

Indonesia's Nickel Downstreaming Dilemma: Quantitative Restrictions Under the GATT and the WTO Appellate Body Impasse

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ABSTRACT: Indonesia's nickel mining downstreaming policy, executed pursuant to Minister of Energy and Mineral Resources Regulation No. 11 of 2019, triggered an international trade dispute with the European Union before the World Trade Organization (DS592). This normative legal research aims to analyze the consistency of the raw nickel ore export ban with the principle of the General Elimination of Quantitative Restrictions under Article XI:1 of the GATT 1994, examine the legal enforceability of the critical shortage and conservation exception doctrines under Article XI:2(a) and Article XX(g), and evaluate the procedural implications arising from the institutional paralysis of the WTO Appellate Body. The findings and judicial deconstruction reveal that the absolute ban on raw nickel ore exports conclusively violates Article XI:1 of the GATT 1994, as it operates as a non tariff barrier distorting global markets. Furthermore, Indonesia's defense arguments regarding the imminent critical shortage of high grade saprolite nickel ore and ecological conservation were rejected by the Panel. This rejection was grounded in the permanently designed nature of Indonesia's measures and the lack of domestic production caps, which violates the principle of even handedness. Notwithstanding the defeat at the Panel stage, Indonesia's procedural maneuver of "appealing into the void" amidst the vacancy of the Appellate Body prevents the Dispute Settlement Body from adopting the Panel Report. Consequently, the Panel Report lacks legally binding force, thereby affording Indonesia tactical leeway to sustain its downstreaming policy in the near term without the imminent threat of authorized retaliatory trade sanctions.

KEYWORDS: Nickel downstreaming; quantitative restrictions; GATT 1994; DS592; Appellate Body paralysis; resource sovereignty.

I. INTRODUCTION

The escalation of international economic tensions between the Republic of Indonesia and the European Union exposes a fundamental paradigm shift in the legal politics of natural resource governance within developing nations. For decades, Indonesia passively positioned itself within global value chains merely as an exporter of raw materials subjected to massive domestic extraction devoid of domestic value addition. Strategic consciousness of economic leakages and the urgent imperative to escape the middle income trap propelled the government to adopt a radical stance grounded in resource nationalism through its mineral downstreaming policy. This policy architecture was engineered toward a precise objective: mandating the domestic localization of mineral refining processes to establish an integrated domestic industrial ecosystem, thereby securing Indonesia's geopolitical leverage within the global electric vehicle battery supply chain.¹

The legal foundation of this structural transformation was initially codified through the enactment of Law No. 4 of 2009 on Mineral and Coal Mining, subsequently reinforced by Law No. 3 of 2020.² This regulatory framework binds all corporate holders of Mining Business Licenses (*Izin Usaha Pertambangan*) to an absolute obligation to refine mineral extraction outputs within the domestic customs territory prior to export.³ The acceleration of this export restriction reached its zenith when the Ministry of Energy and Mineral Resources promulgated MEMR Regulation No. 11 of 2019. This sectoral regulation advanced the deadline for the export ban on low grade nickel ore containing less than 1.7 percent nickel to take effect as of January 1, 2020, curtailing the original

¹ A. P. Prabandari, "National interest vs international obligation: Analisis kebijakan hilirisasi mineral Indonesia dalam kerangka WTO", *Padjadjaran Journal of International Law*, Vol. 4, No. 1, 2020, p. 92.

² Law No. 3 of 2020 on the Amendment to Law No. 4 of 2009 on Mineral and Coal Mining.

³ D. S. N. Heriyanto, "Implikasi hukum kebijakan pelarangan ekspor bijih nikel Indonesia di bawah rezim World Trade Organization", *Jurnal Hukum Internasional*, Vol. 18, No. 3, 2021, p. 350.

⁴ H. Adolf, *Hukum perdagangan internasional: Prinsip-prinsip dan konsepsi dasar*, Jakarta: Rajawali Pers, 2018, p. 45; S. Lester, B. Mercurio, & A. Davies, *World trade law: Text, materials and commentary*, 3rd ed., Oxford: Hart Publishing, 2018, p. 120.

