensing and export quotas.⁴² Then, the complainants request that the Panel recommend that export duties measures are inconsistent with Paragraph 11.3 of China's Accession Protocol. However, China requests that Article XX GATT 1994 are available for the country to defend a potential violation of Paragraph 11.3 of its Protocol and recommend that export duties on such raw materials are justified under Article XX(b) GATT 1994.⁴³

The complainants assert that China's imposition of export duties on rare earth, tungsten, and molybdenum products are not identified in Annex 6 of its Accession Protocol, and it is considered a violation of Paragraph 11.3 of its Protocol. On the other side, China does not deny the complainants' allegations; nonetheless, China argues that the obligation of Paragraph 11.3 of Protocol is subject to Article XX GATT 1994 and submit export duties are justified under Article XX(b) GATT 1994 to protect human, animal, or plant life or health.⁴⁴

The first consideration of the Panel reveals that export duties on rare earth, tungsten, and molybdenum which cover the amount of 82 derivative products are none included among 84 exceptional products identified in Annex 6 of China's Accession Protocol. The Panel concluded that China's temporarily export duties on such products are inconsistent with Paragraph 11.3 of China's Accession Protocol. The Panel notes that China does not dispute the complainants' assertion and evidence regarding the application of the measures, and China does not contest the complainants' argument that the measures at issue are inconsistent with its obligation under the Accession Protocol.⁴⁵ Moreover, the Panel also stipulates that there is no legal basis for

³⁷ WTO.

³⁸ WTO.

³⁹ WTO.

⁴⁰ WTO.

⁴¹ WTO, "China – Measures Related To the Exportation of Rare Earths, Tungsten, and Molybdenum," The WTO Panel Report, 2014.

⁴² WTO.

⁴³ WTO.

⁴⁴ WTO.

⁴⁵ WTO.

setting aside Paragraph 11.3 of its Protocol to justify the application of Article XX of GATT 1994 regarding the provision of the Accession Protocol.⁴⁶ Then, China does not say that Article XX(b) has an appropriate connection with the imposition of export duties. The Panel appraise that China cannot demonstrate that export duties could address the concerning problem or make a material contribution. The alternative proposal submitted is deemed it could not to be a sufficient alternative to make a significant material contribution to solving the problem. Hence, the overall Panel conclusion is that China's imposition of export duties on such product at issues is inconsistent with Paragraph 11.3 of its Accession Protocol, and the obligation in Paragraph 11.3 of its Protocol is not subject to the general exception in Article XX GATT 1994.⁴⁷

Correction Against Indonesia's Imposition of Mineral Export Restrictions

Indonesia's export ban on nickel dan bauxite leads the EU to request the DSU to establish a Panel concerning the measures at issue. The EU deems the export ban applied to support the local development of relevant downstream industries. In addition, the measures seem to be inconsistent with Article XI.1 GATT, although Article XI.2 (a) is available for the ban with some requirements. However, Indonesia seems challenging to prove evidence that article XI.2(a) is appropriate for the member to impose export restraints on nickel and bauxite. Three elements of Article XI.2(a), namely temporarily, critical shortages, and essential products, are insufficiently supposed to be met by the government.

As the current situation prevails, the development of downstream industries on raw materials remains in the early step, which will be launched in 2022. The plan is confirmed by the Minister of Investment, Bahlil Lahadalia, who said that the year 2022 constitutes the period to focus on developing high-value-added industries, which begin with nickel in 2020 and then followed by bauxite in 2022.⁴⁸ Even the President said that the government strongly persuades downstream industries' development by stopping nickel and bauxite export. Furthermore, the Indonesian President adds that the current domestic capacity to proceed with nickel ore is 969 thousand tons annually.⁴⁹ On the same occasion, the Investment Minister said that the export ban on bauxite would be imposed in 2022 to support the development of the downstream mining industry, which is still under feasibility study to consider the effectiveness of the restraint measures.⁵⁰ Meanwhile, according to the Ministry of Energy and Mineral Resources, Indonesia's nickel reserve is recorded at 4.3 billion tons, with an annually extractive production of 17 million tons. The exact figures shown for bauxite deposit, Indonesia reserves 1.6 billion Ton bauxite, producing 2 million washed bauxite annually. Those data show that elements of critical shortages are not qualified as reserve and extraction are oversupplied rather than

⁴⁶ WTO.

