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The Paradox of Downstream Mining Industry Development in Indonesia: Analysis and Challenges

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Article	Abstract
<p>Keywords: Downstream Industry, Export Restriction, Nickel Ore.</p> <p>Article History Received: Mar 1, 2023; Reviewed: Jul 26, 2023; Accepted: Jul 30, 2023; Published: Jul 31, 2023.</p> <p>DOI: 10.28946/slrev.Vol7.Iss2.2734.pp335-349</p>	<p>Development of downstream on the mining industry has been encouraged by the government of Indonesia these past years. With the increasing demand for nickel ore, the government focused on implementing downstream in this sector. Establishing an export ban and domestic processing requirement on nickel ore caused the EU to challenge Indonesia before the DSB WTO. In its report to the Panel, it was concluded that Indonesia had violated the provisions of GATT 1994. While it is understandable that Indonesia has absolute sovereignty over its natural resources, it is also bounded to international organisations and regulations, for it has expressed its consent. This paper aims to examine the analysis by the Panel on what caused Indonesia to decide as the losing party and how Indonesia would implement the development downstream in the middle of its sovereignty and obligations on an international level. Through a juridical normative method, it is concluded that Indonesia had failed to comply with the provisions of GATT 1994 that obliged it. It does not mean it has no sovereignty towards its natural resources, for it has agreed to be bound by the provisions. In order to exercise downstream development, it is recommended that Indonesia create national policies or regulations related to adhering to the provisions of the WTO. A cautious approach to governing the downstream may prevent potentially damaging disputes.</p>

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INTRODUCTION

The international trade dispute between Indonesia and the European Union (EU) regarding the nickel ore export ban, which has been arising since 2019, is now entering a new phase. After a consultation was conducted and went through examination by the Panel of the Dispute Settlement Body (DSB) of the WTO, it was discovered in its report¹ that Indonesia was proven to have violated the rules on international trade barriers governed under the GATT and was rec-

¹ "Report Of The Panel No. Wt/Ds592/R On Indonesia – Measures Relating To Raw Materials," n.d.

ommended to immediately adjust its national regulations and policies to become consistent with the GATT provisions. In other words, Indonesia was declared the defeated party in the trade dispute mentioned. However, Indonesia is still trying to pursue another legal effort by filing an appeal against the Appellate Body of DSB WTO, and now the process is still in the run. Since the beginning, it was known that the EU was challenging Indonesia before the DSB WTO; it has disrupted a big national plan of the government of Indonesia to implement the development of downstream in the mining industry sector.² Ministerial regulations related was believed to force the increase of valuation of mining products, including nickel, which, as the technology develops, has become one of the most wanted natural resources. A lawsuit coming from the EU potentially will cause damages to Indonesia for the downstream plan mentioned.

Indonesia is a country that is very rich in natural resources such as gold, silver, bauxite, and copper, but still unable to manage it optimally to increase the national income and the welfare of its people. It is suspected that the main reason is that most mining companies operated on the upstream part and only exported ore (raw mineral) which is low in value. This practice has been going on for 40 years, making Indonesia called the export of raw material specialist.³ The downstream industry is an industry which processes semis material to become a finished product which could later be directly used or enjoyed by the users or consumers.⁴ There are several reasons why a state applies downstream: to produce strategic products at lower prices to fulfil domestic needs, the cultivation of raw materials would upgrade the skills of local workers, and provide variety in national income.⁵ Downstream is a part of the main minerals and coal business activities. The main activities started with the mining activity, continued with the smelting activity, and ended with the refining activity. As smelting and refining is a downstream activity. Thus the downstream plan covers every activity related to the smelting and refining of mining products.⁶ Activities located in the downstream part are the ones which able to add value to mining products. Thus, the government of Indonesia's attempt to implement downstream was meant to focus on the downstream activities to be conducted domestically. So the mining products that will be exported would have added value or higher sale value, and the mining products originating from Indonesia would have a higher chance to compete in the international market. This measure taken by the government of Indonesia showed that the economy and the use of natural resources grow simultaneously and are interrelated.⁷

The realisation of downstream implementation domestically would, of course, has its challenge, and one of them was the need to build smelters for the smelting activity. As for now, the

² See Point 2.2 Of The Report Of The Panel, "The EU Recognised That The Development Of Downstream Industry Sectors Was A Part Of Indonesia's National Plan," n.d.

³ Syahrir Ika, "Downstreaming Mineral Policy: Policy Reform to Increase State Revenue," *Kajian Ekonomi & Keuangan* 1, no. 1 (2017): 43.

⁴ Eva Johan, "The Protection of Domestic Industry through Safeguards Instrument GATT/WTO and Its Implementation on Downstream Steel Industry In Indonesia," *Indonesian Journal of International Law* 9, no. 4 (2012): 625.

⁵ Olle Östenson, "Promoting Downstream Processing: Resource Nationalism or Industrial Policy?," *Mineral Economics* 32, no. 2 (2019).

⁶ Armadani Rizki Ilahi, "Hilirisasi Pertambangan Dan Dampaknya Terhadap Aspek Ekonomis Lingkungan Hidup Di Indonesia," *Justitia: Jurnal Ilmu Hukum Dan Humaniora* 9, no. 3 (2022): 1438–39.

