

# Legal Certainty of Indonesia's Nickel Downstream Policy Due to the European Union's Lawsuit at the WTO

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KEYWORDS	ABSTRACT
Nickel Downstreaming; International Trade; WTO; GATT; Panel; Appellate Body; Permanent Sovereignty over Natural Resources	Indonesia's nickel downstreaming policy, which prohibits the export of nickel ore with a grade of <1.7%, aims to increase added value and support national development. However, the European Union views this policy as a violation of the General Agreement on Tariffs and Trade (GATT) 1994, leading to a lawsuit at the World Trade Organization (WTO) in 2021. This research employs a normative-descriptive method to analyze the dispute settlement process at the WTO, the impacts of the downstreaming policy for Indonesia, and its prospects for legal certainty in the future. The findings indicate that Indonesia lost at the panel level because the policy was deemed inconsistent with Article XI:1 of the GATT, although an appeal was filed in 2022. Despite legal and diplomatic challenges, downstreaming remains a key strategy to enhance Indonesia's economy. In conclusion, this policy must be refined through strengthening domestic industrial capacity and harmonizing regulations with international standards.

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## Introduction

As one of the supporters of the country's economic prosperity, International Trade is a very important activity that can provide significant benefits, especially for developing countries and other Least Developed Countries (LDCs) that are members of the World Trade Organization (WTO) because they are expected to interact in terms of trade with developed countries.

To facilitate international trade, Indonesia joined the WTO on January 1, 1994. Countries that join the WTO must comply with the provisions of the General Agreement on Tariffs and Trade (GATT), which has been ratified through Law Number 7 of 1994 concerning the Agreement on the Establishment of the World Trade Organization. In addition to joining the WTO, Indonesia also agreed to trade agreements with other countries, both bilateral, regional and multilateral trade agreements.

One of the bilateral agreements in the European Region approved by Indonesia is the Indonesia-European Free Trade Association Comprehensive Economic Partnership Agreement (IE-CEPA). By

approving the IE-CEPA agreement, Indonesia has an opportunity to export its commodities easily without barriers. Indonesia's commodity that is highly targeted by countries in the European Region is Nickel.

As nickel becomes a commodity targeted by countries in the European Region, it can impact the increasing demand for Indonesian nickel. The increase in demand for Indonesian nickel led to a decrease in Indonesia's nickel reserves, so Indonesia took action to prevent the rapid depletion of nickel. One of the actions taken by Indonesia is an export ban on nickel commodities.

Indonesia implemented a ban on raw material export restrictions, particularly nickel ore, which has been banned since 2014, as a way to downstream certain industries, including stainless steel. The export ban was relaxed by Indonesia in 2017 by allowing the export of certain types of minerals, including nickel ore with a concentration below 1.7%, under certain conditions. The European Union considers that the requirement to export nickel ore with a concentration below 1.7% under certain conditions is only temporary. The export ban will be fully re-imposed on January 11, 2022. Article 103 Paragraph (1) of Law No. 4/2009 states that IUP and IUPK holders must carry out mineral processing and refining of mining products in the country.

Article 17 Paragraph (1) of Minister of Energy and Mineral Resources Regulation No. 25 2018 entitled "Sale of Minerals from Processing and/or Refining Abroad", which states that "Holders of Production Operation Mining Business License (IUP), Production Operation Special Mining Business License (IUPK), and Production Operation Mining Business License (IUP) specifically for processing and/or refining metallic minerals, non-metallic minerals, or rocks before conducting sales activities abroad must initially carry out Value Added through Refining activities in accordance with the minimum Processing and/or Refining limits as stated in Appendix I, Appendix II, and Appendix III, which are an integral part of this Ministerial Regulation". Article 17 Paragraph (2) of Minister of Energy and Mineral Resources Regulation No.25/2018 entitled "Sale of Minerals from Processing and/or Refining Abroad", states that "Types of mining commodities of metallic minerals, non-metallic minerals, or rocks that are not included in Appendix I, Appendix II, and Appendix III can only be sold abroad after the minimum Processing and/or Refining limits are set by the Minister".

Article 19 Paragraph (1) states that holders of IUP and IUPK may conduct overseas sales of certain metallic minerals that have met the minimum refining limit and non-metallic minerals that have met the minimum processing limit. Article 19 Paragraph (2) allows other parties that process and refine minerals to make overseas sales if they have met the minimum required limits for refining (in the case of metallic minerals) or processing (in the case of non-metallic minerals). Article 19(3) exempts minerals used for domestic purposes and research and development through overseas shipment of mineral samples from the processing and refining limits.

As a result of the ban on raw material export restrictions, especially nickel ore, the European Union on November 22, 2019, requested consultations with Indonesia on various measures regarding certain raw materials required for stainless steel production, as well as a cross-cutting duty exemption scheme that relies on the use of domestic goods over imports. The request covers the following alleged measures: (a) restrictions on nickel exports, including actual export bans; (b) domestic processing requirements for nickel, iron ore, chromium and coal; (c) domestic marketing obligations for nickel and coal products; (d) nickel export licensing requirements; and (e) prohibited

subsidy schemes. This communication was only circulated to Dispute Settlement Body (DSB) members on November 27, 2019. (WTO, 2022).

Claims from the European Union: (a) Measures restricting exports of certain raw materials, including those requiring domestic processing requirements, domestic marketing obligations, and export licensing requirements, appear to be inconsistent with Article XI:1 of the GATT 1994; (b) prohibited subsidy schemes, appear to be inconsistent with Article 3.1(b) of the SCM Agreement; and (c) failure to promptly publicise the challenged measures appear to be inconsistent with Article X:1 of the GATT 1994.

