

Legal Reform of Indonesia's Nickel Export Ban (Indonesia-Europa)

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Abstract

Introduction: Indonesia's nickel export restriction policy is regulated in the Minister of Trade Regulation No. 96 of 2019 concerning Export Requirements for Mining Products from Processing and Refining which is in line with the Minister of Energy and Mineral Resources Regulation No. 11 of 2019 and is the cause of a lawsuit brought by the European Union to the WTO for Indonesia's violation of the provisions of Article XI.1 of the GATT 1994 WTO agreement related to discrimination against export products in the form of nickel ore.

Purposes of the Research: The purpose of this research is to analyze the rules of the prohibition of Nickel Exports Based on International Law reviewed based on the theory of state sovereignty in Indonesia.

Methods of the Research: This research uses normative legal research using a statutory approach and conceptual approach, and uses descriptive analysis techniques supported by two legal materials, namely primary legal materials and secondary legal materials.

Results of the Research: Indonesia certainly has a strong reason why these restrictions are carried out. In addition to national economic growth, it also realizes sustainable development. This research is conducted to describe the policy through the lens of international trade law and Indonesia's authority as a sovereign state.

Keywords: Export Restriction; Internasional Trade; Nickel.

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INTRODUCTION

International trade is an integral part of national economic development, conducted with attention to developments in other countries, which will impact the national economy. Indonesia has undertaken economic development driven by export activities since the 1980s. This indicates that international trade activities are a determining factor in the process of national development. As a crucial factor in a country's economic growth, orderly and fair relationships between countries are essential to achieve order and justice in the implementation of international trade activities on the global stage.¹

In 1947, countries around the world signed the GATT document, which came into effect in 1948. GATT became an international legal instrument regulating trade between countries. Over time, GATT underwent changes to adapt to the needs of the ratifying countries. Its success led to the formation of the WTO as the World Trade Organization during the Uruguay Round negotiations from 1986 to 1994. The WTO then became the implementing

¹ Syahmin AK, *Hukum Dagang Internasional (Dalam Kerangka Studi Analistis)* (Jakarta: Rajawali Pers, 2019), 35.

and supervisory body of international trade activities initiated through GATT since 1947. Indonesia became one of the member countries of the WTO, ratified through Law No. 7 of 1994.²

In 2003, the era of free markets began for the AFTA (ASEAN Free Trade Area) free trade, and in 2010 for the APEC (Asia-Pacific Economic Cooperation) countries, followed by Indonesia and all WTO member countries in 2020. Through Law No. 5 of 1999, Indonesia demonstrated its good faith and readiness to compete internationally, especially in facing the phenomenon of free markets. The principle of non-discriminatory trade in GATT/WTO and other international regulations ratified by Indonesia has influenced businesses to compete on an international level, both in terms of marketing and in selecting and sorting goods to be accepted domestically.³

Indonesia's role in international trade is certainly inseparable from the export and import activities of goods. Indonesia participates as a supplier to various countries for its superior commodities and products, whether in the form of natural resources or domestically processed products. One of these is nickel resources. Indonesia has established itself as the world's largest nickel supplier, controlling 37.2% of the total global nickel trade. Data shows that Indonesia's metal reserves in 2021 included 639 million tons of copper ore, 38.2 million tons of lead, 1.25 billion tons of tin, 35.3 million tons of zinc, 254.1 million tons of primary iron, 21.04 million tons of manganese ore, and 927.7 million tons of bauxite ore. Indonesia supplies a significant amount of raw mineral materials to several countries around the world, earning the nickname "exporter of raw materials specialist" over the past 40 years.⁴

In this regard, in 2020, Indonesia imposed restrictions on export commodities, particularly in the nickel sector, under Trade Regulation No. 96 of 2019 concerning Guidelines for the Export of Processed and Refined Mining Products, which aligns with Energy and Mineral Resources Regulation No. 11 of 2019, the second amendment following Energy and Mineral Resources Regulation No. 25 of 2018. These regulations stipulate that since January 2020, the export of nickel ore with a grade below 1.7% has been prohibited. The implementation of this rule aims to stabilize nickel reserve availability, ensure the supply of raw materials for several factories operating in Indonesia, and support the government's efforts in the down-streaming program. Besides these reasons, the Indonesian government has other considerations related to enhancing the country's economic sector through various means such as reducing dependence on raw material exports, strengthening domestic industries, expanding economic diversification, reducing vulnerability to global commodity price fluctuations, and increasing national economic resilience.⁵