⁷ Kenichi Nakajima et al., "Global Land-Use Change Hidden behind Nickel Consumption," *Science of The Total Environment* 586 (2017): 730–37, <https://doi.org/10.1016/j.scitotenv.2017.02.049>.

obligation to build smelters is imposed on mining industries that conduct their mining activities in Indonesia, especially industries that have obtained Mining Business License (IUP) in order for them to smelt and/or refine their mining products as a requirement to perform export on those mining products. The government of Indonesia intended to encourage the participation of business actors to accelerate the realisation of downstream implementation. This is according to Law No. 4 of 2009 on Mineral and Coal Mining (hereinafter: Mineral and Coal Mining Law) Article 103, which obliges the holders of IUP and IUPK to conduct the processing and refining of mining products domestically.⁸ Thus as a consequence, the holders of IUP and IUPK shall build their smelters in Indonesia.

Nickel is one of Indonesia's mining products that has a large export value potential and is a driving force to increase Indonesia's foreign exchange.⁹ The escalation of nickel ore demand from Indonesia keeps increasing rapidly, forcing Indonesia's government to consider the reserves left. It is noted that the production of nickel from Indonesia reached 190 thousand tons per year, and it has 8% of world nickel reserves.¹⁰ The existing nickel reserves potential is mostly located in Southeast Sulawesi, which reached 97 billion tons of nickel reserves in the amount on that area.¹¹ To achieve the downstream of the mining industry and also at the same time to manage the reserves of natural resources which Indonesia owns, the government of Indonesia then established various regulations related to the processing and refining until the requirements for doing exports, especially regarding the nickel ore. These regulations include, firstly, the Government Regulation No. 1 of 2014 on the Second Amendment of Government Regulation No. 23 of 2010 on Implementing Mineral and Coal Mining Business. Secondly, Minister of Energy and Mineral Resources (MEMR) Regulation No. 1 of 2014 on the Enhancement of Minerals Added Value through Processing and Refining Activities Domestically. And thirdly, Minister of Trade (MoT) Regulation No. 004/MDAG/PER/1/2014 on Exports Provisions on Processed and Refined Mining Products.¹²

According to those regulations, it is understood that an export ban was found and implemented by Indonesia. Even it was stated explicitly in Article 2 of MoT Regulation No. 004/MDAG/PER/1/2014 that mining products coming from metal minerals and have already reached the minimum limit of processing and/or refining are the mining products that are restricted for its exports. In contrast, mining products in the form of ore that have not reached the minimum limit of processing and/or refining are banned for exports. Historically, the export ban on minerals, including nickel already been reviewed by the government of Indonesia since 2009 and is meant to be applied in 2014. However, the export ban and downstream implementation in 2014 failed because unprepared facilities and the low interest in investigation in the

⁸ Arif Setiawan and Juanita R. Horman, "Perkembangan Regulasi Peningkatan Nilai Tambah Nikel Di Indonesia," *INTAN Jurnal Penelitian Tambang* 2, no. 2 (2019).

⁹ Audrey G. Tangkudung and Jemmi Y. Kaseger, "Nickel Hilirization as Added Value in Strengthening Indonesia's Economy," *Budapest International Research and Critics Institute Journal* 6, no. 2 (2023): 1325.

¹⁰ Atik Krustiyati dan Adam Surya, *Sengketa Perdagangan Internasional Ekspor Biji Nikel Antara Indonesia Dan Uni Eropa Dalam Dinamika Hukum Sumber Daya Alam* (Malang: Inara Publisher, 2022).

¹¹ Pauline H. Pattraine Tan, "Macroeconomic Analysis of the Indonesian Nickel Industry Using Depest Analysis," *Ultima Management: Jurnal Ilmu Manajemen* 14, no. 2 (2022): 311.

¹² Atik Krustiyati dan Surya, *Sengketa Perdagangan Internasional Ekspor Biji Nikel Antara Indonesia Dan Uni Eropa Dalam Dinamika Hukum Sumber Daya Alam*.

mineral sector disadvantaged the state. Therefore, the government issued another MEMR Regulation No. 5 of 2017, *juncto* MEMR Regulation No. 25 of 2018, which relaxed the export restrictions until January 2022. Surprisingly, at the end of 2019, the government of Indonesia accelerated the export ban to become effective again by January 2020 through MEMR Regulation No. 11 of 2019 which prohibited the export of nickel ore originating from Indonesia.¹³ As for those regulations that existed and were implemented, they triggered tension between foreign investors and long-tailed until the EU filed complaints against Indonesia towards the DSB WTO. As a result, such conditions impacted the negative image of Indonesia and influenced the production of nickel, which was shown facing decrease after the dispute arose.

Looking back to the philosophy of implementing the downstream of the mining industry in Indonesia, it follows the spirit mandated by *Pancasila* as the *Staats fundamental norm* of Indonesia. Particularly on the fifth principle, which mandated the social welfare of every people in Indonesia. This is then embodied in Article 33 of the Constitution of Indonesia as the *staats grund gesetz*, which states that earth, water, and natural resources are contained, managed by the state and utilised for profusely the welfare of people¹⁴. The mentioned article of the Constitution of Indonesia influenced the policy-making in Indonesia regarding the protection of natural resources, including those contained in the Mineral and Coal Mining Law. It is shown under Article 4 of the Mineral and Coal Mining Law, which states that minerals and coal as non-renewable natural resources are national wealth controlled by the state for the profuse welfare of people. If the purpose of the downstream was to give added value towards nickel ore products as a natural resource owned by Indonesia, then it is in the framework to fulfil the people's welfare. Nevertheless, it is important to remember that Indonesia is present amid the international community order. Since 1995, Indonesia has stated its consent to be bound and to join the World Trade Organization, the only international organisation managed by trade between states. The bond proves that Indonesia realised that it would not be able to stand alone as a state to fulfil its people's necessities, but it fully realised that the relationship, including in the trade sector with another state, is an essential thing to Indonesia. As a part of the organisation, the policies found in the regulations from WTO's legal framework have become something that Indonesia shall always obey and implement. Thus regarding the dispute, WTO has regulated import and export restriction provisions on GATT 1994. Therefore, it is necessary to constantly harmonise what has become domestic interests against signs applied at the international level.