The panel was established on February 22 based on the European Union's January 14, 2021, request for case document number WT/DS592/3, under article 6 of the DSU, after consultations were held on January 30, 2020, but were unsuccessful. The task of the panel is to examine the facts relevant in case WT/DS592/3 to the parts of the GATT agreement relied upon by the parties in order to assist the DSB in providing a recommendation for a settlement (WTO, 2022). On April 21, 2021, the European Union requested the Director General to determine the composition of the panel on the basis of Article 8.7 of the DSU. In response to this request, the Director-General determined the composition of the panel on 27 April 2022, with Ms Leora Blumberg as the Panel Chair and Mr Gonzalo De Las Casas Salinas and Ms Sanji M. Monageng as panel members. Brazil, Canada, India, China, Japan, Korea, the Russian Federation, the Kingdom of Saudi Arabia, Singapore, Taiwan (Chinese Taipei), Turkey, Ukraine, the United Arab Emirates, the United Kingdom, and the United States exercised their rights as third parties in the case (WTO, 2022).

Indonesia argued that nickel ore export barriers in the form of domestic processing requirements were in place to prevent domestic shortages and that the export ban did not affect exports to Europe, as Indonesia had relaxed the ban by allowing exports of low-grade nickel ore in 2019. Indonesia ultimately lost at the WTO Dispute Settlement Panel, where Indonesia's nickel ore domestic processing requirements were found to violate GATT Article XI:1. Indonesia has imposed non-tariff export barriers. However, Indonesia did not back down and filed an appeal in December 2022.

The case of the nickel export ban between Indonesia and the European Union is indeed a tough one; it may also trigger a trade war. Trade wars are different from trade disputes; trade disputes are specific and can be accepted within an agreed normative framework such as the WTO. While trade wars also originate from trade disputes, but are conducted inside and outside the WTO framework. Trade wars inside the WTO may involve one or a group of disputes over violations of WTO agreements. However, they take place within the framework of the WTO Dispute Settlement System. In contrast, trade wars outside the WTO ignore the existing normative framework in general to achieve a policy objective. If these trade wars disrupt the international trading order and the economic interests of a wider circle of countries, they can become world trade wars. (Qureshi, 2019).

Indonesia, in this nickel dispute, has involved the European Union as a circle of economic interests from European countries classified as developed countries and has dragged third parties from developed and developing countries. This nickel downstreaming policy was taken by the government as one of the programs in order to achieve a golden Indonesia in 2045.

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## Research Methods

This research was conducted using normative and descriptive methods, namely legal research, which is also referred to as a literature study, by examining secondary legal materials. The specification of this research is descriptive analysis because it provides an overview of the dispute that occurred between Indonesia and the European Union and analyses it regarding the issues in dispute, the Indonesian laws and regulations at issue by the European Union, WTO regulations relating to the object of the dispute and litigation procedures in the WTO Dispute Settlement System.

## Results and Discussion

### **Dispute settlement at the WTO over the European Union's lawsuit against the Indonesian government's restrictions on raw nickel exports**

In the case of the European Union's lawsuit against Indonesia regarding restrictions on raw nickel exports, of the four main stages in WTO dispute settlement, two stages have been carried out, namely consultations and panels, with the following information:

#### **1. Consultations as Prima Facie Stage**

The WTO began to play a role in the nickel dispute between Indonesia and the EU as of the DSB's receipt of the request for consultations submitted by the EU on November 22, 2019, which was assigned dispute number DS592 (WTO, 2023e). The request for consultations stage signifies that the parties have formally initiated a dispute at the WTO. In this regard, the DSB issued a document containing the measure at issue, the legal and other instruments relevant to the measure at issue, and the legal basis of the complaint. This is related to efforts to provide policy interpretation in relation to the Indonesian Government's nickel ore export ban at issue by the European Union. Thus, consultations can provide an opportunity for Indonesia and the EU to discuss the issue and find a satisfactory solution without resorting to litigation. The consultation stage is similar to the mediation and negotiation stages in that it allows the WTO to facilitate a meeting for the disputing parties to clarify the facts of the matter and dispel misunderstandings. (Chandra et al., 2024).

#### **2. Dispute Settlement Panel as a First-tier Judicial Body**

##### **a. Panel inquiry and panel formation**

Consultations between Indonesia and the EU were held on January 30, 2020 in Geneva (WTO, 2019). Unfortunately, the consultations failed to resolve the dispute between the two parties. Therefore, the EU communicated to the WTO to establish a panel to examine the dispute under standardised terms of reference (WTO, 2019). This indicates that the nickel dispute between Indonesia and the European Union entered the panel request stage. This panel request was only made by the European Union on January 14, 2021 (Chandra et al., 2024).

##### **b. Panel formation and endorsement**

Subsequently, the establishment of the panel in accordance with the EU's request was endorsed by the WTO on February 22, 2021 (WTO, 2021). The panel formation process allows WTO members and disputants to propose names for panellists. In this case, the role of the WTO has shifted to a quasi-judicial one, as the panel will be responsible for determining the finality of the matter in dispute (Chandra et al., 2024).

### **c. Panel arrangement**

After the formation of the panel, the next stage is the compilation of the panel or it can be defined as the stage where the names of the panelists are already available to run the panel. On April 29, 2021, the WTO announced the panel consisting of chair Leora Blumberg and members including Gonzales De Las Casas Salinas and Sanji M. Monageng. The countries that will participate in the implementation of the panel are Brazil, Canada, China, Japan, South Korea, India, Russia, Saudi Arabia, Singapore, Chinese Taipei, Turkey, Ukraine, and the United Kingdom (WTO, 2021). The process of setting up the panel will support how the panel in the nickel dispute between Indonesia and the European Union takes place on November 30, 2022 (WTO, 2023e). As is well known, panels in the WTO allow disputants and participants to communicate with each other to provide arguments on the matter in question, and these arguments will be analysed by the appointed panellists (Chandra et al., 2024).

