



The Impact of the WTO Dispute Settlement Body Decision on Indonesia and European Union Export Ban Dispute: A Case Study of Nickel Raw Material Export Restrictions

Dampak Keputusan Badan Penyelesaian Sengketa WTO terhadap Sengketa Larangan Ekspor Indonesia dan Uni Eropa: Studi Kasus Pembatasan Ekspor Bahan Baku Nikel

Tria Noviantika

Institut Karya Mulia Bangsa

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Corresponding Author:

Tria Noviantika

trianoviantika4@gmail.com

085809987136

Abstract

Indonesia's Nickel Export Ban Policy to several countries has implications for the European Union's lawsuit to the WTO. This research answers two problem formulations: the first is the background of Indonesia's establishment of a ban and limitation of nickel raw materials through Minister of Energy and Mineral Resources Regulation No. 17 of 2020 concerning the mineral and coal mining business; the second is the impact of the WTO Dispute Settlement Body's decision for banning Nickel Raw Materials on international trade, such as the potential opportunities, and the possible impact for Indonesia after the implementation of Indonesia's nickel export ban policy. This research is based on a qualitative method to describe the problems behind the Ban Restrictions Expenses Nickel raw materials and analyze the impact of the WTO Dispute Settlement Body's decision. The result is that the ban policy was taken as a form of Indonesia's sovereignty to complete control over its resources based on Article 33 (3) of the Constitution. The impact of the WTO ruling can affect Indonesia's reputation as a developer of processing factories and nickel purification (smelters) and also interrupt domestic batteries' ecosystem prospects. It needs some further research to analyze the impact of alternative solutions and the examination process's development through the WTO appeal ban.

Abstrak

Kebijakan Larangan Ekspor Nikel Indonesia ke beberapa negara berimplikasi terhadap gugatan Uni Eropa kepada WTO. Penelitian ini menjawab dua rumusan masalah: pertama, latar belakang Indonesia menetapkan larangan dan pembatasan bahan baku nikel melalui Peraturan Menteri ESDM No. 17 Tahun 2020 tentang usaha pertambangan mineral dan batu bara; kedua, dampak putusan Badan Penyelesaian Sengketa WTO atas pelarangan Bahan Baku Nikel terhadap perdagangan internasional, seperti potensi peluang dan dampak yang mungkin terjadi bagi Indonesia pasca pemberlakuan kebijakan pelarangan ekspor nikel oleh Indonesia. Penelitian ini menggunakan metode kualitatif untuk mendeskripsikan permasalahan yang melatarbelakangi pelarangan ekspor bahan baku nikel dan menganalisis dampak dari keputusan Badan Penyelesaian Sengketa WTO. Hasil penelitian menunjukkan bahwa kebijakan pelarangan tersebut diambil sebagai bentuk kedaulatan Indonesia untuk menguasai sepenuhnya sumber daya alam yang dimiliki berdasarkan Pasal 33 (3) UUD 1945. Dampak dari keputusan WTO tersebut dapat mempengaruhi reputasi Indonesia dalam pengolahan dan pemurnian nikel (smelter) serta mengganggu prospek ekosistem baterai dalam negeri. Diperlukan

penelitian lebih lanjut untuk menganalisa dampak dari solusi alternatif dan perkembangan proses pemeriksaan melalui larangan banding WTO.

INTRODUCTION

Market Study of Battery Mineral Resources in Indonesia stated that Indonesia is the largest nickel-producer in the world (Adisuryo, 2023). Based on mapping conducted by the Geological Agency in 2020, Indonesia has approximately 11.887 million tons of nickel ore resources and 4.346 million tons of ore reserves. Nickel is one of the scarce natural resources, but the demand for nickel has been growing rapidly. Some countries are largely dependent on imports for nickel because they suffer a lack of it. On the other hand, nickel-producing countries must also maintain their nickel supply as a non renewable natural resources. According to classical trade theory, a country will trade between countries for limited production factors because each country has a different form and quantity of natural resources (Suryano, 2022).

Therefore, Indonesia has officially banned raw nickel ore resources through the Minister of Energy and Mineral Resources Regulation No. 11/2019 concerning the Third Amendment to Minister of Energy and Mineral Resources Regulation No. 17/2020 concerning Mineral and Coal Mining Business. A related regulation is Article 103 of Law No. 4/2009 on Mineral and Coal Mining, which requires that metallic minerals, including nickel, be processed and refined domestically in order to increase the added value of Indonesia's minerals. Article 108 stipulates that refining is carried out five years after this law was enacted, which means the nickel export ban was enacted in 2014 (Hada et al, 2022). Because of those regulations, the European Union stated the act is against the WTO non-restrictive trade policy principle (Zaki et al, 2023). Furthermore, in 2019, the European Union filed a lawsuit to the WTO to revoke the banning policy to export raw nickel ore (Nugroho, 2022).