In international law, law sources refer to and are limited to normative provisions such as treaties and principles generally known and accepted by states. This is according to what Article 38 of the International Court of Justice Statute regulated¹⁵. Therefore, to judge an interna-

¹³ Novi Ratna Cahyani, "Kebijakan Pemberhentian Ekspor Biji Nikel Indonesia Tahun 2020: Tinjauan Neomerkantilisme," *Ganaya: Jurnal Ilmu Sosial Dan Humaniora* 6, no. 2 (2023): 424.

¹⁴ Muhammad Irfan Hilmy et al., "The Urgency of Guarantee Off Takers in Increasing Investment Oil and Gas Mining," *Hang Tuah Law Journal* 6, no. 2 (2022): 111.

¹⁵ Article 38 Of The ICJ Statute: "*The Court, Whose Function Is To Decide In Accordance With International Law Such Disputes As Are Submitted To It, Shall Apply: A. International Conventions, Whether General Or Particular, Establishing Rules Expressly Recognised By The Contesting States; B. International Custom, As Evidence Of A General Practice Accepted As Law; C. The General Principles Of Law Recognised By Civilised Nations; D. Subject To The Provisions Of Article 59, Judicial Decisions And The Teachings Of The Most*

tional dispute, it has a broader view to decide and examine that dispute. It also applies to dispute settlement in the WTO, even though the spirit of WTO dispute settlement adheres to the rule-based approach. Moreover, the dispute between Indonesia and the EU more and less intersects with the matter of sovereignty, which has always been a sensitive one in the scope of international relations. According to the description above, this article preliminary aims to analyse further the report of the Panel on the case of nickel ore involving Indonesia and the EU to figure out what has been causing Indonesia to lose in the dispute so that, furthermore, we are able to examine on what has been the challenges for Indonesia to establish the downstream industry especially related to how the sovereignty of state takes place on this situation. In the end, we'll be able to know how to achieve it without injuring its commitment as a member of WTO and its obligation to its people.

RESEARCH METHODS

This research employs a juridical normative method. The juridical normative research method is biblical legal research conducted by examining and studying literature and secondary data related to the issues discussed.¹⁶ This method is also conducted using some approaches, which are the statute, conceptual, and case approaches.¹⁷ The statute approach was carried out by examining regulations, i.e., the GATT and Indonesia's domestic regulations on minerals and coal. The conceptual approach will be carried out by analysing using theories and principles related to the issues. And lastly, the case approach will be conducted by comparing other cases related other than the dispute between Indonesia and the EU in order to obtain a comparison in the settlement of the case. By applying this method through these approaches, a holistic and comprehensive analysis will solve the main problem discussed.

ANALYSIS AND DISCUSSION

Indonesia's Faltering Points: Report of the Panel Analysis

Based on the report of The Panel of DSB WTO regarding the dispute between Indonesia and the EU on raw material, especially Nickel Ore, basically what the EU filed as complaints are the export ban and the domestic processing regulation (DPR). Both were demanded by the EU to be reviewed by the Panel to determine whether it is inconsistent with the WTO regulations for the EU, the measures were inconsistent with Article XI:1 of the GATT 1994, which stated:

“No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences 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.”

Both were measures taken by Indonesia as the requirements of Ore Nickel trading internationally. In its statement, the main argument of Indonesia was that *the measures were only temporary to prevent or retrieve critical shortages of a product essential to Indonesia*¹⁸

Highly Qualified Publicists Of The Various Nations, As Subsidiary Means For The Determination Of Rules Of Law.”

¹⁶ Soerjono Soekanto And and Sri Mahmudji, *Penelitian Hukum Normatif, Suatu Tinjauan Singkat* (Jakarta: Raja Grafindo Persada, 2013).

¹⁷ Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Kencana Prenada Media Group, 2005).

¹⁸ See Points 7.17 And 7.22 Of The Report Of The Panel.

as it is according to Article XI:2 of GATT 1994. From the sentence in bold above, there are three main keywords to be examined by the Panel, i.e. *temporary*, *critical shortage*, and *essential product*. These were the highlights that the Panel needed to investigate if the clause used was consistent with the GATT or vice versa.

However, prior to further explanation on the examination of those highlights, previously, the Panel tried to prove if the measures mentioned (re: export ban and the DPR) were inconsistent with Article XI:1 of GATT 1994, which were things that prohibited or restricted the export of Nickel Ore originating from Indonesia. For the export ban, as it has been clearly stated explicitly on the MEMR Regulation No. 11/2019 and MOT Regulation No. 96/2019, Nickel Ore was prohibited from being exported. As Indonesia also did not dispute anything regarding the export ban but admitted and acknowledged that the measure was a prohibition and restriction meant on Article XI:1 GATT 1994 but still argued that it fell within the scope of Article XI:2. The Panel then analysed that the EU has demonstrated. Indonesia has admitted to prohibiting exports of nickel ore, so the export ban was inconsistent with Article XI:1. As for the DPR, it needs to be tested if having a regulation that forces the business actors to conduct the processing stage of mining nickel domestically would create the limiting effects to the export of nickel ore or not. Indonesia argued that the DPR was not able to restrict exports as it didn't govern whether nickel ore can be exported, as provisions governing the permits of nickel ore exports are distinct from the DPR. However, then, according to the analysis of the Panel, looking back to the nature of the DPR where nickel ore is required to be sold to domestic processors to transform it into something other than nickel ore and as a consequence, there will be no nickel ore available to be exported (the MEMR and MOT Regulation only allows the export of nickel that been through the DPR). This shows that the DPR created a *de jure* restriction¹⁹ on the export of nickel ore even when there is no export ban; this also means that the DPR has a limiting effect, which is proved to be inconsistent with Article XI:1 of the GATT 1994.