### **d. Discussion and Report on panel results**

The panel to discuss the nickel dispute between Indonesia and the EU was convened on November 30, 2022 (WTO, 2023e). In simple terms, the panel can be divided into three stages of implementation as follows (WTO, 2022). First, a preliminary discussion of the issues. At this stage, Indonesia and the EU communicate with each other to defend their arguments, and review the articles at issue to harmonise with WTO articles. Second, the discussion related to whether Indonesia's actions constituted a ban or restriction on nickel beans for export. Third, there was a discussion on whether Indonesia's measures were justified under the GATT 1994 articles. Furthermore, the panel concluded with an analysis stating that the EU had put forward a reasonable alternative remedy, and Indonesia had failed to rebut the argument (Chandra et al., 2024).

The three stages of the panel-level deliberations can be described as follows:

#### **1. Discussion of the initial problem**

The European Union is suing Indonesia at the WTO over a policy to ban exports and domestic processing requirements (DPR) of nickel ore in January 2021. The policy at issue by the European Union is contained in Minister of Energy and Mineral Resources Regulation No. 11/2019 concerning the Second Amendment to Minister of Energy and Mineral Resources Regulation No. 25/2018 concerning Mineral and Coal Mining Business (Permen ESDM No. 11/2019) and Minister of Trade Regulation No. 96/2019 concerning Export Requirements for Processing and Refining Mining Products (Permendag No. 96/2019). (Sutrisno, 2024).

According to the EU, both regulations are inconsistent with Article XI:1 of the GATT 1994 (GATT, 1994). This article stipulates that each WTO member country is prohibited from imposing restrictions other than tariffs, taxes, and other duties, and not other restrictions, including quotas and licensing of imports or sales in the context of exports (Sutrisno, 2024).

The EU believes that this action is also inconsistent with Indonesia's obligations under the agreement, particularly under 3.1 (b) of the SCM Agreement. According to Article 3.1 B) the SCM Agreement is a violation because Indonesia did not promptly announce all general implementation measures relating to the implementation of export restrictions and the issuance of export licenses. (Syafira et al., 2023).

## **2. Discussion on whether Indonesia's actions constitute a ban or restriction on nickel ore for exports**

In rebutting the EU's argument, Indonesia argued that the export ban on nickel ore and DPR can be justified through Article XI:2(a), which reads: "...export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party." (Indonesia, 1994) Even if the Panel holds otherwise, Indonesia's policy can still be justified through Article XX(d) as "necessary to secure compliance with laws or regulations [...] relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trademarks and copyrights, and the prevention of deceptive practices." (Sutrisno, 2024).

Indonesia argued that the export ban was imposed due to the estimated depletion of nickel reserves in Indonesia and also the use of nickel for the government program in the manufacture of the electric vehicle battery industry. In addition, the downstream program for domestic mining commodities is also ongoing. This downstream is carried out because existing natural resources must be used for the prosperity of the people. Downstreaming itself has good goals, namely adding value to natural resources, creating many jobs for the people, and increasing foreign exchange. (Sutrisno, 2024).

## **3. Discussion of whether Indonesia's actions were justified under the GATT 1994 articles**

The Panel, in its Decision (Report), first analysed whether the DPR was an export barrier as defined in Article XI:1 of the GATT 1994. Indonesia argued that the DPR is not an export barrier under Article XI:1 of the GATT 1994 because it is not a "border measure" but an "internal measure" as it is not directly related to export activities with other WTO members. To support its argument, Indonesia referred to the Appellate Body Report in the China-Auto Parts case, which stated that the Panel must scrutinise "the design, architecture and structure of the measure as a whole", whether a policy inhibits export activities with other countries or only internally. Indonesia argues that the EU's argument that it seeks to expand the scope of Article XI:1 of the GATT 1994 is absurd. Japan, Canada and the UK agreed with the EU that the Panel should focus on determining whether or not Indonesia's policy has a direct impact on imports and exports from and to other countries.

The Panel agreed with Indonesia that the Appellate Body in China-Auto Parts had a useful interpretation to analyse Indonesia's case. However, the Panel added that in China Parts, the issue discussed was related to import duties influenced by internal factors, namely the use of imported auto parts in the PRC. In Indonesia's case, the policy applied was indeed for domestic actors but implied hindering the process of selling nickel ore exports. The Panel rejected Indonesia's argument that it could not control whether the domestic actor in question intended to export its product or not. Thus, the Panel held that the DPR's scope fell within Article XI:1 of the GATT 1994 and, therefore, had the element of impeding international trade.

The Panel then examined whether nickel ore is essential to Indonesia as provided for in Article XI:2(a) of the GATT 1994. Indonesia argued that there are at least three reasons why nickel ore is essential to it. First, nickel is a significant source of revenue for Indonesia and contributes to employment, particularly in the Sulawesi and Maluku regions. Indonesia is one of



the largest nickel producers in the world with an output of around 7%. Second, nickel is a crucial natural resource for the domestic steel industry, which accounts for 3.94% of the Gross Domestic Product (GDP). The material supply of the steel industry cannot be met if it continues to export nickel, considering that some materials are also supplied from abroad. Third, in order to achieve the national strategic plan, especially for the development of electric vehicle (EV) battery products, Indonesia must secure one of its production materials, namely nickel. (Sutrisno, 2024).

The Panel disagreed with Indonesia's assertion that nickel ore is an essential product for it. The Panel argued that the nickel industry contributes to providing jobs and revenue for the country. However, the Panel found that Indonesia's export barriers were not aimed at addressing nickel scarcity per se but rather at stabilising nickel stocks for domestic needs (particularly downstream). Furthermore, the Panel added that the EV battery industry has not actually been established, meaning that Indonesia based its argument on predictions.