Regarding this policy, the European Union (EU), as one of the largest nickel importers, feels disadvantaged due to restricted access to raw nickel ore. The EU views Indonesia's actions as a violation of WTO provisions, specifically Article XI:1 of the General Agreement on Tariffs and Trade (GATT) 1994, which states:

"No prohibitions or restrictions other than duties, taxes or other charges, whether imposed utilizing quotas, import or export licenses or other measures, shall be imposed or maintained by any contracting party on the importation of any product from the territory of the other contracting party or on the exportation or sale for export of any product destined for the territory of the other contracting party."

The lawsuit covers five materials: (a) restrictions on exports of nickel, including an actual prohibition to export; (b) domestic processing requirements for nickel, iron ore, chromium, and coal; (c) domestic marketing obligations for nickel and coal products; (d) export licensing requirements for nickel; and (e) a prohibited subsidy scheme (Mitrana et al, 2021). It applied for responding some issues : 1) the measures on restricting a particular raw material export, including material which need a domestic processing requirement, domestic marketing obligations, and export licensing requirements, were seen to be not in line with Article XI:1 of General Agreement on Trade (GATT) 1994; 2) the subsidiary scheme which is prohibited does not seem inline with Article 3.1 (b) of Agreement on Subsidies and Countervailing Measures; and 3) the failure to publish immediately the measures which appears inconsistent with Article X:1 of General Agreement of Tariffs (GATT)1994 (Hada et al, 2022).

In this context, the Indonesian government has two primary reasons for implementing the nickel export ban policy

(World Trade Study Center, 2022). *First*, the advancement of smelter technology within the country is expected to drive a significant rise in domestic nickel demand. Currently, Indonesia operates 21 smelters, and plans to expand this number to 53 by 2024. The demand for nickel as a raw material for smelter processing is projected to reach 100 million tons in 2022 and is anticipated to grow further. Nickel processed through smelters offers a higher quality and selling price that is not low, so the export profit is more significant than nickel ore alone (Hasannah, 2021). Instead of being sold abroad, the government aims to secure domestic nickel ore stocks for smelter needs.

Second, the nickel export ban policy is seen as capable of developing domestic downstream industries related to nickel commodities. The Indonesian government is targeting more investment in the nickel downstream industry, especially in the development of the electric battery industry. Indonesia can only produce grade 2 nickel derivative products needed for stainless steel. Meanwhile, grade 1 nickel derivative products are required in order to manufacture electric batteries; in his statement, President Jokowi wants Indonesian nickel to be processed into grade 1 nickel products and lithium battery raw materials to produce electric vehicles. The grade 1 nickel processing industry is considered promising for Indonesia (Nursyabani et al, 2023).

Based on the description above, the focus of the problem in this Article is to further elaborate on 1) the background of Indonesia establishing a ban and limitation of nickel raw materials through Minister of Energy and Mineral Resources Regulation No. 17 of 2020 concerning Mineral and Coal Mining Business and 2) the impact of the WTO Dispute Settlement Body's decision on the ban on Nickel Raw Materials on international trade, what are the potential opportunities, and how will it impact Indonesia after the appeal decision if Indonesia loses. This research is

important considering that Indonesia's interest in managing natural resources should not be interfered with by other countries while remaining responsible according to the principle of permanent sovereignty over natural resources.

RESEARCH METHODS

This research uses a normative method, a literature study-based research (Soekanto and Mamudji, 2009). It will outline the issues behind the ban and Restrictions on the export of nickel raw materials to be carried out by Indonesia and analyze the impact of the Dispute Settlement Body's decision issued by the WTO on Indonesia in international relations and trade. The above review will utilize various primary legal materials that are juridically binding, namely multiple laws and regulations and jurisprudence. Meanwhile, secondary materials are not juridically binding but have conceptual explanations related to primary legal materials, namely research results, scientific articles, and journals (Benuf and Azhar, 2020).

RESULTS AND DISCUSSION

A. Safeguarding Sovereignty: Indonesia's Raw Nickel Export Bans and Restrictions

As a sovereign developing country, Indonesia must obtain the maximum economic benefits as a manifestation and purpose of national interests (Ulum, 2022). One way to get these economic benefits is to bind oneself into an International Agreement and join the World Trade Organization (WTO), which was then followed by the ratification of Law No. 7 of 1994 concerning the Ratification of the Agreement Establishing the World Trade Organization, which *mutatis mutandis* will have consequences for national sovereignty to harmonize laws and regulations to be following the provisions of the WTO and the provisions of the GATT-WTO (Bossche et al, 2022). Along with this, there are three main reasons why the Government

of Indonesia has adopted a nickel export ban policy, which is then regulated through a Government Regulation, which is a form of protection carried out by the Government of Indonesia to protect the sovereignty of national natural resources (World Trade Study Center, 2002), in a multilateral system, this can be sustainable. It is also essential to have an exception clause for protection against national security concerns (Boklan and Bahri, 2020). The purpose of trade between countries is not only to meet the community's needs but also to encourage economic growth, absorb labor, and improve the technological skills of the community due to the expansion of markets and increased production (Boklan and Bahri, 2020).