It was later understood that both measures of the export ban and the DPR were inconsistent with the Article XI:1 of the GATT 1994, and the next step is to examine if both could fall within the provision of Article XI:2(a) as the exception of Article XI:1, with three highlights to be examined. *Firstly*, whether the measures were temporary, Indonesia argued that the application of the export ban and the DPR on nickel ore was only for a limited period to secure the immediate supply needs of the domestic processing industry. Also, export prohibition on low-grade nickel ore was only applied temporarily. However, mainly, it will be applied temporarily until the nickel reserve is well maintained. Canada, as a third party, gave a good paradigm statement as it stated that "... the Panel should consider whether the ban is more in the nature of a long-term conservation measure that is applied to an exhaustible mineral resource... a restriction that is imposed almost all the time until reserves are depleted would not meet the 'temporary applied' requirement."²⁰ Nevertheless, then Indonesia argued that the measures were not intended to maintain the reserves of nickel ore until it is depleted but constantly reassessed the measures and the level of reserves until "economically useful nickel reserves are sufficient to meet the

¹⁹ See Point 7.75 Of The Report Of The Panel.

²⁰ See Point 7.109 Of The Report Of The Panel.

demand of the domestic processing industry". The last statement of Indonesia showed the concern of Indonesia to implement downstream industry on nickel products.

Nevertheless, then, as the Panel analysed, there was no citation of text in the current regulations that explicitly govern a specific timeframe regarding the measures, as in the Panel in the China – Raw Materials case, the Appellate Body of DSB WTO agreed that to measure something is 'temporary' must be something finite, applied for a specific limited time. Yet, the export ban and the DPR both still have no limited time period mentioned in any regulations. There was no explanation if it only applies to low-grade ore, even no certainty on when the "supply meets demand" ends, and it can be concluded that the measures can not be interpreted as temporary. Here Indonesia failed to provide arguments and evidence to prove that the measures were meant to be temporary until the wanted level of the reserve was reached, for its plan downstream was also not explained in a time frame to convince the Panel and other parties. It has to be admitted that Indonesia was lacking in defining its so-called national plan for the downstream industry about the specific goals, plans, and time frame.

The next highlight to be examined is proofing that nickel ore is essential to Indonesia. Article XI:2 of GATT only applies to products that are essential to a member, so it is important to convince another member that the product prohibited or restricted for its export is something crucial to the member applying measures. In this case, Indonesia had to prove that nickel ore was essential. Indonesia has argued that nickel is essential for some reasons, including the importance of mining for the Indonesian economy as nickel mining contributes significantly to government revenue and employment, also nickel is an indispensable input for the steel industry, and domestic steel industry supply is not able to meet demand and half of Indonesia's demand still supplied from abroad. Lastly, Indonesia points to the implementation of a strategic plan to expand EV battery production in Indonesia in the short term, which results in a need to secure a critical input for such production.²¹ The analysis of the Panel stated that a product will be called "essential" if it is absolutely indispensable or necessary. Sadly, making its argument had a falling point, Indonesia distinguished nickel ore into two types: low-grade ore and high-grade ore. Indonesia only pays attention to high-grade nickel ore as a valuable and necessary product, while low-grade nickel ore is described as waste and burden and not economically viable. The distinction that Indonesia created has clearly shown that only some of the nickel ore could be called essential to Indonesia, not all of the nickel ore found in Indonesia. This made the Panel conclude that Indonesia needed to demonstrate that nickel ore is essential for Indonesia. Furthermore, the export ban and the DPR were not designed to solve a critical shortage of nickel ore but to address the availability of nickel ore as an input product to downstream industries in Indonesia; it made the Panel more convinced that nickel ore was not indispensable to Indonesia.

And coming to the last highlight is proofing that nickel ore was in a critical shortage. Indonesia argued that the export ban and the DPR were meant to prevent a critical shortage of nickel ore in Indonesia. It stated that the high demand for nickel ore from Indonesia had caused higher and unsustainable levels of nickel ore extraction, so preventions were needed to prevent imminent crucial deficiency of nickel ore. However, in the evidence Indonesia submitted, the

²¹ See Point 7.87 Of The Report Of The Panel.

calculation of nickel ore reserves only included high-grade nickel ore as it is the one considered valuable. The export ban is not applied to low-grade nickel ore anymore, as it only bans the export of high-grade nickel ore based on the state of critical shortage arguments. However, the DPR still applies to both high-grade and low-grade nickel ore. This means that the domestic processing requirement also applies to low-grade nickel ore, which is in a relatively low supply. As the measure applied to both grades, it must be proved that there was an imminent critical shortage. As Indonesia excluded low-grade nickel ore from the reserve calculation, the Panel concluded that Indonesia needed to demonstrate a critical shortage of low-grade nickel ore. In the report, even Indonesia admitted that the export ban on low-grade nickel ore was not to prevent a critical shortage of it but to deforestation and other environment-related issues. The inconsistency of Indonesia also showed when it said that the low-grade nickel ore has no value for Indonesia, but in the implementation, Indonesia acknowledged the use of low-grade ore in some domestic facilities, and miners may economically sell it to foreigners. As a critical shortage shall be of decisive importance or at a turning point and capable of being resolved, it cannot be merely a situation where there is a need to secure a product for a domestic industry to meet demand, as found in Indonesia's argument. Therefore the projections for the demand for nickel ore have yet to be fully developed in Indonesia but only focused on two regions. Hence, the Panel considered that the imminent critical shortage that needs to be prevented by the measures of an export ban or the DPR had yet to be fulfilled.