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roadmap that envisioned a transitional export phase through 2022.

This assertion of economic sovereignty clashed directly with the multilateral trading system under the General Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO).⁴ Under International Trade Law, non-tariff barriers in the form of quantitative restrictions are regarded as the most disruptive instruments affecting open market access. WTO jurisprudence strictly prohibits member states from physically halting the movement of goods at their borders. Protection of domestic industries is legally permissible solely through transparent tariff mechanisms or price-based instruments. This principle of trade liberalization is prescriptively codified under Article XI:1 of the GATT 1994,¹ and any deviation can only be justified if the implementing state demonstrates rigorous compliance with the strict cumulative requirements of exception clauses.²

Previous academic inquiries into Indonesia's mineral downstreaming have largely concentrated on macroeconomic fiscal revenues or the technological feasibility of smelting infrastructure. Legal studies by Heriyanto (2021) and Kartika & Setyawati (2022) examined Indonesia's stance primarily under general GATT provisions.³ Furthermore, national interest post-panel findings has been addressed in contemporary literature.⁴ Nonetheless, current academic discourse reveals a void in comprehensive legal analysis synthesizing substantive failures under GATT exception doctrines specifically Articles XI:2(a) and XX(g) with the procedural anomaly of "appealing into the void" caused by the institutional paralysis of the WTO Appellate Body. Herein lies the novelty and significance of this research: providing a holistic synthesis of international substantive compliance alongside the procedural exploitation of the Dispute Settlement Understanding (DSU) to safeguard national economic sovereignty.

Formulated upon this background, the legal problem in this study is demarcated into three core issues. First, whether the domestic regulatory formulation establishing an absolute export ban on raw nickel ore constitutes a violation of the General Elimination of Quantitative Restrictions under Article XI:1 of the GATT 1994. Second, to what extent justifications concerning the critical shortage of essential products and natural resource conservation retain legal validity in legitimizing Indonesia's nickel downstreaming before the WTO Panel. Third, how the procedural implications of the Appellate Body impasse under the DSU framework influence the binding force of the DS592 Panel Report concerning the sustainability of Indonesia's economic sovereignty.

II. METHODOLOGY

This research constitutes normative legal research examining the systemic coherence among positive legal norms, fundamental international legal principles, and multilateral trade jurisprudence. The analytical approach encompasses a statutory approach by scrutinizing pertinent WTO covered agreements and domestic statutory instruments. Conceptual and analytical approaches are deployed to deconstruct international trade exception doctrines. In particular, a case approach is utilized through an in depth dissection of the WTO Panel Report in *Indonesia Measures Relating to Raw Materials* (WT/DS592/R) issued in late 2022, comparatively analyzed against authoritative precedents including *China Raw Materials* (DS394) and *United States Shrimp* (DS58).

Primary legal sources comprise the legal texts of the GATT 1994, the WTO DSU, Law No. 3 of 2020, and MEMR Regulation No. 11 of 2019. Secondary legal materials include authoritative textbooks on international economic law, peer-reviewed journal articles, official WTO panel proceedings, state defense submissions, and public international law treatises. Data collection was conducted through extensive library research and judicial document retrieval via official WTO repositories. The gathered legal materials were qualitatively evaluated through deductive reasoning, assessing overarching multilateral trade disciplines against empirical facts surrounding Indonesia's nickel downstreaming policy.⁵

III. ANALYSIS AND DISCUSSIONS

A. Anatomy of Quantitative Restrictions under Article XI:1 of the GATT 1994 and Indonesia's Nickel Embargo

The multilateral trading system administered by the WTO derives its institutional legitimacy from economic efficiency, predictability of market access, and non-discrimination.⁶ Within this regulatory discipline, all non-tariff border measures are categorized as systemic disruptions to cross-border competitive equality. The GATT framework accommodates price-based tariff

¹ J. H. Jackson, *The jurisprudence of GATT and the WTO: Insights on treaty law and economic relations*, Cambridge: Cambridge University Press, 2000, p. 112; P. V. d. Bossche & W. Zdouc, *The law and policy of the World Trade Organization: Text, cases and materials*, 5th ed., Cambridge: Cambridge University Press, 2022, p. 480.