⁴⁷ WTO.

⁴⁸ Laila Afifah and Ririe Ranggasari, "Minister Confirms Indonesia Will Stop Exporting Tin, Bauxite This Year," TEMPO.CO, 2022, <https://en.tempo.co/read/1592798/minister-confirms-indonesia-will-stop-exporting-tin-bauxite-this-year>.

⁴⁹ Filip Warwick, "Indonesia's Domestic Demand for Nickel Ore to Jump 30% in 2022, S&P Global Commodity Insight," 2022, <https://www.spglobal.com/commodityinsights/en/market-insights/latest-news/metals/021022-indonesias-domestic-demand-for-nickel-ore-to-jump-30-in-2022-report>.

⁵⁰ Wilda Asmarini, "Indonesia to Consider Expediting Export Ban on Bauxite, and Others," Reuters, 2019, <https://www.reuters.com/article/indonesia-metals-idUSL3N2631IS>.

existing domestic demand. Then, the current development of downstream industries is not reflected the value essentialness of the raw materials as the existence of concerning industries remains a lack of capacity to absorb throughout the production of the materials.

Another provision, Article XX(b) and (g), could not be a legal basis for the Indonesian government to restrict the export of nickel and bauxite. Application of paragraph (b) Article XX should prove material contribution from the measures whose purpose is to protect human, animal or plant life. The Appellate Body in *Brazil – Retreaded Tyres* confirms that to determine a measure as necessary within the meaning of Article XX(b), the Panel must appraise the contribution to the achievement of the measure's objective. A genuine relationship between the measures and the objective must show that the measures are appropriate and apt to make a material contribution to achieving its objectives.⁵¹ Regarding the case, Indonesia may not argue that the measures protect human, animal or plant life. Instead, the export ban has objectives to support the preparation of relevant downstream industries' development. The program results in the development of some processing and purification industries, which may increase domestic demand significantly. Moreover, the raw material is located in mountain forests, damaging animal life as deforestation increases. The government could carry out the alternative measures by negotiating with the complainants. The complainants should propose the available alternatives that could protect the respondent's interest and assess the alternatives' effectiveness. Thus, there is no relationship between the restriction measures and objectives, which still affect less human, animal, or plant life protection.

It is also paragraph (g) Article XX; the government should prevail in even-handedness requiring equal treatment accorded to domestic consumption. Indonesia bans the export of such raw materials, not followed by a reduction in domestic production. However, the industrialisation of raw materials program makes the country target planning establishment of chain environment of electric vehicle industries mostly come from the domestic industries. In this situation, conservation of the environment could not be enforced as relating to the planning, which raises domestic demand, while global demand could be reduced.

In addition, domestic security is not qualified as a legal reason to impose restrictions. In these terms, Article XXI GATT 1994 mandates the restriction could be taken into force if the export of such material may threaten national security from derivative of manufactured products. Otherwise, high global demand of such raw materials results from the global vision to develop green technology in a friendly environment. The Paris Agreement compulsory obligates the member countries to adopt policies reducing CO₂ gradually. This commitment makes carbon base utilisation begin to be reduced with based battery energy in sector transportations commonly. The energy transformation affects the demand for nickel and bauxite, which constitutes the primary component of battery products. Hence, the current situation shows that such raw materials could not produce products that threaten domestic security as required by the United Nations Charter provision.

⁵¹ The WTO Appellate Body Report, “Brazil – Measures Affecting Imports of Retreaded Tyres,” 2007.

Possibility for Imposing Export Duties for Indonesia

Indonesia is potentially supposed to inconsistency with Article XI.2(a), Article XX (b) and (g), and Article XXI GATT 1994 in the imposition of mineral export restrictions on nickel ore and washed bauxite. Some flexibility requirements provided by those provisions seem that the government could not meet those as the raw materials are endowed in huge reserves, and alternative measures are available to protect humans, animals, or plants, including the environment. However, imposition of export duties may be carried out regarding Article XI.1 GATT 1994. The provision forbids the member countries to impose restrictions which cover export quota and licensing, including a totally export ban. On the other hand, the provision does not regulate export duties. For this reason, imposition of the measures is justified for Indonesia to impose such duties as alternative measures to the export ban.