State Sovereignty within the Membership of the WTO

Based on the explanation and analysis above, it is understood that Indonesia still needs to fulfil the elements of Article XI:2 of the GATT 1994, as we can see from the news expressing the disappointment of the government of Indonesia regarding the decision of the Panel and how Indonesia still tries to appeal this case. Even President Joko Widodo encouraged to keep up the implementation of the downstream industry, even though the dispute was still rolling on.²² It is very understandable that the downstream industry is a great national plan to help Indonesia leap onto significant economic growth. Especially it is, according to the Constitution of Indonesia, the state has absolute sovereignty over natural resources for the people's welfare. However, it was a long ago when Indonesia admitted that it could not stand on its own in this international order to fulfil everything on its own. That is why Indonesia ratified and consented to be bound by the WTO and its regulation.

Consequently, Indonesia shall always remember to respect what has been agreed on in hundreds of agreements in the WTO legal framework. It is known that the spirit of international trade nowadays is liberalisation or free trade, where minimum barriers shall be applied to trade policies among members. Nevertheless, the GATT 1994 has governed several exceptions, such as Article XI:2, concerning the sovereignty of states. Speaking of sovereignty, membership in an international organisation is an expression of the state's legal sovereignty and may nevertheless undermine the state's sovereignty in the perspective of classical Westphalian Sovereignty. However, Meltzer stated that the membership of the WTO is more to reinforce than undermine

²² “Presiden: Jangan Sekali-Kali Takut Hilirisasi Industri Karena Gugatan,” *Antaranews*, February 22, 2023, <https://www.antaranews.com/Berita/3405126/Presiden-Jangan-Sekali-Kali-Takut-Hilirisasi-Industri-Karena-Gugatan#Mobile-Src>.

state sovereignty. Membership in the WTO has specific trade benefits where the WTO will allow them to exercise aspects of sovereignty that they did not previously have the power to exercise, particularly in the practice of international trade.²³

There is an existing principle among the members of the United Nations (UN) which governs the sovereignty of states over their natural resources, which is the Principle of Sovereignty over Natural Resources (PSNR). The UN established this principle through the UN General Assembly Resolution No. 523 (VI) and No. 1803 (XVII). This principle has its roots in two main concerns of the UN, which is the economic development of developing countries and the self-determination of colonised people²⁴, this is why the principle emerged post the 1945 period when new states had just declared their independence from colonisation.²⁵ This principle governs states' sovereignty over their natural resources and shall be used for their people's welfare through national development. A state is in absolute sovereignty over the management, allotment, and utilisation of its natural resources based on its law and social condition. Other states are not allowed to intervene, so that the state may conduct restrictions, prohibitions, or even agreements regarding its natural resources.²⁶ The Panel may consider this principle while analysing the dispute regarding the nickel ore. However, as we see, Indonesia has never mentioned this principle in its argument, which could be a strong foundation for Indonesia to apply the measures complained by the EU. Surprisingly, in its report, the Panel mentioned the existence of this principle. The Panel stated that the principle of permanent sovereignty over natural resources is relevant to interpreting GATT obligations. However, the analysis of the Panel does not contradict the principle as stated:

“The Panel understands that the GATT 1994 must be interpreted in a manner consistent with general principles of customary international law, including the principle of permanent sovereignty over natural resources. The Panel agrees with the Panel in *China – Raw Materials* that the ability to enter into international agreements such as the WTO Agreement is a quintessential example of the exercise of sovereignty. The Panel also notes that the principle of harmonious interpretation requires that Members must exercise their sovereignty over natural resources consistently with their WTO obligations. At the same time, the flexibilities built in the GATT 1994 and the other covered agreements must be interpreted to respect this principle and the goals of the Preamble of the WTO Agreement concerning sustainable development. For this reason, like the Appellate Body, the Panel does not exclude the possibility that a measure falling within the ambit of Article XI:2(a) of the GATT 1994 could relate to an exhaustible natural resource. Nevertheless, Indonesia would still have to demonstrate that all of the component elements of Article XI:2(a) are satisfied.”

By the statement of the Panel above, the government of Indonesia still needs to comply with and fulfil all the elements of Article XI:2(a). But it is figured out that Indonesia still needs to satisfy the Panel on fulfilling the elements. Another question arise whether this condition means the existence of WTO regulations taking up the sovereignty of states in the field of establishing regulations, especially in the scope of economy and trade. Talking about sovereignty

²³ Joshua Meltzer, “State Sovereignty and the Legitimacy of the WTO,” *University of Pennsylvania Journal of International Law* 26, no. 4 (2005).

²⁴ Nicolaas Schrijver, *Self-Determination of Peoples and Sovereignty over Natural Wealth and Resources* (New York: United Nations, 2013).