Regarding the "temporarily applied" element, Indonesia had difficulty defending its argument because of the policies at issue in the case; none of them showed that the export ban and DPR policies were only temporary. Indonesia only proved that among the policies starting from 2012, the policies had their validity period. However, the Panel found that for the different policies from 2012 to 2019, there was no break in implementation (continuous). The Panel refers to AB in China-Raw Materials, and there is indeed no specific time defining the temporary element. However, at least, the quantitative barrier policy applied should be "[...] finite, that is applied for a limited time and not indefinitely." The Panel sees that Indonesia has no intention to apply the export ban and DPR policy on a temporary basis. Instead, in the Panel's view, Indonesia will continue to apply the policy until domestic needs are met and when it has the technology to do so. (Sutrisno, 2024). This also suggests that Indonesia did not actually implement the export barriers to remedy the critical shortage of nickel itself, as elaborated in the following paragraphs. (Sutrisno, 2024).

In defining "critical shortage", the Panel borrowed the Appellate Body's interpretation of China-Raw Materials as "those deficiencies in the quantity that are crucial, that amount to a situation of decisive importance, or that reach a vitally important or decisive stage or a turning point." To prove this element, the Panel asked Indonesia to prove how critical its nickel ore reserves were. Indonesia relied on an expert report (the Maryono report) stating that its high-grade nickel ore reserves (high-grade ore, nickel content >1.7% nickel) were in a critical shortage situation due to the high production of stainless steel and EV batteries in Indonesia (due to investor pressure). The export ban is intended to keep nickel ore reserves at least until 2030 for nickel-hydrometallurgy types and 2049 for nickel-pyrometallurgy.

The European Union disputed Indonesia's argument that it should not include low-grade ore (nickel content <1.7%). The Panel agrees with the European Union's view because according to it. However, the low-grade ore mentioned by Indonesia is of little economic value, it should still be included in the calculation of the overall nickel ore reserve determination. The exclusion of low-grade ore from the calculation meant that Indonesia again lost momentum to defend its argument. Moreover, the Panel noted that Indonesia's high-grade nickel ore reserve requirements are still projections for some manufacturing facilities (stainless and EV batteries), meaning that they are not yet operational. In the end, the Panel concluded that Indonesia's nickel

ore was not actually in a critical shortage condition and thus failed to fulfil this element. (Sutrisno, 2024).

The panel concluded that Indonesia's export ban and domestic processing requirements were contrary to Article XI: 1 (WTO, 2022). Indonesia itself was officially declared defeated in the Dispute Settlement Body DS 592 dispute in the final panel report issued on October 17, 2022. Investigated, it turns out that Indonesia's defeat of the European Union's lawsuit at the WTO occurred because the downstream industry in Indonesia was considered immature. The Special Staff of the Minister of Trade for International Trade Agreements, Bara Krishna Hasibuan, said that this was one of the reasons put forward in the panel at the first level. The WTO considers that in a country that bans the total export of a commodity, the industry in the country supported by the commodity must be fully developed first. Meanwhile, the downstream nickel industry, namely iron in Indonesia, is still considered undeveloped. "So, for example, there is a commodity crisis, and then the country's domestic industry is mature, if, for example, an export ban is given, it is declared valid by the WTO. This is said by the WTO that our iron industry, our iron is a by-product of nickel is iron, iron in Indonesia has not developed, so it is not mature," he explained in CNBC Indonesia's Mining Zone, quoted Thursday (16/2/2023) (CNBC, 2023b).

### **3. Appellate Body as the Final and Highest Judicial Body**

As the court of appeal and final instance, the Appellate Body automatically becomes the fulcrum of hope for the parties to resolve the dispute. The Appellate Body is the pinnacle of dispute resolution to obtain a fair and satisfactory decision. The Appellate Body will become a legal battleground to win and ensure that the position of member countries is in accordance with the rules of international trade in the WTO Agreement. As an appellate body, the Appellate Body's decision will be decisive, as the power of the Appellate Body will affect the multilateral trading system on the movement of international flows of goods and services. The Appellate Body's decisions will also serve as a reference for countries in taking the direction of global trade policy in the future. The Appellate Body's decisions will have an impact on upholding rule-based multilateral trade and become the jurisprudence of international trade law. (Kusnowibowo, 2020, p. 119).

In the DS 592 case, the Indonesian Government filed an appeal in December 2022 and prepared its argument, namely that currently, Indonesia is indeed in the stage of boosting the downstream industry in the country, especially the downstream of raw minerals such as nickel. "Nickel is already growing; we already have dozens of smelters that process the nickel; that is our argument, so we will be there and later in 2024 or 2025 when the appeal hearing starts, we have many smelters, and our industry is more mature," he said. For information, the Special Staff of the Minister of Trade for International Trade Agreements, Bara Krishna Hasibuan, said that RI's appeal regarding nickel might only be able to run in 2024. This happened because of the blockade of the election of the Appellate Body by one of the WTO Members, namely the United States (US).

The US believes that major reforms need to be made at the WTO. Thus, as long as reforms at the WTO have not been made, the US will not approve the formation of an appeals panel. "We have consulted with our Geneva-based lawyers, and it is estimated that the panel will realistically only be formed in 2024," he said. In addition, according to Bara, the government also still has to wait for the queue to process at the WTO Appellate Body, so the appeal process does take a long time. "So once



the panel is formed, there is also a queue of cases that must be heard at the panel. Well, we are still number 23-24. So as long as there is no decision from the panel, we can continue our policy on the development of the downstream industry," he said.

Indeed, as explained above, the WTO's quasi-judicial nature allows for appeals to be filed with the Appellate Body. However, the WTO Appellate Body is currently in crisis due to the non-appointment of new judges after the expiration of the previous judges' terms. This is due to pressure from the United States under Donald Trump (Bown, 2022; Bown & Keynes, 2020).

So, in terms of dispute settlement at the WTO, the dispute over the lawsuit filed by the European Union against Indonesia over restrictions on raw nickel exports cannot be said to have received a final and binding decision because the appellate body has not made a decision.

