

Business on Nickel Down Streaming with China and European Union Lawsuits at World Trade Organization

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Abstract

This study aims to discuss the law and investment business between China-Indonesian companies and the European Union lawsuit. China companies that build nickel refining and processing plants or smelters in Indonesia with large investment values, the Indonesian government obtains significant profits from exports through domestic processed nickel exports. The research method used in this study is the normative legal research method. The results of the study indicate that the benefits between Indonesia and China include China investment in Indonesia, job creation in Indonesia, and increased export results, which have an impact on concerns in the European Union, especially since Indonesia recently banned the export of nickel ore. On the contrary, Indonesia has encouraged domestic nickel ore processing to add value to nickel products. Indonesia as one of the largest nickel producers in the world has regulations regarding nickel exports. This is stated in the Regulation of the Minister of Energy and Mineral Resources Number 11 of 2019 concerning the Second Amendment to the Regulation of the Minister of Energy and Mineral Resources Number 25 of 2018 concerning Mineral and Coal Mining Business Activities. In the regulation, Indonesia imposed a ban on nickel ore exports. Regarding this ban, the European Union reacted by filing a lawsuit with the World Trade Organization (WTO). Based on the State sovereignty & Theory of Welfare State, the state must actively strive for welfare, and act fairly that can be felt by all people evenly and in balance. Therefore, the implementation of a ban or restriction on nickel ore exports is a way for the Indonesian government to improve people's welfare. The narrative of national sovereignty and welfare state can be used as an argument in front of the WTO international forum but accompanied by a strong legal basis argument by using Article XIX of GATT 1994 regarding the exception in economic circumstances, a safeguard measure against domestic industry when there is a surge in imports that causes or threatens to cause serious losses.

Keywords: *Nickel Down Streaming; China Smelter; European Union Lawsuit.*

1. INTRODUCTION

The moderating role of the rule of law in the country is crucial in regulating foreign direct investment. The results mostly show that the moderation of the rule of law in the country has a positive and significant effect on a country's exports. This also suggests that the rule of law moderates the performance relationship in

exports¹, as seen in the case of the moderation of legal regulations in Indonesia regarding the exploitation of mineral and coal mining. In terms of the influence of Indonesian mining laws and regulations on export relations, this has an impact on the negative perception of partner countries. The policy of stopping nickel ore exports has given rise to negative perceptions from partner countries that have depended on the supply of raw materials.²

Specifically, Regulation of the Minister of Energy and Mineral Resources Number 11 of 2019 concerning the Second Amendment to the Regulation of the Minister of Energy and Mineral Resources Number 25 of 2018 concerning Mineral and Coal Mining Business imposed a ban on the export of nickel ore starting from January 1, 2020.³ The moderation of legal regulations in Indonesia regarding the exploitation of mineral and coal mining is carried out for the greater benefit of domestically processed nickel exports rather than exporting nickel raw materials or nickel ore at much lower prices.⁴

The rule of law is not only subject to the rule of law but also includes ethical (moral) values and good norms.⁵ Regulations are basically designed not only to provide order but also to create justice and welfare for the community. In the Indonesian government, justice and welfare refer to the foundation of the Indonesian state to create “Social Justice for All Indonesian People”.⁶ Included in nickel management for the welfare of the state. To emphasize the statement, based on the theory of the welfare state, the state is responsible for the welfare of its citizens, the form of responsibility is in the form of welfare in the economic, social, cultural and other fields where the form of responsibility is regulated in the provisions of laws and regulations. The welfare state has a philosophy that is essentially marked by the high role of the state in developing the welfare of its citizens.

In the State’s objectives stated in the opening of the 1945 Constitution of the Republic of Indonesia, paragraph 4 (four), one of which states “promoting the general welfare”, it is clear that Indonesia is a country that upholds the concept of a welfare state.⁷ The welfare state is run by a democratic government that is responsible for the welfare of its people. This concept aims to reduce the suffering of society, such as poverty, unemployment, health problems, and so on. Therefore, a country that applies the welfare state concept

1 Belay Seyoum & Rebecca Abraham, 2022, US Trade Preference and Export Performance of Sub-Saharan Africa (SSA): Evidence from the African Growth and Opportunity Act (AGOA), *World Trade Review*, Vol. 21, Issue 5, December, Cambridge University Press, p. 573

2 Novi Ratna Cahyani, 2023, Kebijakan Pemberhentian Ekspor Biji Nikel Indonesia Tahun 2020: Tinjauan Neomerkantilisme, *Ganaya Jurnal Ilmu Sosial & Humaniora* 6 (2), p.423-436

3 Article II, Regulation of the Minister of Energy and Mineral Resources of the Republic of Indonesia Number 11 of 2019 concerning Second Amendment to Regulation of the Minister of Energy and Mineral Resources Number 25 of 2018 concerning Mineral and Coal Mining Businesses.