As refer to both cases of China in DSB WTO, Indonesia could apply the measures as the country participated in acceptance since Jan 1 1995. Even Indonesia has been recorded as an original member of GATT 1947 since Feb 24 1950. That position justifies Indonesia exercising the original provisions of the GATT/WTO without any additional requirements to join the global trade system. A distinct situation is suffered by China, which needs to adopt new provisions to accede to the agreement. Regarding Article XII (1) of the Marrakesh Agreement, any state may accede to the agreement on the terms to be agreed between the new candidate member and the WTO. Article XII (1) describes that the new candidate should negotiate with an entire organisation member. For this term, China adopts the accession protocol, which prohibits applying export duties as referred to in the cases of China DSB.

In addition, the vacuum export duties provision could be advantageous for Indonesia to impose higher duties to control the export of mineral resources. The duties could be practical alternative measures that give global markets an optional choice whether to consume Indonesia's raw materials or look for another producer. Moreover, imposing a higher tariff is probably to be exercised since the GATT 1994 provision does not explicitly regulate the tariff for exporting products. Instead, the GATT 1994 only governs tariffs in terms of importing products as Article II.1 (b) on Schedule of Concession provides. Thus, importing export duties probably results in some advantages for the country. The duties may be granted additional revenue, and the development of downstream industries seems to continue regarding the government measures to guarantee domestic stock.

For this term, the government may impose a progressive tax in which the charge duties may rise when global price increases, while the duties decrease if the commodities price becomes low. The measures are supposed to be the right thing for Indonesia because the country constitutes one of the top producers of those minerals. Hence, the global consumer will relatively purchase the minerals from Indonesia.

CONCLUSION

Indonesia's mineral export restrictions on nickel ore and bauxite potentially violate Article XI.1 and Article XX of GATT 1994. The measures do not prove that exercising the measures is to prevent critical shortages which probably exist. Then, the Mineral Act does not classify the raw materials concerns as essential materials for Indonesia, showing that these materials do not hold a pivotal role in domestic necessity. Moreover, the oversupply of both raw materials extractions

could not be absorbed fully by the current domestic purification industry due to the remaining low capacity affecting weak domestic demand. Article XX on general exception could not be legal reasoning for the archipelago country to impose restrictions as well. As optional measures are available to protect humans and the environment, the country does not justify applying the restriction measures. The country still has alternative measures through new technology adoption, and the even-handedness principle should also be implemented by referring to both DSB WTO cases in China – Raw Materials and China – Rare Earths. However, the Indonesian government could apply other measures to control the export of nickel ore and bauxite. Export duties might be applied directly without doubtful infringement of Article XI.1 GATT. The measures can be implemented since Indonesia constitutes an original member of GATT 1947, which is not bound by additional obligation as applied to China accessing the organisation after a decade of its establishment. Application of export duties could be implemented as an unobvious provision of GATT rules which could take advantage of Indonesia to impose higher duties as the tariff binding is only carried out for imports which are governed under Article II GATT 1994 on the schedule of concession.