²⁵ Petra Gumplova, *Sovereignty over Natural Resources – A Normative Reinterpretation, Global Constitutionalism*, vol. 9, 2019.

²⁶ Natalia Yeti Puspita, Elizabeth Nadeak, and Aloysius Deno Hervino, “Justifikasi Penerapan Prinsip Permanent Sovereignty Over Natural Resources Dalam Perdagangan Internasional,” *Jurnal Komunitas Yustisia* 5, no. 3 (2022): 509.

itself is another round of long discussion, but here we focus on how actually the membership of WTO impacts state sovereignty. The traditional concept of sovereignty means a state's absolute power over its subjects, such as population and territory, internally, with three aspects: exclusive jurisdiction, state equality, and non-intervention. However, this traditional concept is not entirely acceptable in modern international relations, where the matter of the international community has changed into circumstances related to human rights, war crime, and even terrorism that require intervention into the sovereign territory of another state in order to resolve global concerns.²⁷ This also applies to the membership of the WTO, where in order for a state to cooperate in international trade relations, which is also important for a state's survival in nowadays global conditions, consenting itself to be bound by a treaty and/or organisation shall be recognised to the extent that the state did a consent, not in the form of taking the sovereignty owned by a state. When a state agrees to confer its power to an international organisation, it limits its right to exercise its power to the international organisation; inconsistent actions with the treaty norms would give rise to an international law violation.²⁸ Globalisation does impact sovereignty, forcing the creation or adaption of multilateral institutions that can cope with it. It caused the treaty obligations naturally reach deeply into domestic policy-making fields, including economic regulation. International cooperation mechanisms will clash with special national interests. At the same time, the WTO is both an institution to solve current international levels problems and a target to attack regarding domestic interests.²⁹

It is important to have a paradigm on how the WTO regulations apply to members, that all of the agreements are discussed, negotiated, and agreed on by the members who signed the agreement. The creation of WTO has been through several rounds until its establishment in 1994, where at the very same time, various multilateral agreements were also established.³⁰ The obligations contained within the agreements were not created by WTO but by the members themselves; this also includes all the exceptions of the obligations. It was believed that the time the members were trying to establish a new international trade organisation, it was also because there were domestic interests they tried to fulfil. They were especially looking back on how the world had faced economic downfall during World War, where protectionism was the main cause of global economic destruction.³¹ That is why the spirit of modern international trade was the liberalisation of trade to create fair and freer trade among states. So if it is said that Indonesia failed to satisfy certain obligations, it is not something caused by the standards set by the WTO, but from the very start, it was set by the members of the WTO. By joining as a member of the WTO, then Indonesia, since the very beginning, shall have the consciousness of what has been the spirit of the organisation and what was the organisation trying to achieve, and with that awareness, Indonesia also shall have full respect for the obligations found on the rules of

²⁷ Soyoung Jung, "A State's Sovereign Rights And Obligations In The Wto To Harmonize Environmental Policies," *Michigan State International Law Review* 21, no. 2 (2013): 465.

²⁸ Natalia Yeti Puspita, Elizabeth Nadeak, and Aloysius Deno Hervino, "Justifikasi Penerapan Prinsip Permanent Sovereignty Over Natural Resources Dalam Perdagangan Internasional," *Jurnal Komunitas Yustisia* 5, no. 3 (2022): 481.

²⁹ et al. Peter Sutherland, *The Future of the WTO, Addressing Institutional Challenges in the New Millenium, World Trade Organization* (Switzerland, 2004).

³⁰ Hata, *Perdagangan Internasional Dalam Sistem GATT Dan WTO* (Bandung: Refika Aditama, 2006).

³¹ Huala Adolf, *Hukum Perdagangan Internasional* (Surabaya: Raja Grafindo Persada, 2004).

the WTO. It is one of Indonesia's challenges to create such economic and trade policies or regulations.

Several Way Out for Downstream Succession

Even Indonesia is bound to the obligations of WTO that do not give the WTO any authority to challenge national policies or regulations. The WTO only gave a framework on how to conduct trade involving states. However, Indonesia can only create a regulation by acknowledging its obligation on an international level. The discussion above shows that Indonesia still needs to satisfy Article XI:2 of the GATT 1994. Without undermining any principles of sovereignty, it is still mandatory for Indonesia to comply with the provision. The WTO and its regulations honour and acknowledge the principle of sovereignty over natural resources within the practice of international trade; however, that does not mean reducing or removing state members' obligations to comply with each provision's elements. Indonesia needs to stay aware that other members of the WTO have the right to challenge its national regulations if it disrupts the international market and causes damage to them, just like how the EU filed complaints against Indonesia. As it shall be believed that if another State implements an act based on its national interest and will cause damage to Indonesia, it would be something unwanted and prevented.