The restriction on nickel exports has certainly impacted the industrial sector of the European Union, one of the world's main nickel ore suppliers. The international view on this prohibition has sparked tensions between Indonesia and the European Union.⁶ As a

² Ghazwan Aqrabin Faqih, "Pengaturan Anti Dumping Dalam Hukum GATT-WTO dan Implementasinya Di Indonesia," *JISOSEPOL: Jurnal Ilmu Sosial Ekonomi dan Politik* 1, no. 2 (2023): 135, <https://doi.org/10.61787/w2dyfy71>.

³ Ilham Agustian Candra, Dody Wibowo, dan Fatihatur Rahmi Azizah, "WTO Role In Nickel Dispute Between Indonesia and The European Union in 2019 - 2022," *Supremasi: Jurnal Pemikiran dan Penelitian Ilmu-ilmu Sosial, Hukum, & Pengajarannya* 19, no. 1 (2024): 38.

⁴ Ferdinand Jason, Rina S. Shahrullah, dan Elza Syarief, "Implikasi Putusan World Trade Organization Terhadap Larangan Ekspor Nikel Indonesia Oleh Uni Eropa," *Jurnal Supremasi*, 24 Maret 2024, 135, <https://doi.org/10.35457/supremasi.v14i1.3528>.

⁵ Monica Wulandari dkk., "Analisis Dampak Non-Migas Indonesia Setelah Kebijakan Larangan Ekspor Bijih Nikel," *EKONOMIKA45: Jurnal Ilmiah Manajemen, Ekonomi Bisnis, Kewirausahaan* 10, no. 2 (5 Mei 2023): 60, <https://doi.org/10.30640/ekonomika45.v10i2.789>.

⁶ Muhammad Alwan Ramadhana dkk., "Gugatan Uni Eropa Terhadap Pembatasan Ekspor Nikel Indonesia," *Doktrin: Jurnal Dunia Ilmu Hukum Dan Politik* 2, no. 2 (15 Januari 2024): 187, <https://doi.org/10.59581/doktrin.v2i2.2608>.

result, the European Union filed a complaint with the WTO, the World Trade Organization. The European Union claimed that Indonesia's nickel export ban violated international trade rules as per the agreements ratified by Indonesia, creating a trade barrier through discriminatory, unfair trade practices that harm the processing industry in the EU, which heavily relies on nickel ore suppliers.

Regarding the complaint filed by the European Union, the WTO Dispute Settlement Panel issued a decision on dispute DS 592 related to the EU's complaint. The Panel found that Indonesia's export policy and the processing and refining requirements for nickel ore violated Article XI.1 of the GATT 1994 agreement of the WTO. Moreover, the policy could not be justified under Articles XI.2 (a) and XX(d) of the GATT 1994. The WTO ruling stated that Indonesia's policy would damage the global market and harm countries that have been consumers of nickel.

METHODS OF THE RESEARCH

This study employs a normative juridical approach called doctrinal legal research. This approach analyzes legal norms and principles documented in written regulations, court decisions, and relevant legal literature.⁷ The normative judicial approach is suitable for this study as it allows for an in-depth examination of the legal framework and principles governing Indonesia's nickel export ban and its compliance with international trade law and state sovereignty theory. This research uses primary legal materials, including Minister of Trade Regulation No. 96 of 2019 and Minister of Energy and Mineral Resources Regulation No. 17 of 2020, the General Agreement on Tariffs and Trade (GATT) 1994 National legislation: Laws and regulations related to Indonesia's nickel export policy, such as Trade Regulation No. 96 of 2019 and Minister of Energy and Mineral Resources Regulation No. 17 of 2020 and Primary sources legal literature: Books, journal articles, and expert opinions on international trade law, state sovereignty theory, and economic policies.