4 Diah Cahyaningrum, 2023, Larangan Ekspor Sumber Daya Alam Mineral Mentah: Nikel dan Bauksit, *Info Singkat*. Vol. XV, No 4/II/Puslit/Februari/2023

5 Prabu Buana Rumiarta, I Nyoman. 2022. “Correlation Theory A.V. Dicey Perspective of the Rule of Law in Indonesia: Correlation Theory A.V. Dicey Perspective of the Rule of Law in Indonesia”. *Focus Journal Law Review* 1(1). <https://ojs.balidwipa.ac.id/index.php/fjl/article/view/19>.

6 Rumiarta., 7

7 Athiq, U. (2014). Policy of temporary direct aid program analyzed from welfare state concept. *Jurnal IUS Kajian Hukum Dan Keadilan*, 2(2). <https://doi.org/10.12345/ius.v2i5.172>

has a public policy that is in the form of service, assistance, protection or prevention of social problems.⁸

The Indonesian government's downstream program and ban on raw material exports have successfully added value to nickel products. This is related to the construction of a nickel smelter or purification and processing plants in Indonesia. Chinese companies have made substantial investments in building these facilities in Indonesia. As a result, the Indonesian government has greatly benefited from exporting domestically nickel products instead of lower-value nickel raw materials or ore exports. Both Indonesian and Chinese companies benefit from having a nickel smelter or refining and processing factories in Indonesia. These advantages include Chinese investment, job creation, and increased export results in Indonesia. However, this simultaneously led the European Union (EU) to feel disadvantaged mainly because, in recent, Indonesia has banned the export of nickel ore and encouraged domestic processing of nickel ore to add value to nickel products.

Based on the statistical data below, it explains that after the ban on nickel ore exports was implemented on January 1, 2020, the export value of the mining commodity actually increased through the export of nickel products. Last year, the export value of nickel products recorded its highest record in the last 22 years, which was around US\$6 billion or grew 364.7% from the previous year. The increase in the export value of nickel products in 2022 was due to the downstreaming of nickel, which was initially the export of raw nickel materials into nickel products that had been processed in Indonesia.

Kinerja Nikel Indonesia

Negara	Produksi (ton)		Cadangan (ton)	Kontribusi Produksi (%)		Kontribusi Cadangan (%)
	2021	2022*		2021	2022*	
Indonesia	1.040.000	1.600.000	21.000.000	38,0	48,8	19,3
Filipina	387.000	330.000	4.800.000	14,1	10,1	4,4
Russia	205.000	220.000	7.500.000	7,5	6,7	6,9
Kaledonia Baru	186.000	190.000	7.100.000	6,8	5,8	6,5
Australia	151.000	160.000	21.000.000	5,5	4,9	19,3
Kanada	134.000	130.000	2.200.000	4,9	4,0	2,0
China	109.000	110.000	2.100.000	4,0	3,4	1,9
Brazil	76.000	83.000	16.000.000	2,8	2,5	14,7
Amerika Serikat	18.400	18.000	7.370.000	0,7	0,5	6,8
Negara Lain	429.000	440.000	20.000.000	15,7	13,4	18,3
Total Dunia	2.735.400	3.281.000	109.070.000	100,0	100,0	100

Sumber: U.S. Geological Survey, Mineral Commodity Summaries, Januari 2023
*) angka estimasi

datanesia

The policy mandating mining companies to establish smelters aims to ensure that exported mining products are no longer in raw form. By utilizing smelters, the added value of mining minerals is increased, thereby providing significant benefits to Indonesia.⁹ Notably, Chinese companies have made substantial investments in the development of these facilities in Indonesia. One example is a Chinese company, Tsingshan Holdings

⁸ Miftachul Huda, 2009, *Pekerjaan Sosial dan Kesejahteraan Sosial sebuah Pengantar*, Pustaka Pelajar, Yogyakarta, p. 73.

⁹ Agung, Muhammad, and Emmanuel Ariananto Waluyo Adi. "Peningkatan Investasi Dan Hilirisasi Nikel Di Indonesia." (*JISIP Jurnal Ilmu Sosial dan Pendidikan*) 6.2, 2022).