First, nickel is one of the scarce natural resources, so some countries that still need this natural resource must import it from other countries. In addition, nickel-producing countries also need to protect their natural resources to avoid scarcity, considering that nickel is one of the non-renewable natural resources. *Second*, developing smelter technology in Indonesia can increase domestic nickel demand. Indonesia has 21 smelters, which are planned to increase to 53 by 2024. Domestic nickel demand as raw material for smelter processing is predicted to reach 100 million tons by 2022 and will continue to increase. The results of smelter processing are higher quality and prices in the market, so export profits are more favorable than those of raw materials (Hasannah, 2021). Therefore, the government aims to secure domestic nickel for smelter processing.

Third, The nickel export ban policy can develop domestic downstream industries related to nickel commodities. The Indonesian government is targeting more investment in nickel downstream industries, especially batteries. At present, Indonesia is only able to produce grade 2 nickel, which is used as a raw material in the manufacture of stainless steel.

Meanwhile, Indonesia cannot yet produce the grade 1 nickel domestically, as a raw materials for lithium-ion batteries to produce electric vehicles.. The President of Indonesia, Joko Widodo, wants that Indonesia can produce nickel into grade 1 in the future. The grade 1 nickel processing industry can provide enormous economic benefits for Indonesia (Nursyabani et al, 2023).

B. The Impact of Dispute Settlement Body of WTO Verdict Regarding the Prohibition of Raw Nickel Material Export towards International Trade

Related to the policy taken by the Government of Indonesia, the European Union, being one of the world's largest importers of nickel, perceives Indonesia's policy as detrimental due to restricted access to raw nickel ore. The EU argues that this policy breaches the provisions of the World Trade Organization (WTO), specifically Article XI:1 of the General Agreement on Tariffs and Trade (GATT). Article XI.1 GATT 1994 stated:

"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".

Dispute Settlement Body of WTO decided that the export policy, processing, and refining nickel obligations in Indonesia violated the WTO provisions Article XI. 1 of GATT 1994 because in its implementation through the Minister of Energy and Mineral Resource Regulation No. 11 of 2019 and the Regulation of the Minister of Trade No. 96 of 2019 is not inline with Article XI.1 of GATT 1994. Therefore, it cannot be justified with

Article XI.2 (a) and XX (d) of GATT 1994 (World Trade Organization, 2022).

Referring to the final report on October 17, 2022, WTO stated that Indonesia is proven to have violated the provisions related to one WTO principle regarding quantitative restrictions prohibition, which is regulated by Article XI:1 of GATT 1994 on a dispute registered on Dispute Settlement Body (DSB:592). This regulation prohibits members from imposing trade restrictions other than tariffs, taxes, and other duties. However, other members of WTO could do a quantitative restriction if it meets the exclusion criteria stated in Article XX of GATT 1994. Furthermore, after the Dispute Settlement Body issued by WTO on December 8, 2022, Indonesia told the secretariat of WTO and European Union regarding its decision to appeal the panel report “Indonesia – Measures Relating Raw Materials” (WT/DS592) by submitting the electronic copy of appeal notice and filing an appeal through Appellate Body (World Trade Organization, 2022).

Given the Appellate Body's inoperability, all procedural deadlines in the Appellate Body Working Procedures should be considered suspended. In this regard, the European Union also intends to participate in an oral statement "that the European Union disagrees with all of Indonesia's allegations of errors of law and interpretation in the Panel Report as set out in the Notice of Appeal and the Appeal Submission" in the proceedings to held by the Appellate Body.

The impact of the WTO Dispute Settlement Body verdict is *that* it can first affect Indonesia's reputation as a developer of processing factories and nickel purification (smelter). *Second*, if Indonesia loses the Appeal at WTO, then Indonesia needs to pay the compensation, which is not cheap (to the plaintiff). *Third*, losing on WTO will interrupt the ecosystem prospect of domestic batteries, which is Indonesia's goal to carry out the nickel downstream and produce batteries. Related to that,

according to the classical trade theory, a state will do a trade between states because of its production limitation. Furthermore, Adam Smith also states that a state will export several goods because that state could produce a product cheaper than other states (Suryano, 2022). Those states must specialize in producing and exporting commodities with a slight loss and importing commodities with a sizeable absolute loss (Ibrahim and Halkam, 2021).