RESULTS AND DISCUSSION

One of Indonesia's most important mining materials is nickel. The country is endowed with the largest nickel reserves in the world. Nickel is also valuable in modern times because it is the raw material of various industrial products, either as a mixture, component or finished good.⁸ Nickel is a natural resource commodity possessed by Indonesia. Indonesia is one of the largest producers of this commodity.⁹ This is certainly one of Indonesia's advantages, given the significant global demand for nickel. Consequently, Indonesia's nickel production sector has made it an exporter of nickel to numerous countries worldwide. In 2021, Indonesia can produce as much as 1 million metric tons, contributing to 37.04% of world nickel production. The distribution of nickel in Indonesia can be found on Sulawesi Island, Maluku and Halmahera Islands, Papua, and Kalimantan.¹⁰ Many major consumer countries favor the sale of raw nickel abroad due to the availability of cheap raw

⁷ Irwansyah Irwansyah, *Penelitian Hukum: Pilihan Metode dan Praktik Penulisan Artikel (Edisi Revisi)*, 5 ed., vol. 3, 123 (Yogyakarta: Mirra Buana Media, 2022), 85.

⁸ Muhammad Hirza Barizi dan Reza Triarda, "Rantai Pasokan Global Dan Nasionalisme Sumber Daya Alam: Kajian Terkait Hilirisasi Nikel Di Indonesia," *Indonesian Journal of International Relations* 7, no. 2 (19 Agustus 2023): 315, <https://doi.org/10.32787/ijir.v7i2.466>.

⁹ Muhammad Agung dan Emmanuel Ariananto Waluyo Adi, "Peningkatan Investasi Dan Hilirisasi Nikel Di Indonesia," *JISIP (Jurnal Ilmu Sosial Dan Pendidikan)* 6, no. 2 (14 Maret 2022): 4010, <https://doi.org/10.58258/jisip.v6i2.3085>.

¹⁰ Dicky Dwi Radhica, "Proteksionisme Nikel Indonesia Dalam Perdagangan Dunia," *Cendekia Niaga* 7, no. 1 (10 Agustus 2023): 75, <https://doi.org/10.52391/jcn.v7i1.821>.

nickel from Indonesia. The largest consumers of Indonesia's nickel exports include China, Japan, and the United States (Nugroho, 2022).

Naturally, nickel is a metal element widely found in the Earth's crust. Nickel is an important material for the industrial sectors of household appliances, transportation, construction, and many more. The need for nickel is used for materials such as stainless steel, metals, batteries, and others. Therefore, nickel is a highly demanded material, especially for countries that do not have nickel resources or have limited resources. As a significant nickel producer, Indonesia exports a large amount abroad. In 2021 alone, Indonesia contributed 37.04% to the global distribution of nickel, and even with the amount of nickel exported, Indonesia still holds 52% of the world's nickel reserves. In 2022, the US Geological Survey reported that Indonesia has one of the world's largest nickel reserves, amounting to 21 tons.

In 2020, Indonesia began implementing a new policy that significantly impacted the international trade world by restricting the export activities of raw nickel materials abroad. This was done through the implementation of the Minister of Energy and Mineral Resources Regulation No. 11 of 2019, which was later updated with Minister of Energy and Mineral Resources Regulation No. 17 of 2020 as the third amendment to Minister of Energy and Mineral Resources Regulation No. 25 of 2018 concerning the management of mineral and coal mining. This regulation mandates that all companies establish purification facilities to wash aluminium oxide content to more than or equal to 42%. The purpose of implementing this regulation is for the government to increase the quality and selling value of Indonesia's natural resource-derived nickel ore and, of course, to take a preliminary step in imposing restrictions on global trade (Minister of Energy and Mineral Resources Regulation No. 17 of 2020, 2020).