### **Legal certainty over Indonesia's nickel downstream policy due to dispute settlement ruling at WTO**

#### **1. Nickel downstream policy for green transformation and efforts to increase foreign exchange**

Indonesian nickel is a leading commodity in the international market. In line with the increasing demand for nickel commodities used for the use of electric cars as a component of electric vehicle batteries, Indonesian nickel is highly targeted by many countries, especially European Union countries.

The abundant amount of nickel reserves in Indonesia gives Indonesia many opportunities to take advantage of this situation. The abundance of laterite nickel ore, both limonite and saprolite types, encourages the development of the electric vehicle battery industry in connection with the growth of electric vehicle sales which are predicted to reach 20 million sales by 2050. At the end of 2020, LG Energy Solution officially signed an MOU or memorandum of understanding to invest in the battery industry both in the upstream industry and in the downstream nickel processing industry with an investment value of Rp 142 trillion.

The increase in nickel commodity exports is due to global market demand, which continues to increase over time. This itself is related to the rise of electric vehicles (EVs), which are designed to meet the need for environmentally friendly vehicles, reduce carbon emissions, and anticipate the decline in world oil reserves and production.

In addition, the target towards green transformation through the "net zero emissions" program in 2050 will continue to drive nickel export demand. It is estimated that by 2040, the value of nickel exports will reach more than 6.2 million tons per year. In the B-20 Indonesia Net Zero Summit 2022: Decarbonization at All Cost event, Indonesia stated that it is currently focusing on building nickel downstream. In 2019 alone, companies that want to export nickel are required to downstream nickel first in the country.

Downstreaming itself is an effort to increase the added value of a commodity, especially in this case, nickel mining. The downstreaming of the nickel mining industry is carried out to achieve the main goal of increasing the added value of commodities. In addition, downstream is also carried out to develop the downstream mineral industry, increase the amount of Gross Domestic Product (GDP), create jobs, increase the ability to develop technology and human resources and foster national economic resilience.

## **2. The impact of the EU lawsuit on Indonesia and how to reduce the risk of such impact**

The impact of this lawsuit from the European Union itself on Indonesia, in addition to the trial if Indonesia is proven wrong, is that the government must revise the rules regarding the nickel ore export ban. If so, nickel ore exports will likely return to the European Union. In addition, the impact in the short term is the amount of losses incurred by the government to pay compensation and sanctions. In contrast, in the long term, it will be related to potential investment in Indonesia.

However, there are ways to reduce some of these risks, namely by increasing domestic investors, especially for State-Owned Enterprises (BUMN), in the absorption of nickel ore downstream. Thus, nickel ore reserves available for export will be depleted because domestic downstream has been carried out first. This is done to maintain the increasingly limited availability of nickel ore and spur business actors in Europe to carry out downstream cooperation with Indonesia through BUMN. In addition, what can be done is to increase the export duty on nickel ore significantly. With the increase in export duty, the price received by buyers in the export market will remain expensive.

Instead of a total export ban, Indonesia can actually do another alternative by imposing high export duties on nickel ore exports. Quoting the statement of Pande Putu Oka Kusumawardhani, Acting Head of the State Revenue Policy Center of the Ministry of Finance's Fiscal Policy Agency, as reported by Kompas, the government has actually planned this long ago. It has nothing to do with Indonesia's win-loss at the WTO. (Theodora, 2022). This was also emphasised by the Minister of Finance, Sri Mulyani. She added that it takes time to finalise this plan, one of which is by holding discussions with other ministers. The export tax is not just for state financial purposes but for a broader purpose, namely strengthening the structure of the Indonesian economy, especially in the nickel sector. (Muliawati, 2022).

Unlike Article II:1(b) of the GATT 1994, which prohibits WTO members from applying import tariffs in excess of agreed limits or concessions rates, there are no specific rules regarding tariff limits for exports. Looking at history, GATT negotiators focused their thoughts and energy on formulating rules related to import tariffs, while exports were simply forgotten. (Ghori, 2020). This indicates that according to WTO law, member countries can freely set export tariffs according to the needs of their respective economies. (Sutrisno, 2024).

There are three strategies, according to Prof. Nandang Sutrisno, S.H., LL.M., M.Hum., Ph.D. in his Inaugural Speech of Professor at the Islamic University of Indonesia, that the Indonesian government can take over the defeat in the panel decision of the European Union's lawsuit against Indonesia from nickel ore export restrictions. First, Indonesia can take advantage of the legal gap, namely the weakness of the WTO in export control arrangements. WTO members can impose no regulation on the maximum export tariff on the export of commodities or products related to natural resources. The characteristics of the WTO, which are very strict in legal interpretation, can also be utilised by Indonesia to make export tariff policies rather than non-tariff policies through quantitative restriction prohibitions. Second, the government should harmonise regulations from all sectors related to natural resources with WTO provisions. Thirdly, the government should foster a spirit of "nationalism" among industry and trade players related to natural resources so that considerations of Indonesia's national interests are mainstreamed on a volunteer basis rather than momentary

business interests. Finally, the government must continuously improve the ability of its officials to make smart policies that protect national interests without violating international law (Sutrisno, 2024).

Director of the Center of Economic and Law Studies, Bhima Yudhistira Adhinegara, said that the government needs to prepare the appeal carefully. Many developing countries lack thorough preparation when handling disputes at the WTO. "This is a classic problem in developing countries, the main weakness in the negotiation process in terms of substance and negotiation techniques. If you are ready to compete at the WTO level, starting from policy making, defence arguments, and lobbying skills must be complete." Bhima said that Indonesia's team of lawyers and representatives at the WTO needs to be totally evaluated. This also refers to previous WTO dispute cases such as chicken imports from Brazil. Bhima said arguing at the international level requires capacity and experience that is credible enough. "Because Indonesia has already entered the WTO, so we have to find loopholes to defend our policies," he said. (Komalasari, 2022).