With respect to the fundamental norms applied in Indonesia and the purpose of its people's welfare as mentioned in the Consitution. They recalled that Article 33 of the Constitution influenced the creation of the Mineral and Coal Mining Law, which meant for the national welfare and interests. However, natural resources shall be managed optimally and ensured that the sustainable development of it in order to make sure that the nation's people can enjoy the natural resources for a long period and would be able to achieve the greatest welfare. The management of natural resources must be done optimally, efficiently, transparently, sustainable, and environmentally friendly and be equitable to provide the greatest advantages for the sake of the welfare of the people of Indonesia in a certain sustainable manner.³² The idea of downstream development in Indonesia itself is a national agenda for achieving higher income for national welfare, leading to an economic development agenda. The downstream development is certainly a national interest and under the Constitution.³³ However, in the sector of mining industry, the governance of the downstream industry must be planned and regulated with several considerations as follow; it starts with the nature of non-renewable mining products; the downstream sector of mining industry shall be aware that the preservations of the products must be sustained in order to fulfil not only the necessities of the global market but more importantly of national's needs. Another consideration that the policymaker should notice is that the regulations downstream shall be pro-environmental; the activities downstream shall not harm the environment but, in return, should contribute to the maintenance of sustainability. Pro-environmental regulations are in line with the mandate of Article 33 of the Constitution, which asserts the relations between economic development and environmental preservation. This means economic development shall be harmonious and synergised with the environmental fac-

³² Irsan and Meria Utama, "The Political Law on Coal Mining in the Fulfilment of People's Welfare in Indonesia," *Sriwijaya Law Review* 3, no. 1 (2019): 24.

³³ Sri Mastuti And and Pangi Syarwi, "Kebijakan Pelarangan Ekspor Bijih Nikel Indonesia Dari Sudut Teori Keadilan John Rawls," *Jurnal Communitarian* 4, no. 2 (2023).

tor.³⁴ While establishing a policy regarding downstream development, these considerations play important roles in ensuring the fulfilment of welfare rather than taking measures that would violate any international consensus that Indonesia has been part of and would make the downstream implementation be postponed and not optimal.

Speaking of the international plan about downstream development, the national plan on implementing downstream, especially in the mining industry, is allowed, with no provisions on the WTO prohibiting the downstream activities from being focused and conducted domestically. Suppose the downstream activities bring great benefits and value to Indonesia's economic sector. In that case, they shall be implemented by adhering to the obligations of the WTO, in this case – the GATT 1994. The GATT 1994 governs that no prohibition or restriction other than duties or tariffs is allowed as a requirement to exercise import or export. In the dispute between the EU and Indonesia, the DPR complained to the EU means the downstream in the nickel ore mining industry. The DPR has a limited effect and restricts the export of nickel ore activity by *de jure* as it is required for IUP or IUPK holders to build their smelters to process and refine the nickel ore before it is exported. The highlight here is that the DPR obligation is burdened on the business actors, who need to build smelters independently and are struggling with it. Thus, the downstream would be ineffective, disrupting the export chain and global demand for nickel ore. Enhancing the added value for nickels is in the form of a smelter building. The building of smelters shall be accommodated by infrastructure development. The government of Indonesia shall support the downstream through the development of infrastructures such as energy generators, smelters area, tariffs and taxes incentives for a certain time, and also legal certainty on the period of mining production as a guarantee on smelter materials to realise the downstream into industrialisation.³⁵

Therefore, it is very clear that technical barrier like the DPR is not allowed by the regulation of the WTO. The highlight here is to make the DPR as the downstream implementation to not become a trade barrier, as a requirement to conduct exports. Indonesia may choose to utilise duties or tariffs as barriers to succeed in the downstream implementation. Products that have not been processed and refined domestically will be applied with the highest level of duty or tariff rather than those that have been processed and refined domestically. Being ambitious to accelerate the downstream industry is valid as long as it does not violate any international trade regulation. Rather than being careless and implementing bold regulations that will cause dispute just like what happened now and brings potential circumstances to face another round of trade sanctions, it is wise to walk on a cautious path with clear and mature calculation. Applying the duty and tariff schemes as mentioned will trigger it, and naturally, the business actors will prepare their time and budget to build their own smelters. Even the government may build state-owned smelters, so mining companies that still need to be able to have their smelter may put their raw products there, and the output will be the same wanted processed and refined nickels ready to be exported. The global chain of nickel export will not be disrupted, and Indonesia will still gain more value from it. Former research by an economist, Blonigen, showed

³⁴ Irwansyah, "Research-Based Environmental Law: The Debate Between Ecology Versus Development," *Sriwijaya Law Review* 1, no. 1 (2017): 46.

³⁵ Muhammad Agung and Emmanuel Ariananto Waluyo Adi, "Peningkatan Investasi Dan Hilirisasi Nikel Di Indonesia," *Jurnal Ilmu Sosial Dan Pendidikan* 6, no. 2 (2022): 4017.

that non-tariff barriers such as trade restrictions could raise prices of the protected sector and hurt the downstream sectors' competitiveness and development.³⁶ This means that poorly calculated regulations would obstruct the development of downstream industries.

Another important thing to consider is that this national plan for the downstream industry must be planned and calculated very well. Not only a short-term discussion but for very long-term and sustainable consideration. Whether Indonesia's government is aware of the reserve of nickel ore in its territory, not only because nowadays, nickel demand increases as the development of electrical vehicles trend arises. The downstream industry must accommodate all types of nickel, both high-grade and low-grade ore. As a natural resource, all types of nickel ore shall be considered valuable, and the government shall use the sustainability paradigm so that the downstream industry will not only be in the scope of input to increase national income but also how it will contribute to maintaining the nickel reserves. Therefore, the government shall be certain of how this plan will work and how long it will take time with clear goals to achieve each year or term. Then, the implementation of downstream will bring satisfaction not only to the people of Indonesia but also to the international community.