The Indonesian government not only urged all mining industry players to build smelters or processing and refining plants for nickel but also encouraged all nickel industry business players to prioritize meeting domestic needs first. This new regulation is considered an unfair policy by the European Union because it is specifically targeted at the mining industry. As a result, the European Union filed a complaint against Indonesia's policy to the WTO (World Trade Organization). Indonesia was sued for violating Article XI:1 of the GATT/WTO, which states that WTO member countries are not allowed to impose quantitative restrictions on imported or exported products except through tariffs, taxes, and other measures. Consequently, the WTO ruled that Indonesia violated WTO provisions as a member country.¹¹

Reviewing the WTO's decision on the European Union's complaint, it is essential to examine the objectives of Indonesia's imposed restrictions more deeply. It is undeniable that the demand for nickel in several countries is quite significant, making nickel a highly sought-after commodity from Indonesia's natural resources in the international arena. Nickel has numerous benefits in the electronics, steel, and various other industries. Indonesia's nickel export restrictions aim to maximize the utilization of the country's natural resource commodities.

A. Legal Review of Nickel Export Ban Based on International Law

International trade involves the buying and selling of commodities beyond a country's borders. The purpose of international trade is to meet the needs of a country for certain

¹¹ Radhica, "Proteksionisme Nikel Indonesia Dalam Perdagangan Dunia."

commodities that cannot be fulfilled independently. Additionally, international trade serves the economic interests of countries, where a country with an excess of a commodity can sell it to another country that lacks it. According to experts, international trade interactions occur when there are differences in commodities sold by a country and trade is conducted to achieve economies of scale.

As described above, each country engages in international trade to fulfill its own interests. To maintain stability in international trade among countries with differing interests, agreements are made to establish mutual rights and obligations. The WTO, as the world trade organization, plays a crucial role in international trade. The WTO promotes global economic development and serves as a forum for resolving disputes among its member countries.

As a member of the WTO, Indonesia's nickel export restriction dispute is entitled to be resolved by the WTO along with other involved member countries. The WTO uses general trade agreements ratified by Indonesia as the basis for resolving this dispute. The European Union's complaint claimed that Indonesia violated Article XI:1 of the General Agreement on Tariffs and Trade (GATT) 1994, which concerns the elimination of quantitative restrictions that prohibit WTO members from imposing import or export restrictions except in cases of tariffs, taxes, and other charges. The WTO upheld the complaint and found Indonesia in violation of the article.

According to the relevant article in the agreement, Article 3 allows for export and import restrictions if a country has legitimate interests. Indonesia argued that the nickel export restriction aimed to focus on achieving the nickel downstreaming strategy for sustainable development. The article essentially provides flexibility for WTO member countries to impose export and import restrictions on commodities for legitimate reasons. This means the reasons must be lawful and acceptable, with evidence that can be justified under international law. Therefore, the prohibition is not absolute as long as Indonesia can substantiate the rationale for its nickel ore export restriction.

The Minister of Energy and Mineral Resources Regulation Number 11 of 2019 concerning the Second Amendment to the Minister of Energy and Mineral Resources Regulation Number 25 of 2018 decided to stop the export of low-grade nickel, this caused the European Union as a nickel importer from Indonesia to disagree and sue Indonesia to the World Trade Organization because it felt aggrieved by Indonesia's policy. The EU filed its lawsuit to World Trade Organization regarding Indonesia's nickel ore export ban and accused Indonesia of designing the restriction to benefit its own industry. On November 22, 2019, the European Union filed a request for consultations with the WTO Dispute Settlement Body (WTO DSB) under case number DS592.¹² The EU argued that smelter refining in Indonesia would produce seven times more carbon dioxide, resulting in very cheap and highly polluting steel.

The nickel ore export ban policy implemented by Indonesia starting January 1, 2020 has generated strong reactions from the international community, particularly from the European Union, which has condemned the policy. The export ban imposed by Indonesia, along with the processing and promotion requirements in our own country as well as the current export approval provisions on raw materials such as nickel, iron ore, chromium,

¹² Hanina Haddad, Helitha Novianty, dan Huala Adolf, "Larangan Ekspor Bijih Nikel Indonesia Diantara Stabilitas Perdagangan Internasional," *Mimbar Hukum* 34, no. 2 (30 Desember 2022): 560, <https://doi.org/10.22146/mh.v34i2.2686>.

coal, metal waste, scrap, and coke, are allegedly not as stipulated in Article XI:1 of the General Agreement on Tariffs and Trade (GATT) 1994 about outlines the provisions regarding quantitative restrictions and Article III.1 b) of the Agreement on Subsidies and Countervailing Measures (ASCM).¹³