² M. Matsushita, T. J. Schoenbaum, & P. C. Mavroidis, *The World Trade Organization: Law, practice, and policy*, 3rd ed., Oxford: Oxford University Press, 2015, p. 210.

³ D. S. N. Heriyanto, *op. cit.*, p. 355; P. R. Kartika & D. Setyawati, "Analisis sengketa perdagangan Indonesia dan Uni Eropa terkait pelarangan ekspor nikel (DS592) berdasarkan perspektif GATT 1994", *Jurnal Magister Hukum Udayana*, Vol. 11, No. 2, 2022, p. 415.

⁴ A. P. Prabandari, *op. cit.*, p. 95; A. Nugraha & B. Santoso, "Kedudukan hukum kebijakan hilirisasi minerba Indonesia pasca laporan Panel WTO", *Jurnal Hukum Jus Quia Iustum*, Vol. 29, No. 1, 2022, p. 118.

⁵ H. Juwana, et al., *Hukum internasional dalam dinamika hubungan antarbangsa*, Depok: Badan Penerbit FH UI, 2019, p. 78; F. J. Priyono, et al., *Hukum ekonomi internasional dalam era global*, Semarang: Undip Press, 2020, p. 64.

⁶ P. V. d. Bossche & W. Zdouc, *The law and policy of the World Trade Organization: Text, cases and materials*, 5th ed., Cambridge: Cambridge University Press, 2022, p. 485.

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mechanisms, such as customs duties or progressive export taxes, because fiscal measures merely influence product pricing without stripping away the physical right of commodities to traverse sovereign borders. Conversely, quantitative prohibitions implemented via absolute export bans or zero-quota allocations are deemed harmful, as they arbitrarily suppress market mechanisms irrespective of purchasing power or foreign competitive efficiency.⁷

This anti protectionist doctrine is categorically codified in Article XI:1 of the GATT 1994. This provision prohibits all member states from instituting or maintaining prohibitions or restrictions other than duties, taxes, or other financial charges on the exportation or importation of any product. When MEMR Regulation No. 11 of 2019 is evaluated against this normative benchmark, an unavoidable legal conflict emerges. Both *de jure* and *de facto*, the ministerial decree functions as an absolute commercial embargo. It grants absolute mandate to customs and port authorities to lock, reject, and revoke all shipment declarations of unprocessed raw nickel ore with a grade below 1.7 percent destined for global markets since early 2020.

WTO dispute settlement jurisprudence has established an unyielding track record against quantitative restrictions. Drawing from the *ratio decidendi* in *China Measures Related to the Exportation of Various Raw Materials* (DS394) and *China Measures Related to the Exportation of Rare Earths* (DS431), the Panel and Appellate Body consistently rejected attempts by developing nations to justify raw material export restrictions aimed at promoting local industrialization.⁸ Indonesia's downstreaming architecture replicates this prohibited legal design. Trial facts proved that withholding raw nickel supplies to Europe occurred not because domestic output was unavailable, but was engineered by the state to guarantee artificially cheap raw materials for domestic processing facilities.⁹ Given that its provisions physically bar commodities from leaving the border, Indonesia's measures conclusively constitute a *prima facie* breach of the core obligation under Article XI:1 of the GATT 1994.

The WTO Panel's rejection of Indonesia's export restrictions becomes even more indisputable when comparatively analyzed against the *China Rare Earths* jurisprudence. In that dispute, WTO adjudicators expressly dismissed arguments that export prohibitions could be justified to secure resource availability while concurrently granting domestic refining industries unfettered access to the feed. Indonesia's nickel downstreaming framework fell into an identical legal trap. The raw nickel export ban operates not as a genuine instrument to safeguard national mineral reserves, but functions empirically as an implicit domestic protection and subsidy mechanism to secure high commercial margins for domestic smelters at the expense of European Union market access.