### **3. The concept of The Principle of Sovereign Equality in International Trade and efforts to uphold Permanent Sovereignty over Natural Resources in the face of EU lawsuits**

#### **a. The Principle of Sovereign Equality Concept in International Trade**

The principle of sovereign equality consists of 3 (three) basic words, namely principle, sovereign, and equality. The principle can be interpreted as a principle, principle, basis, habit, theory, rule, law and so on. (Language Center, 2024). Sovereign is defined as sovereignty; the state is said to be sovereign, meaning that the state has the highest power. However, this supreme power has its limits. The state's territory limits the space of validity of this supreme power, so a state only has supreme power within its territory. (Santoso, 2018). Finally, equality focuses on equality or equal treatment for all individuals, regardless of their different needs, abilities, and backgrounds. In a broader context, this equality can be interpreted as impartiality, i.e. equal treatment for everyone. (Anugerah, 2023).

Based on the UN Charter article 2 paragraph 1, which states, "The Organization is based on the principle of the sovereign equality of all its Members", meaning that international law as the law applies to the international community, which consists primarily of sovereign and independent states. Each state is independent and sovereign, a principle in international law is the principle of sovereign equality. In this sense, no state or international organisation stands higher than other countries; the law governing relations between equal states is the law of international relations. Therefore, international law is coordinative with other laws that are relations between states. (Setianingsih, 2019).

The reason every country and international organisation uphold the principle of sovereign equality is because it contains an attitude of equality in every country. The condition of this principle is that the state is not under another state and has sovereignty and independence. In terms of communication between countries, each state representative can express themselves to other countries without having to override logic. The UN designed this principle to stop wars, although, in the facts on the ground, wars still exist until 2022, and the current events are the failure of the UN in transforming the opinions of each member state in the session.

The principle of sovereign equality needs to be realised even though it is declared impossible because each country has different truths that are seen when the state or its representatives express their opinions; on the other hand must uphold tolerance and mutual respect between sovereign countries. However, the sovereignty view and the economic view are different things. However, they are seen as the same due to the fact that economic and welfare problems will hit the newly sovereign state, so the sovereignty of a country is currently seen through its resistance to the economic turmoil that has been faced. (Koskenniemi & Kari, 2020).

The requirements of the principle of sovereign equality based on UNGA (United Nations General Assembly) Doc A/6799 (September 26, 1967) are to have sovereignty, have the right to sovereignty, respect the personality of the state, and free to choose and develop its political, social, economic and cultural; independent; in good faith fulfil international obligations. Each country is free to determine and develop its economy, so this is the basis for the application of the principle of sovereign equality in investment in general.

Basically, politics, social and economy cannot be separated from sovereignty. An attribute of state sovereignty is economic sovereignty. Without this, political sovereignty is incomplete. Asserting economic sovereignty means controlling the economic activities of both legal entities and foreign legal entities that run businesses within a country, whether citizens of the country or foreigners. Specifically, international economic law must be based on the principles of *pacta sunt servanda*, freedom, sovereign equality, reciprocity, and sovereign economics.

So, every state and international organisation is required to uphold the principle of sovereign equality, which describes the equality of degrees in each country. The condition is that the state is not under another state, has sovereignty and is independent.

Developing countries such as Indonesia have investment attraction in the form of natural resources that are still abundant, such as minerals or the agricultural/plantation sector; previously, to control it, the colonial system prevailed, which resulted in threats to sovereignty, to avoid the system prevailing again, the UN issued a resolution known as the General Assembly Resolution on the Permanent Sovereignty over Natural Resources (PSNR), which states that the state's sovereignty over natural wealth and resources must be exercised in the interests of national development and the welfare of the people, where the exploitation, development and disposition of resources and foreign capital are necessary, but must be in accordance with the rules and conditions of the country with provisions deemed necessary or desirable based on the authorisation, restrictions and policies of a country.

b. Efforts to uphold Permanent Sovereignty over Natural Resources in the face of an EU lawsuit

The WTO is very strict in interpreting and applying its agreements. The US, PRC and Indonesia have very rational arguments regarding the protection and management of natural resources (biological and non-biological) and their relation to economic growth. Nonetheless, the state's authority to manage natural resources within its territory, in this case, the PSNR principle, must be applied with caution when juxtaposed with international trade activities. However, this does not indicate that the WTO (Panel and Appellate Body) has a narrow interpretation of the PSNR principle; rather, it emphasises that the PSNR principle must be applied in line with each country's

obligations in the WTO. The Panel on China-Raw Materials emphasised that being part of the WTO (and its agreements) is the most representative example of the exercise of sovereignty in general.

In US-Tuna II, the Panel and Appellate Body had contrasting views. The case did not explicitly talk about the management of natural resources in the US territory. However, its scope was more general, namely in the interest of the survival of dolphin species that are often caught accidentally (by-catch) because they often go hand in hand with tuna species. The "dolphin-safe" certification policy for tuna products entering the US is a good step in protecting dolphin species, which could become endangered if left unchecked. However, the carelessness in implementing the policy has disrupted international trade activities (in this case, Mexico). It was found that the US policy was discriminatory because it only excluded Mexican tuna products, while local tuna products did not require such certification (Sutrisno, 2024).

China-Raw Materials and Indonesia-Raw Materials are two cases that are more relevant when talking about the PSNR principle. In the case of Indonesia-Raw Materials, if referring to the Panel's findings, the Indonesian government did not prepare or formulate the nickel ore export ban policy carefully enough to trigger complaints from other WTO member countries. Not only in terms of policy, as said by the Special Staff of the Minister of Trade for International Trade Agreements, but Bara Krishna Hasibuan, the management of nickel downstream in Indonesia can also be said to be imperfect. (CNBC, 2023a). In one of Indonesia's arguments at the WTO, it is said that nickel ore is an essential material to support domestic needs. However, the needs in question are partly aimed at industries that have not even started (still in planning). Due to the strict characteristics of the WTO, this argument is certainly not in Indonesia's favour (Sutrisno, 2024).