Adverse reactions to Indonesia's nickel ore export ban have come from the European Union and the United States (US). Although the US has yet to take legal action on the ban, its firm stance shows that Indonesia's policy has significant implications at the global level and has caught the attention of major countries in the international trade.¹⁴ The Indonesian side defended the nickel ore export ban policy by arguing that this step was taken to safeguard nickel reserves for domestic interests, especially in the context of electric vehicle battery production, and to promote the development of upstream industries. This reasoning reflects Indonesia's efforts to optimize its natural resources to support economic growth and strengthen the domestic industrial sector.¹⁵

B. Legal Review of The Nickel Export Ban Based on State Sovereignty

The nickel export ban policy is a breakthrough by Indonesia to strengthen the economy and national resilience. Indonesia's strong reason for maintaining its new policy is the national interest in the down-streaming of nickel products to boost the country's economic growth. Nickel is a commodity in high demand by many countries for various industrial raw materials. As a producing country, Indonesia also has an interest in utilizing it and prioritizing domestic needs.¹⁶

From the perspective of state sovereignty theory, which prioritizes national interests, Indonesia indeed has the authority to exercise power over its territory and enforce its national laws. In the context of international trade, as George Jellinek stated regarding the theory of state sovereignty, law is not created by God or the king but by the state.¹⁷ This theory positions the state as the highest authority in managing its territory, enforcing its laws, and ensuring the security and welfare of its citizens.¹⁸ In international trade law, the state is a subject with the authority to regulate the goods or services entering and leaving its territory. This sovereignty also grants a state the right to determine regulations as needed.

The implementation of Indonesia's export ban policy is an exercise of state sovereignty in formulating necessary regulations. However, under the theory of a sovereign state, a country has the responsibility to respect the sovereignty of other nations and not misuse its sovereignty to cause harm to others.¹⁹ Therefore, it must be ensured that Indonesia's restriction on nickel ore exports, while prioritizing national needs, is proportionate and does not violate the responsibility to respect other nations' sovereignty, even though importing countries may initially experience some loss.

¹³ Vestyo Gelcheri Amalo dan Hizkia Hardi, "Kebijakan Larangan Ekspor Bijih Nikel: Tinjauan Hukum Internasional Dan Dampak Ekonomi Di Indonesia," *Causa: Jurnal Hukum Dan Kewarganegaraan* 2, no. 3 (10 Januari 2024): 7, <https://doi.org/10.3783/causa.v2i3.1883>.

¹⁴ Ari Dwiyo dkk., "Strategi Pertahanan Ekonomi Indonesia: Sengketa Perdagangan Internasional Nikel," *Journal of Economics and Business UBS* 12, no. 3 (26 Juni 2023): 1833, <https://doi.org/10.52644/joeb.v12i3.256>.

¹⁵ Amalo dan Hardi, "Kebijakan Larangan Ekspor Bijih Nikel," 5.

¹⁶ Rakha Al-Hakim G dkk., "Strategi Penegakan Kebijakan Hilirisasi Nikel Terhadap Pemenuhan Kebutuhan Domestik Dan Kemandirian Industri Pertahanan," *NUSANTARA: Jurnal Ilmu Pengetahuan Sosial* 10, no. 7 (7 September 2023): 3309, <https://doi.org/10.31604/jips.v10i7.2023.3305-3311>.

¹⁷ Lenny Husna dan Agus Riyanto, "Implikasi Perjanjian Internasional Flight Information Region (FIR) Singapura atas Ruang Udara Indonesia terhadap Kepulauan Riau," *SNISTEK* 2, no. 2 (2019): 130.

¹⁸ Desak Putu Dewi Kasih dkk., "Kedudukan Negara sebagai Pembeli dalam Perspektif Hukum Perdagangan Internasional," *Jurnal Pembangunan Hukum Indonesia* 3, no. 3 (17 September 2021): 355, <https://doi.org/10.14710/jphi.v3i3.354-369>.

¹⁹ Koesriati Koesriati, *Kedaulatan Negara: Menurut Hukum Internasional* (Airlangga University Press, 2021), 62.