REFERENCES

- Afifah, Laila, and Ririe Ranggasari. "Minister Confirms Indonesia Will Stop Exporting Tin, Bauxite This Year." TEMPO.CO, 2022. <https://en.tempo.co/read/1592798/minister-confirms-indonesia-will-stop-exporting-tin-bauxite-this-year>.
- Armia, Muhammad Siddiq. "The Role of Indonesian In Protecting Energy Security Perlindungan Hukum Terhadap Ketahanan Energi Nasional Melalui Putusan Mahkamah Konstitusi," 2016.
- Asmarini, Wilda. "Indonesia to Consider Expediting Export Ban on Bauxite, and Others." Reuters, 2019. <https://www.reuters.com/article/indonesia-metals-idUSL3N2631IS>.
- Espa, Ilaria. *Export Restrictions on Critical Minerals and Metals – Testing the Adequacy of WTO Disciplines*. Cambridge: International Trade and Economic Law, 2015.
- Fitri, M. Fadly, I Nyoman N, Slamet Suhartono, and Budiarsih Budiarsih. "Policy Renewal of Indonesian Mineral and Coal Smelters for Global Impact." *Technium Social Sciences Journal* 27 (2022): 379–83. <https://doi.org/10.47577/tssj.v27i1.5584>.
- Garside, M. "Bauxite Imports and Exports Worldwide from 2005 to 2020," 2021.
- Henckens, Theo. "Scarce Mineral Resources: Extraction, Consumption and Limits of Sustainability." *Resources, Conservation and Recycling* 169, no. October 2020 (2021): 105511. <https://doi.org/10.1016/j.resconrec.2021.105511>.
- Kazeki, Jun. "Analysis of Non-Tariff Measures: The Case of Export Duties." OECD Publication, 2002.
- Khemani, R.S., and D. M. Shapiro. "Glossary of Industrial Organization Economics and Competition Law." OECD, 1993.
- Kim, Jeonghoi. "Recent Trends in Export Restrictions." OECD Trade Policy Papers, 2010.
- Korinek, Jane. "Trade Restrictions on Minerals and Metals." *Mineral Economics* 32, no. 2 (2019): 171–85. <https://doi.org/10.1007/s13563-018-0161-z>.

- Mancheri, Nabeel A, Benjamin Sprecher, Gwendolyn Bailey, Jianping Ge, and Arnold Tukker. "Resources, Conservation & Recycling Effect of Chinese Policies on Rare Earth Supply Chain Resilience." *Resources, Conservation & Recycling* 142, no. July 2018 (2019): 101–12. <https://doi.org/10.1016/j.resconrec.2018.11.017>.
- O'Neill, Aaron. "Average Price for Nickel Worldwide from 2014-2025," 2020.
- Pramita, Sinta Ana, I Gusti Ayu, Ketut Rachmi, and Lego Karjoko. "Constitutional Development on Mineral and Coal Governance in Indonesia" 583, no. Icep (2021): 141–45.
- Report, The WTO Appellate Body. "Brazil – Measures Affecting Imports of Retreaded Tyres," 2007.
- Santana, Roy, Yong-shik Lee, Social Considerations, and Gregory Messenger. "Trade, Law and Development" IX, no. 2 (2017).
- Schmid, Marc. "The Revised German Raw Materials Strategy in the Light of Global Political and Market Developments." *Review of Policy Research* 38, no. 1 (2021): 49–75. <https://doi.org/10.1111/ropr.12408>.
- Science, Environmental. "Understanding Natural Resources Clause in Indonesia Constitution Understanding Natural Resources Clause in Indonesia Constitution," n.d. <https://doi.org/10.1088/1755-1315/940/1/012040>.
- Survey, US Geological. "Mineral Commodity Summaries 2020," 2020.
- "Trade in Mineral Resources." WTO iLibrary, 2010.
- Warwick, Filip. "Indonesia's Domestic Demand for Nickel Ore to Jump 30% in 2022, S&P Global Commodity Insight," 2022. <https://www.spglobal.com/commodityinsights/en/market-insights/latest-news/metals/021022-indonesias-domestic-demand-for-nickel-ore-to-jump-30-in-2022-report>.
- WHO. "Indonesia – Measures Relating To Raw Materials." World Trade Organization, 2021.
- Widiatedja, I Gusti Ngurah Parikesit. "Indonesia's Export Ban on Nickel Ore: Does It Violate the World Trade Organization (WTO) Rules?" *Journal of World Trade* 55, no. 4 (2021): 668.
- WTO. "China - Measures Related to the Exportation of Various Raw Materials." The WTO Appellate Body Report, 2012.
- . "China – Measures Related To the Exportation of Rare Earths, Tungsten, and Molybdenum." The WTO Panel Report, 2014.
- . "India – Quantitative Restriction on Imports of Agriculture, Textile and Industrial Products." The WTO Panel Report, 1999.
- . "Turkey – Restrictions on Imports of Textile and Clothing Products." The WTO Panel Report, 1999.
- Wu, Mark. "China's Export Restrictions and the Limits of WTO Law." *World Trade Review* 16, no. 4 (2017): 675.