Apart from these three impacts, in the WTO Decision, Indonesia can take alternative solutions, namely by resolving disputes with the help of third parties as arbitrators or through bilateral negotiations commonly referred to as diplomacy. These efforts are to obtain a win-win solution considering that the EU as one of the trading partners is very potential for Indonesia, and vice versa, Indonesia as an important trading partner for the EU, especially in agricultural products (Sutrisno, 2024).

Given the opportunity, Indonesia continues to impose export restrictions to justify compliance with an international regime that tends to be non-binding to the international regime, regardless of the state's incentives to violate (Mariatulkubtia, 2020). The myopic interest refers to the state's perception of fees and tariffs collected on this issue if this issue is isolated from others (Keohane, 1984). Conversely, unfinished trade disputes may escalate into retaliation. By the European Union against Indonesia, this retaliatory action was taken by a country because it could not reach an agreement in the dispute settlement process (Fairuz et al, 2021). For a state that violates the WTO regulation, the last step that can be taken is a bilateral sanction between states. The trade sanction will generally given to the state that violated one or more of the members of the WTO that took the initiative to oppose the violation (Salles, 2010).

Several countries still need to implement the WTO ruling, including 1) The United States related to steel and

aluminum tariffs violating GATT 1994. 2) South Korea did not implement a panel ruling about a dispute over applying anti-dumping duties on certain paper products imported by South Korean importers from Indonesia (World Trade Organization, 2004). 3) The United States sued the European Union because of the prohibition of meat imports from the United States.

This case is related to the Sanitary and Phytosanitary Agreement, where the European Union has not complied with the WTO recommendation and even chose to agree with the consequences by offering compensation (World Trade Organization, 2008). 4) The United States is suing India over the import prohibition for several agricultural products. The prohibition is impacting one of the biggest poultry exports in the United States, as it is concerned about the spread of Avian Influenza (Theoarta et al, 2021). In its process, India felt that it had implemented following the recommendations of the Dispute Settlement Body. However, the United States felt that India needed to implement the verdict of the Dispute Settlement Body (World Trade Organization, 2016).

CONCLUSION

Nickel is one of the scarce natural resources in some countries, but plays an important role in various industries in several countries worldwide. The important role of Indonesia as one of the countries rich in Nickel resources accounts for about 37% of the world's total nickel production, which means that 2.7 million tons of world nickel comes from Indonesia (Winona, 2023), while in 2023 the significance of Indonesia's nickel production is increasing rapidly by contributing 50.5% (Bright Indonesia Foundation, 2024). Indonesia's domestic demand for nickel is expected to increase in line with the development of smelter technology in Indonesia. Moreover, the smelter will produce better quality and higher price products, so it could benefit

Indonesia as a nickel exporter. The prohibition of nickel export also aims to increase the downstream industry, especially on nickel commodities (Bright Indonesia Foundation, 2024).

However, the prohibition of raw material export causes complaint from the importing state, such as the European Union. because of the limited access to import the raw nickel. The European Union stated that prohibition is excessive and illegal because it could harm the nickel price in the world market (European Commission, 2023). For the record, Indonesia has 22% of the world's nickel reserves. This amount is quite large, so Indonesia's Nickel Export Ban has impacts on suppliers who use nickel as the main component (The National Bureau of Asian Research, 2023). This ban policy also affects Indonesia. For example, the European Union shifted nickel imports from Indonesia to Russia, as seen by the significant increase in Russian nickel imports in 2020. However, the war between Russia and Ukraine caused the world nickel price to increase (Cantayani et al, 2023). Indonesia has suffered commercial disadvantage in terms of import-export.

On the other hand, Indonesia has yet to take the opportunity to benefit from the world nickel price increase caused by the war with Russia. In addition, the operation of the smelter requires a large electricity capacity of about 4.8 gigawatts, which is different from what Indonesia has previously stated to reduce the use of carbon emissions for the coming years (Gupta, 2023).

The prohibition created by Indonesia is also in the field of Indonesia's sovereignty as a state, according to the 1945 Constitution of the Republic of Indonesia, Article 33 (3), which stated that "The land, the waters, and the natural resources within shall be under the powers of the State and shall be used to the greatest benefit of the people." Indonesia has complete control over the natural resources above the states

for the most significant benefit of its people (Gupta, 2023). It can positively encourage an economic driver because it is processed domestically. This can be a significant income for Indonesia because the process requires high costs. This regulation is a derivative of the Mineral and Coal Mining law, which was also conveyed by the Indonesia former President Joko Widodo in his speech and included in the Medium-Term Development Plan. This study has not analyzed the impact of alternative solutions that Indonesia can take after the delay in the appeal examination at the WTO. Therefore, further research is needed to analyze the impact of alternative solutions and the examination process's development through the WTO appeal band.

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