From a national sovereignty perspective, Indonesia's nickel export restriction is not merely about increasing value but also concerns sustainable exploitation of natural resource. Law No. 4 of 2009 emphasizes the mining industry's contribution and responsibility toward sustainable development as a key priority. Achieving this involves challenges, including meeting global economic demands, as represented by the European Union. Indonesia needs to prove that the restriction serves not only national interests but also aligns with fair international trade principles for sustainable development as pursued by the United Nations. According to the International Energy Agency (IEA), global nickel demand will continue to rise. In 2020, global nickel demand was 2,340.56 metric tons (mt), with a predicted increase of 658.34 mt by 2030, representing a 714.07% rise compared to the previous decade. Ten years later, demand is expected to rise by 50% to 986.98 mt. Arguments in the international dispute should highlight the positive contributions of Indonesia's export restriction policy.²⁰ Policies like Indonesia's are not new in international trade. Protectionist measures have occurred in various cases, such as the United States restricting beef imports from Canada, Indonesia's protection against alcoholic beverages²¹, and the US imposing high tariffs on China, leading to a trade war.²²

International law often lacks strength when national interests clash²³, as countries invariably prioritize their interests. International law does not impose absolute penalties for violations; consequences may include poor international relations, impacting trade and the effects of Indonesia's nickel export restrictions on the European Union. However, such tensions are usually temporary, as Indonesia would likely employ diplomatic efforts to resolve them outside WTO legal proceedings. Therefore, resolving this dispute requires managing differences diplomatically and strategically between Indonesia and EU countries.

CONCLUSION

The tension caused by the European Union over Indonesia's policy arose with the implementation of new regulations that directly created turmoil. It is undeniable that this upheaval comes from countries that heavily rely on Indonesia's nickel exports to meet their domestic supply needs. International law can be seen as non-binding because it does not impose absolute penalties for violations. There are many loopholes that countries can exploit, leading to diplomatic resolutions between involved nations. The purpose of international trade regulations and organizations is to maintain stability in international trade activities, ensuring that countries' interests do not clash. Dispute resolution in international law is only sufficient if it prioritizes individual national interests over international interests. Indonesia's nickel export restriction is a new approach to achieving sustainable economic growth and development. Indonesia has strong arguments for maintaining the export restriction policy based on several reasons referring to Article 3 of the General Agreement on Tariffs and Trade (GATT) 1994; as a member of the WTO, Indonesia has the right to make exceptions to the prohibition of discriminatory measures against export and import commodities for reasons that are legitimate and recognized by international law. In addition, Indonesia has the right to prioritize its interests to sustain and fulfill its national needs. This practice is common in international trade, where some

²⁰ Grace Hutabarat, "Sengketa Ekspor Nikel Indonesia Dengan Uni Eropa Di World Trade Organization," *Jurnal Ilmu Hubungan Internasional LINO* 3, no. 2 (30 November 2023): 120, <https://doi.org/10.31605/lino.v3i2.2896>.

²¹ Radhica, "Proteksionisme Nikel Indonesia Dalam Perdagangan Dunia," 76.

²² Ayu Kurniawati, "Proteksionisme Ekonomi Amerika Serikat Pada Era Donald Trump," t.t., 5.

²³ Musfala Yudha, Nur Qalbi Putri Ramadhani Ahmad, dan Muhammad Agung, "Ketaatan Negara Terhadap Hukum Perdagangan Internasional," *Jurnal Litigasi Amsir*, 3 September 2022, 10, <https://journalstih.amsir.ac.id/index.php/julia/article/view/175>.

countries have practiced protectionism to prioritize their interests, and Indonesia has consistently adhered to the principles of fair international trade to achieve the UN sustainable development goals by ensuring the long-term utilization of natural resources, such as nickel, which continues to be in demand. The uncertainty in international trade law provides loopholes for violations of agreed regulations. This includes proving the validity of a country's reasons for taking discriminatory actions on export and import commodities, which can be exempted for legitimate reasons. These legitimate reasons need to be clearly defined so they can be deemed valid under international trade law, rather than being perceived as unilateral assumptions by the WTO. Each country has the authority to manage its affairs as an expression of its sovereignty. The question arises as to the extent to which a country is allowed to prioritize national interests over agreed international treaties when such interests need to be prioritized.

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