B. Deconstruction of the Critical Shortage and Ecological Conservation Defenses

WTO legal philosophy recognizes that sovereign states require safety valves when confronting domestic crises that threaten survival. Consequently, measures breaching substantive GATT obligations do not automatically engender international liability if they can be justified under General Exceptions. Cognizant of its breach of Article XI:1, Indonesia's legal defense in DS592 rested upon two alternative pillars: the critical shortage defense under Article XI:2(a) and the environmental conservation defense under Article XX(g) of the GATT 1994.¹⁰

Indonesia's first line of defense invoked Article XI:2(a) of the GATT 1994, contending that the export ban was imperative to alleviate a critical shortage of high-grade saprolite nickel ore, the absence of which was argued to jeopardize the operational viability of domestic smelters. However, the Panel's textual deconstruction revealed the narrow scope of this provision. Tracing its drafting history, the clause allowing temporary restrictions to "prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party" was intended solely to mitigate sudden, unexpected shocks threatening human survival, such as agricultural export controls during nationwide famines. Commercial nickel ore intended purely for industrial manufacturing cannot be classified as an essential product under this standard.¹⁵ Crucially, Article XI:2(a) mandates that such measures be temporary. Because the refining mandate under the Mining Law represents a permanent structural transformation, this emergency defense collapsed at trial.

Indonesia's secondary defense invoked Article XX(g) of the GATT 1994, which exempts measures "relating to the conservation of exhaustible natural resources".¹¹ Geologically, nickel qualifies as an exhaustible natural resource. However, international trade law imposes an absolute threshold on conservation measures: the even-handedness principle.¹² This jurisprudential criterion dictates that export restrictions must operate concurrently and balance with domestic production or consumption curbs.

The empirical realities presented before the Panel negated Indonesia's ecological defense. The Panel underscored that while foreign exports were completely banned, the central government aggressively granted fiscal incentives, tax holidays, and expedited licensing to establish dozens of mega-smelter complexes. Consequently, the downstreaming policy merely shifted extraction and

⁷ J. H. Jackson, *The jurisprudence of GATT and the WTO: Insights on treaty law and economic relations*, Cambridge: Cambridge University Press, 2000, p. 115; S. Lester, B. Mercurio, & A. Davies, *World trade law: Text, materials and commentary*, 3rd ed., Oxford: Hart Publishing, 2018, p. 125.

⁸ I. Mrevlje, "Export restrictions on raw materials under WTO law: The China – Rare Earths dispute", *Journal of World Trade*, Vol. 50, No. 1, 2016, p. 75.

⁹ WTO Panel Report, *Indonesia – Measures Relating to Raw Materials*, WT/DS592/R, 2022, para. 7.120.

¹⁰ R. Santosa & A. Gunadi, "Sengketa larangan ekspor nikel: Telaah doktrin pengecualian sementara berdasarkan Pasal XI ayat (2) GATT", *Jurnal Konstitusi & Demokrasi*, Vol. 5, No. 2, 2021, p. 145; R. Pratama & H. Juwana, "Dilema penerapan Pasal XX(g) GATT 1994 dalam kebijakan proteksi lingkungan dan perdagangan internasional", *Indonesian Journal of International Law*, Vol. 20, No. 4, 2023, p. 505. ¹⁵ WTO Panel Report, *op. cit.*, para. 7.145.

¹¹ S. Charnovitz, "The law of environmental protection and international trade", *Journal of International Economic Law*, Vol. 24, No. 3, 2021, p. 595.

¹² R. Pratama & H. Juwana, *op. cit.*, p. 510.

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consumption from European buyers to domestic industrial conglomerates, displaying no genuine intent to conserve finite reserves underground. As affirmed in *United States – Shrimp* (DS58), discriminatory trade restrictions fail the good-faith requirements of the Chapeau of Article XX, operating merely as disguised protectionism.