Group, the world's largest company in the metal industry. In 2018, Tsingshan Stainless Steel became the world's 46th largest steel producer, producing 9.29 million tons of steel.¹⁰

Tsingshan, a privately-owned company headquartered in Wenzhou City in China operates a nickel production factory (smelter) in Indonesia. Tsingshan collaborates with Bintang Eight Group from Indonesia to build a nickel smelter factory, PT Indonesia Morowali Industrial Park (IMIP) in Morowali Regency, Central Sulawesi on May 21, 2017. PT Indonesia Morowali Industrial Park (IMIP) manages a nickel-based industrial area integrated with the main products such as nickel, stainless steel, and carbon steel. Tsingshan Group operates 3 nickel pig iron (npi) production units with a capacity of 2 million tons and 3.4 million tons of stainless steel. Tsingshan Group is the world's largest nickel processing company and has mastered complete processing technology with advanced and modern technology. In collaboration with PT IMIP, established in 2013, it constitutes a nickel processing-based industrial area with the world's longest industrial chain and nickel as its primary product.¹¹ Furthermore, PT Vale Indonesia Tbk (INCO) teamed up with Chinese companies, China Baowu Steel Group and Shandong Xinhai Technology, to build a nickel smelter or refining and processing plant in Bahodopi District, Morowali Regency, Central Sulawesi with an investment of US\$2.1 billion or around IDR 31 trillion.¹²

Indonesian and Chinese companies both benefit from having a nickel smelter or refining and processing factories in Indonesia. Indonesia as one of the world's largest nickel producers has regulations in terms of nickel exports. This is stated in the Regulation of the Minister of Energy and Mineral Resources Number 11 of 2019 concerning the Second Amendment to the Regulation of the Minister of Energy and Mineral Resources Number 25 of 2018 concerning the Business of Mineral and Coal Mining. In this regulation, Indonesia imposed a ban on the export of nickel ore starting January 1, 2020. Regarding this ban, the European Union also reacted by filing a lawsuit against the WTO (World Trade Organization).

In the realm of international trade, one crucial source of law is the provisions of the General Agreement on Tariffs and Trade (GATT), which eventually led to the establishment of the World Trade Organization (WTO). GATT was formed through an agreement among 23 countries in October 1947. The creation of the WTO in 1994 made GATT one of the WTO annexes, binding WTO member countries to its provisions so that they were referred to as GATT/WTO members. In addition to tariffs and trade, GATT is also a general rule for provisions relating to Agreements on Services (GATS), Investments (TRIMs), and agreements on Intellectual Property Rights (TRIPS).¹³

In principle, the World Trade Organization (WTO) is a means to encourage orderly and fair free trade in this world. In carrying out its duties to promote free trade, WTO applies several principles that serve as the foundation of its operations. Through

10 World Steel Association, *World Steel in Figure 2019*, (Belgium: World Steel Association, 2019)

11 <https://www.metrosulteng.com/ekonomi/pr-5194214597/profil-tsingshan-holding-group>

12 <https://trilogi.co.id/perusahaan-tambang-nikel/>

13 Huala Adolf, *International Trade Law*, Raja Grafindo Persada, 2005, p. 97

the implementation of trade liberalization under WTO rules, member countries are encouraged to adhere to these rules.¹⁴

Trade liberalization initiated through WTO rules led WTO member countries to open their markets to other member countries. This transition involves the decentralization of decisions given to business actors related to the amount and how the process of production is carried out, thus granting businesses greater autonomy in their activities.¹⁵

Based on the downstreaming of nickel as stated in the Regulation of the Minister of Energy and Mineral Resources Number 11 of 2019 concerning the Second Amendment to the Regulation of the Minister of Energy and Mineral Resources Number 25 of 2018 concerning Mineral and Coal Mining Business, the European Union objects to the ban on exports of raw nickel or nickel ore which has been in effect since January 1, 2020. This policy of restricting exports of raw nickel ore is considered unfair and has a negative impact on the European steel industry due to limited access to nickel ore and other mineral ores.

The European Union believes that Indonesia has violated Article XI paragraph 1 of the General Agreement on Tariffs and Trade (GATT) 1994 by restricting nickel ore exports, which expressly prohibits WTO member countries from imposing tariff restrictions, taxes, and other duties, as well as other restrictions, including quotas and licensing, in the context of exports and sales. The policy of banning nickel ore exports implemented by the Indonesian government is considered to violate Article XI of the General Agreement on Tariffs and Trade (GATT) 1994 concerning the commitment not to hinder international trade. The research method used in this study is the normative legal research method. The approach methods used in this research are the statutory regulation approach, case study approach and legal and business approach as well as the literature approach in the form of books and journals in studying and analyzing business on nickel downstreaming with China and European Union lawsuits at World Trade Organization.

2. ANALYSIS AND DISCUSSION

2.1. A Brief Introduction to Indonesian “Nickel Downstream Program”

The legal system that encourages, directs, and regulates various economic development activities is one of the supporting infrastructures needed to achieve national development goals,¹⁶ including in this case economic development through nickel downstream development businesses.