CONCLUSION

As it is a desired national plan to be able to implement the development of downstream industry in Indonesia, the dispute between Indonesia and the EU concerning the export ban and the domestic processing requirement of nickel ore is still going on before the DSB of the WTO, starting from 2019 with the latest position on December 2022 the Panel reported under appeal. From the analysis done by the Panel of the DSB, it is known that Indonesia still needs to fulfil the elements of Article XI:2(a) as the exception to conduct prohibition or restrictions on export other than applying duties or tariffs. It is concluded that Indonesia could not demonstrate that the measures were applied only for a limited time, for it has no definite time frame written in any regulation. Besides, Indonesia could not demonstrate that nickel is an essential product and is in critical shortage. Indonesia distinguishes nickel into high-grade and low-grade ore and considers low-grade ore as not valuable and excluded from the reserve calculation.

The loss of Indonesia in this first phase of dispute settlement showed that Indonesia had violated the obligation of the GATT 1994. Indonesia is allowed to control its natural resources as a part of its sovereignty. However, it does not dismiss Indonesia's obligations as a member of the WTO to comply with every regulation found under the WTO legal framework. Therefore, national policies and regulations shall be constantly aligned with the agreed provisions. The suspected violating regulations shall immediately be adjusted to ensure downstream implementation would operate without any barrier. Furthermore, in establishing any regulation, the government shall perform cautious calculations on the impacts both at national and international levels to manage any risks or disputes. It is hoped that the downstream may succeed in bringing growth to the economic sector of Indonesia and bring welfare to its people as output without making Indonesia has to violate any of the international trade obligations subjected to it.

³⁶ Bruce A. Blonigen, "Industrial Policy and Downstream Export Performance," *The Economic Journal*, 2016, 126.

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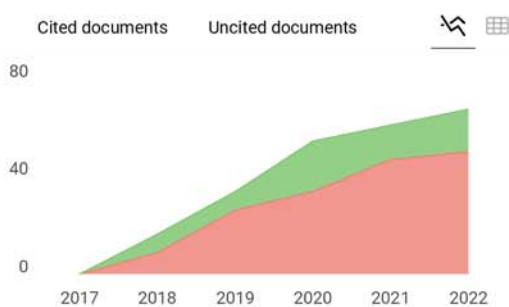
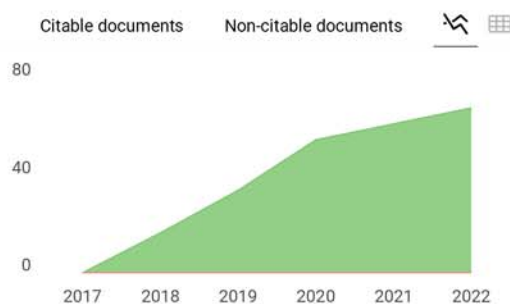
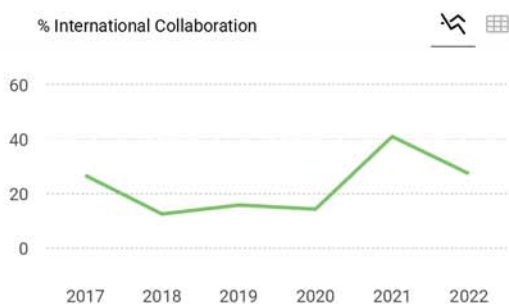
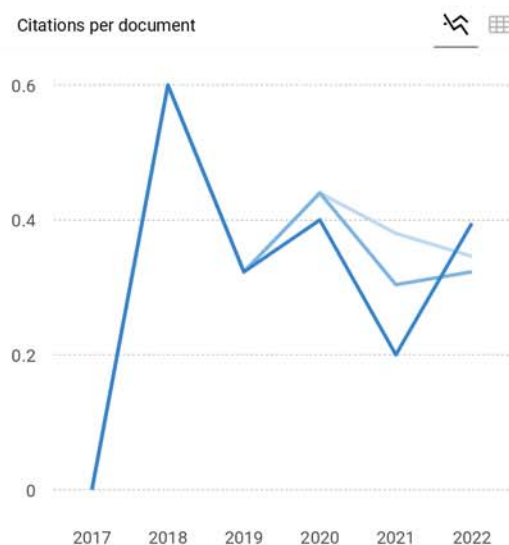
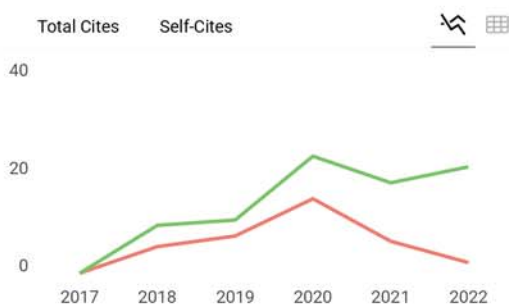
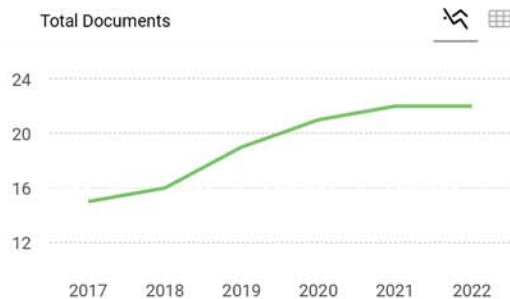
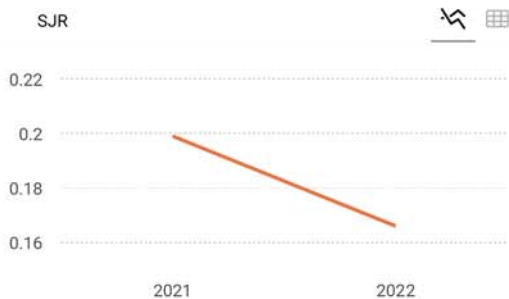
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