Taking into account the condition of Indonesia's nickel, which has limited stocks, and the downstream industry, which is still in the process of development, this position (legal vacuum) certainly benefits Indonesia. Indonesia can set nickel export tariffs to other countries at a fairly high price without having to worry about colliding with WTO regulations. This situation is common, and other developing countries tend to apply the same thing. The European Union had submitted a proposal regarding the renewal of export control arrangements in the GATT but received rejection from developing countries exporting natural resources. (Ghori, 2020).

Internal sector improvement is also an important key to the smooth implementation of the PSNR principle. Reflecting on Indonesia-Raw Materials, it can be concluded that Indonesia's defeat is due to technical factors, namely the imperfect nickel downstream industry and other derivative industries (for steel and EV batteries). This factor can be used by other countries, in this case, the European Union as the largest nickel importer, as a loophole so that Indonesia does not stop exporting nickel ore. (Sutrisno, 2024).

The immaturity of the internal sector can affect Indonesia's position when it has to settle disputes at the WTO, especially if it faces developed and economically strong countries. This was examined by Sitanggang (2017) by analysing four Indonesian cases at the WTO (Indonesia-Autos; US-Offset Act; Korea-Certain Paper; and US-Clove Cigarettes). According to his findings, every time Indonesia litigates at the WTO, it is always constrained by weak evidence to support its rebuttal (whether the case is won or lost). (Sitanggang, 2017). This can certainly be overcome by improving human resources with adequate legal, political and economic understanding. Indonesia is also

advised to use facilities provided by the WTO, such as the Advisory Center on WTO Law (ACWL). (Sutrisno, 2024).

Still about internal factors, Oliver Long, cited by Jamilus, stated that the problems of developing countries in the international trade sector come from the country itself. (Sutrisno, 2024). He said that the unpreparedness of human resources on the part of business owners and also from the government greatly hampers the international trade process. In terms of entrepreneurs, it can be seen that the lack of managerial skills and business understanding in the world of international trade is a factor that needs to be highlighted and improved. Then, from the government side, the inconsistency of government agencies to regulate the flow of international trade and the lack of commitment to macro-economic policies are also obstacles and must be immediately corrected (Sutrisno, 2024).

PSNR has been recognised in the interpretation of international trade dispute cases related to natural resources, even though the WTO itself does not specifically regulate international trade in natural resources. From the existing cases, the Panel and Appellate Body of the WTO have not or at least not favoured the enforcement of PSNR for the national interests of WTO members. This is not because the WTO adopts a narrow view in interpreting PSNR but simply because the international trade policies adopted by the countries concerned are contrary to the basic principles of the WTO, as reflected in the cases of US - Tuna II, China - Raw Materials and Indonesia - Raw Materials. One of the harshest WTO principles is the prohibition of quantitative restriction, which means "no restriction" on both exports and imports. In addition, the export or import ban policy is not justified by Article XX of GATT 1994. Thus, a country can claim the application of the PSNR principle if and only if it continues to comply with international obligations that have become its commitment as a member of the WTO (Sutrisno, 2024).

#### **4. Weaknesses of WTO and unratified GATT rules in line with the dynamisation of international trade**

As an international organisation that resolves trade disputes, the WTO has been perceived as lacking/weak in administrative, procedural, and organisational management for more than 29 years since its establishment in 1995. (Kusnowibowo, 2020, p. 138). Most WTO agreements are the result of the 1986-94 Uruguay Round of trade negotiations. Some, including the GATT 1994, are revisions of texts that previously existed under the GATT as multilateral or plurilateral agreements.

The most important principle of GATT is non-discriminatory trade. The most-favoured-nation principle was made part of the GATT, as nondiscrimination is a key principle of the agreement. In accordance with this principle, no country should try to take advantage of another country's economic conditions. Developed and developing countries have different perspectives and interests in the world economic community and international law. Developed countries are the beneficiaries of international law because international law used to be the law governing relations between countries in Europe, then became international law after the First and Second World Wars. Developing countries that were still colonised at that time were not involved in the formation of international law. As a result, international law does not reflect the values adopted by developing countries, including in international economic law. The international economic law embodied in the WTO and its agreements is more favourable to developed countries.



Developed countries are industrialised countries that want to market their industrial products to developing countries. Therefore, they want to remove all trade barriers and create free trade because it will benefit them. Meanwhile, developing countries do not want trade barriers to be removed because it will be detrimental. After all, if there is free trade, then the products of developed countries will enter and destroy the developing countries' industries that are being built.

The rules imposed in the WTO are not in line with the vision of a Golden Indonesia 2045. In achieving the economic growth target of 6%-7% towards the Golden Indonesia Vision 2045, Indonesia cannot only rely on the brown economy. However, it must also start building a circular economy, green economy, and blue economy. The process of transforming the Indonesian economy into a sustainable green economy must balance economic, social and environmental aspects, then be in line with the SDGs, the Paris Agreement, the Golden Indonesia Vision 2045, and be able to achieve the Net Zero Emissions (NZE) target in 2060. "The implementation of the green economy in the long term is projected to stabilise economic growth by an average of 6.22% until 2045, reduce emissions by 86 million tons of CO<sub>2</sub>-equivalent, and create up to 4.4 million jobs," explained Coordinating Minister for Economic Affairs Airlangga Hartarto in his virtual speech at the opening of the Green Economy Expo 2024, which has the theme "Advancing Technology, Innovation, and Circularity", in Jakarta, Wednesday (3/07). The green economy is also important in the realising economic transformation towards a high-income country on par with developed countries and out of the middle-income trap. (Limanseto, 2024). One of the strategies implemented by the Indonesian government to support the green economy is the nickel hyalinisation policy.