Indonesia's substantive failure under Article XX(g) stemmed from its inability to prove even-handedness before international adjudicators. The rapid expansion of industrial smelting centers across Morowali and Weda Bay undermined Indonesia's environmental diplomacy. As upstream extraction is maintained at peak operational capacity to supply the expanding domestic smelting footprint, assertions that the export ban serves natural reserve conservation lose both legal foundation and empirical coherence.¹³

C. Doctrinal Position of Permanent Sovereignty over Natural Resources (PSNR) vs. Multilateral Law

The legal vortex surrounding Indonesia's nickel downstreaming fundamentally mirrors an acute philosophical collision between the doctrine of Permanent Sovereignty over Natural Resources (PSNR) and strict adherence to multilateral trade disciplines.¹⁴ Deeply rooted in third world legal traditions and firmly codified in United Nations General Assembly Resolution 1803 (XVII) of 1962, the PSNR doctrine establishes the inalienable right of sovereign states to control, manage, and dictate the exploitation of natural riches within their territorial borders for national development and human welfare.¹⁵ In the Indonesian domestic legal matrix, this anti economic imperialism paradigm finds its supreme constitutional crystallization under Article 33, paragraph (3) of the 1945 Constitution of the Republic of Indonesia.

However, the modern international legal order functions under distinct mechanics of delegation. When a sovereign nation consciously ratifies an international agreement as Indonesia did by ratifying the WTO Agreement via Law No. 7 of 1994 it simultaneously exercises a voluntary self limitation of sovereignty.¹⁶ Public international law rests categorically on the bedrock canon of *pacta sunt servanda*. Furthermore, the peremptory norm embodied in Article 27 of the Vienna Convention on the Law of Treaties 1969 explicitly dictates that a state party may not invoke internal statutory provisions or constitutional mandates as justification for failing to perform obligations under a treaty.

This jurisprudential dichotomy entraps Indonesia in an acute structural dilemma. On one hand, domestic constitutional obligations and resource sovereignty doctrines mandate the state to proactively undertake statutory engineering to halt low value raw extraction. On the other hand, the WTO legal framework flatly proscribes unilateral measures physically blockading border trade flows unless substantiated by legitimate exception clauses. The defeat of Indonesia's substantive defense in DS592 serves as a pivotal precedent demonstrating that before WTO tribunals, legitimate assertions of national economic sovereignty cannot displace clear text obligations under Article XI:1 of the GATT 1994, particularly when domestic policies are enacted without methodological conformity to international exception standards.

D. Procedural Implications of the WTO Appellate Body Paralysis and the Legal Status of the DS592 Report

Any academic evaluation of an international dispute remains methodologically flawed if restricted solely to substantive legal merits without deconstructing procedural law strategies. The decision of the Indonesian government to formally file a notice of appeal before the WTO Appellate Body in mid December 2022 was not an act of legal futility; rather, it represented a calculated procedural litigation maneuver exploiting institutional gridlock within multilateral adjudicative bodies. Exercising procedural prerogatives under Article 17, paragraph (6) of the Dispute Settlement Understanding (DSU), an unsuccessful respondent holds an absolute procedural right to seek appellate review regarding errors in legal interpretation made by the panel of first instance.¹⁷

This institutional crisis originates from the total operational dysfunction engulfing the Appellate Body. The WTO's apex judicial arm lost the mandatory statutory quorum of three division members required to adjudicate appellate proceedings. This condition was precipitated by deliberate, systematic political vetoes enforced by the United States in continuously blocking member selection procedures since late 2019.¹⁸ The tactical strategy deployed by Indonesian legal representatives is widely recognized across international economic law scholarship as "appealing into the void". This legal maneuver remains strictly lawful and procedurally valid, as the DSU text provides no transitional or contingency rules to resolve proceedings when the Appellate Body faces institutional vacancy.

Under the rigid framework of Article 16, paragraph (4) of the DSU, a Panel Report cannot be formally adopted by the Dispute Settlement Body (DSB) if a disputing party files an official notice of appeal. Given that neither Indonesia nor the European Union entered into the alternative Multi-Party Interim Appeal Arbitration Arrangement (MPIA) for this dispute, the DS592 Panel Report

¹³ A. P. Prabandari, *op. cit.*, p. 98.

¹⁴ N. Schrijver, *Sovereignty over natural resources: Balancing rights and duties*, Cambridge: Cambridge University Press, 2008, p. 130.

¹⁵ A. Anghie, *Imperialism, Sovereignty and the Making of International Law*, Cambridge: Cambridge University Press, 2005, p. 215.

¹⁶ H. Adolf, *op. cit.*, p. 58; H. Juwana, et al., *op. cit.*, p. 82.