##### **5. Government's current and future steps on nickel downstream policy**

The strategy of limiting nickel ore exports has been incorporated into the 2020-2024 National Medium-Term Development Plan (RPJMN) by the Indonesian government. In the 2020-2024 RPJMN, the government designated nickel as one of the main investment projects for State-Owned Enterprises to increase the added value of nickel ore to achieve National Priority I. The development policies implemented in PN 1 aim to support the recovery of production activities, as well as increase added value and productivity by optimising the linkages between the primary, secondary, and tertiary sectors. The following are the strategic steps taken by the Ministry of Energy and Mineral Resources as outlined in the Grand Strategy to increase the added value of nickel (Directorate General of Mineral and Coal, 2021).

The first step is to increase the resilience of nickel reserves and maximise the production of industrial raw materials. This step aims to ensure the availability of reserves, ensure the accessibility of industrial needs, and extend the life and sustainability of nickel reserves. The second step includes the improvement, optimisation and efficiency of the nickel processing and refining industry. The third step includes developing the manufacturing and production industry and increasing the Domestic Component Level (TKDN). The fourth step optimises the use of domestic products and introduces a recycling system. These initiatives aim to reduce the trade deficit and strengthen downstream national industries. Of course, the plan cannot be implemented by the Ministry of Energy and Mineral Resources alone. However, later, the Ministry of Energy and Mineral Resources will collaborate with other Ministries. (Mernissi, 2024).

On July 7, 2023, the then Indonesian Minister of Defense, Prabowo Subianto, stated that downstream is a strategic key for Indonesia to become a developed, prosperous and welfare country. This is in line with the strategic program policies pushed by President Joko Widodo's current administration. "The purpose of independence, apart from protecting all Indonesian blood, is to make our nation prosperous and smart. An independent nation is a nation that comes out and is able to eliminate poverty among its people," Defense Minister Prabowo said while attending the National Meeting of Punguan Simbolon dohot Boruna Indonesia (PSBI) in Jakarta. Defense Minister Prabowo stated that many experts and institutions assessed that the success of the government in building and controlling the Indonesian economy had reached the stage that, in the not-too-distant future, Indonesia could become a prosperous country. The implementation of downstream or processing of natural resources in the country can increase added value for the people. On the other hand, according to the Minister of Defense, President Jokowi reminded that in the development of a nation, there is something called a demographic bonus. A demographic bonus is a condition where the productive age population is twice the number of children and elderly population. President Jokowi considered this demographic bonus to be a strength. "It is predicted that in 2025, around 14 or 15 years, if we are able to utilise this, Indonesia can become a very large nation. The condition is that growth must be at least 6 per cent. Currently, Indonesia's economic growth is more than 5 per cent. To realise this, we must get along well, work together, work well and understand each other. That is the key," Defense Minister Prabowo said. (Ministry of Defense, 2023).

After being sworn in as President of Indonesia on October 20, 2024, President Prabowo Subianto changed the nomenclature of the Ministry of Investment/Investment Coordinating Board (BKPM) to the Ministry of Investment and Hilirisasi. Rosan Roeslani, who was appointed as Minister, said Prabowo wants to expand downstream to add more value to Indonesia and create more jobs. "The direction is that more downstream is carried out, not only in mining, so that there is added value that we enjoy. Moreover, the end is how increased employment can continue to be created," said Rosan (CNN, 2024).

Then the Minister of Industry of the Red and White cabinet for the period 2024 to. 2029, Agus Gumiwang Kartasmita was given the first task by President Prabowo Subianto to expand the downstream industry of all commodities. "The directive from the President is to pay attention to downstream, not just a few commodities but all commodities to create added value," Agus said at the Presidential Palace Complex after the inauguration of the Red and White Cabinet Monday (21/10/2024). The downstream program is a follow-up policy that has also been intensified in the Jokowi era. Downstreaming is considered to be a way to develop the processing industry, as well as create new jobs for the industry. In this case, Agus will make a roadmap or road map in the next 3 years related to downstream while strengthening the manufacturing industry. This effort is considered to be able to encourage the target of economic growth set at around 7%-8%. "We will make a roadmap as a form of support from the manufacturing sector for economic growth targeted at 7%-8%; we will make a roadmap in the next 3 years," he said. (Nurdifa, 2024).

From the above explanation and the ministries formed by the elected Indonesian president for the period 2024 to. 2029, it can be clearly concluded that the Indonesian government remains serious about the nickel downstream policy in an effort to achieve a Golden Indonesia 2045.

## Conclusion

Nickel is a commodity that is prioritised in meeting the needs of modern humans, especially for the green economy. Indonesia, as a country that holds the largest nickel reserves in the world, certainly has a strategic bargaining position. It is no wonder that the nickel ore export restrictions issued by the Government of Indonesia in 2020 became a serious attraction and debate from the international community. The European Union, as a strategic partner that has a strong dependency on nickel supply from Indonesia, feels disadvantaged by this policy. The dispute between the two parties has recently become a serious dispute to be discussed at the WTO. In this case, the WTO, as the world's largest international trade organisation, is more trusted to contribute to the resolution of trade issues compared to other international legal schemes, but it still has remedies to be fixed in the system, as the appeal that has not been able to be facilitated finally could not put this dispute fully reach the stage of a mutually beneficial agreement. Until now, the Appellate Body has been unable to review appeals due to its ongoing vacancy caused by the United States reappointment process. The nickel downstreaming policy taken by the Indonesian government is an effort made to increase the added value of nickel to increase the country's foreign exchange resources and the Indonesian nation's efforts to become a developed country that not only supplies nickel in raw form to the international world but processes it into raw materials for making Electric Vehicle (EV) batteries in accordance with the dynamics of international trade that supports green transformation (net zero emissions).

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