¹⁷ J. Pauwelyn, "The WTO Dispute Settlement Post 2019: What to Expect?", *Journal of International Economic Law*, Vol. 22, No. 3, 2019, p. 305.

¹⁸ J. Pauwelyn, *ibid.*, p. 308.

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remains suspended indefinitely in a procedural vacuum lacking DSB adoption. Consequently, the legal determination concluding that Indonesia's raw nickel restrictions violate Article XI:1 of the GATT 1994 lacks *res judicata* and is formally not legally binding.

The strategic consequence of this systemic procedural loophole significantly favors the preservation of Indonesia's policy sovereignty. Without an officially adopted Panel Report, the European Union is legally stripped of its right under DSU rules to seek formal authorization from the DSB to levy retaliatory trade sanctions or tariff suspensions under Article 22 of the DSU. This procedural deadlock creates temporary legal immunity and sovereign breathing space for the Indonesian government to preserve the enforcement of MEMR Regulation No. 11 of 2019 domestically, pending the indefinite restoration of the Appellate Body.

Nevertheless, legal security contingent on systemic paralysis remains precarious and geopolitically volatile. The unsettled legal posture of the DS592 dispute risks triggering unilateral retaliatory actions by the European Union outside formal WTO dispute settlement avenues. Extralegal countermeasures may take the form of autonomous market instruments, including border adjustments under the Carbon Border Adjustment Mechanism (CBAM) or stringent corporate sustainability due diligence standards targeting imported battery products from Indonesia. Consequently, the tactical success achieved through "appealing into the void" must be leveraged as a strategic window of opportunity for the government to recalibrate its domestic downstreaming legal design, rendering it structurally defensible and substantively compatible with multilateral trade rules going forward.

IV. CONCLUSIONS AND RECOMMENDATION

Grounded in normative legal analysis and judicial deconstruction of the panel proceedings, this research delivers conclusions addressing the three core inquiries. First, Indonesia's absolute export prohibition on raw nickel ore promulgated under MEMR Regulation No. 11 of 2019 conclusively constitutes a manifest violation of quantitative restriction elimination disciplines under Article XI:1 of the GATT 1994, operating as an absolute non-tariff barrier distorting global market access. Second, Indonesia's justification claims under the essential product shortage exception of Article XI:2(a) and the natural resource conservation exception of Article XX(g) of the GATT 1994 were legitimately set aside by the Panel. This substantive defeat stemmed from the permanent statutory structure of the downstreaming mandate and a fatal failure to satisfy the even-handedness doctrine, as the external export ban was juxtaposed against domestic industrial expansion devoid of upstream extraction or production caps. Third, the institutional paralysis of the WTO Appellate Body was strategically navigated by Indonesia via the procedural maneuver of "appealing into the void". Pursuant to Article 16, paragraph (4) of the DSU, filing an appeal into an organ lacking quorum blocks adoption of the Panel Report by the DSB. As a legal consequence, the DS592 Panel Report lacks legally binding force, creating an anomaly that tactically insulates Indonesia from the immediate execution of multilateral trade retaliatory countermeasures by the European Union.

Building upon these findings, Indonesia's tactical postponement of WTO sanctions does not eliminate the imperative to harmonize national statutory design with multilateral disciplines. Therefore, several strategic regulatory reforms are recommended. First, the government is advised to initiate an institutional transmutation from absolute physical export bans to price based fiscal instruments, specifically the implementation of high, progressive export duties on raw mineral ores. This fiscal mechanism is legally permitted under GATT tariff rules while generating equivalent economic disincentives against raw material outflows. Second, the government, through the Ministry of Energy and Mineral Resources, should promptly promulgate binding technical regulations establishing statutory national production caps across all upstream mining license holders. Instituting domestic production ceilings constitutes an indispensable legal prerequisite to satisfy the even handedness criterion under Article XX(g) should Indonesia face future WTO scrutiny. Third, the state must exploit the status quo window of the unadopted DS592 report by actively pursuing alternative diplomatic negotiations to achieve a Mutually Agreed Solution (MAS) with the European Commission, particularly by negotiating strategic investment and supply chain partnerships within the sustainable battery ecosystem.

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