Downstreaming refers to the process of adding value to a commodity that is originally in raw or unprocessed form, transforming it into a product that has undergone industrial processing. This transition leads to increased profits for a country by boosting the

¹⁴ Jamilus, 2017, *Analysis Of The Function And Benefits Of WTO For Developing Countries (Especially Indonesia)*, Journal IKH, Vol. 11 No. 2 July, Jakarta, p. 206

¹⁵ Jur Udin Silalahi, et.al, 2011, *Analysis and Evaluation of the Law Concerning the Protection of the Domestic Industry*, National Legal Development Agency, Indonesian Ministry of Law and Human Rights, Jakarta, p. 1

¹⁶ Sri Kusuma dewi, A., & Anindita Purnama Ningtyas. (2023). The Fulfillment of The Clarity Principle Towards the Formulation Arrangement in The Recognition of Statutory Bodies Within the Limited Liability Company. *Jurnal IUS Kajian Hukum Dan Keadilan*, 11(1), 156–175. <https://doi.org/10.29303/ius.v11i1.1206>

export value of the commodity.¹⁷ The downstream policy for nickel commodities is fundamentally guided by Law Number 4 of 2009 on Minerals and Coal, which advocates for the transformation of nickel from its raw state to processed products before entering the global market, thereby enhancing its value. This legislation also mandates that mining business operators in the mineral and coal sectors establish smelters to process mining outputs into refined products.¹⁸

In recent years, several regulations have been enacted concerning the nickel sector, the most significant of which is the ban on nickel ore exports starting January 2020, as stipulated in MEMR Regulation No. 11/2019. This regulation was introduced to amend MEMR Regulation No. 25/2018 on the Utilization of Mineral and Coal Mining. Despite the benefits of the ban, it poses the risk that local smelters might attempt to purchase nickel ores from small-scale miners at unfairly low prices. To address this, the government sets a monthly mineral benchmark price, known as Harga Patokan Mineral (HPM), for nickel ores, which is calculated based on the reference mineral prices, or Harga Mineral Acuan (HMA).¹⁹ The regulation mandates that smelters may purchase nickel ores at prices no more than 3 percent below the HPM. Additionally, in August 2020, the government established a task force to ensure companies' compliance with this floor price. Despite appeals from international trading partners, this ban remains in effect: MEMR Regulation No. 17/2020, which was later issued to relax restrictions on the export of certain commodities, did not include nickel ores.

The nickel downstreaming initiative represents the Indonesian Government's efforts to boost export value through two key measures: establishing smelters to process nickel into products for battery raw materials and iron and steel materials, and prohibiting the export of raw nickel, which is considered to have low added value compared to processed products.²⁰ This downstreaming of nickel is believed to have a positive impact on the national economy by increasing the value of the production supply chain. Downstreaming can shield nickel commodities from fluctuations in low export prices, thereby improving Indonesia's economy. The nickel downstreaming policy can benefit the national economy by enhancing the value of the production supply chain and increasing the selling price of processed nickel commodities. Nickel exploration activities must continue so that Indonesia can become more self-reliant in nickel production.

Nickel downstream policy, Indonesia can be more self-sufficient in utilizing its natural resources and maximize the export potential of value-added products. Moreover, the nickel downstream policy has significantly positively impacted the export of Indonesian iron and steel commodities, including increasing the export value of these commodities. Indonesia is currently focusing its efforts on establishing downstream nickel processing

17 Pribadi, A., Hilirisasi Nikel Ciptakan Nilai Tambah dan Daya Tahan Ekonomi, (Kementerian ESDM RI, 2022) Esdm.go.id: <https://www.esdm.go.id/id/mediacenter/arsip-berita/hilirisasi-nikel-ciptakan-nilai-tambah-dan-daya-tahan-ekonomi>

18 Sandra, Vivi, Satria Unggul Wicaksana Prakasa, and MH SH. "Peran WTO Dalam Penyelesaian Sengketa Gugatan Uni Eropa Terhadap Indonesia Terkait Larangan Ekspor Bijih Nikel." (*Hukum Organisasi Internasional* 2021)

19 Deloitte Indonesia, Overview of Indonesia's EV downstream sector: A focus on nickel (Deloitte Indonesia Perspectives | Third Edition, 2022)

20 Rizani, Ahmad, et al. "Profit and losses of the nickel downstream program for the Indonesian economy." (*International Journal of Society Reviews* 1099.(11).0-1094:(2024) 2,0

capabilities for Class 2 nickel – with the ultimate objective of developing integrated lithium battery production facilities. This strategic move aims to capitalize on the growing demand for electric vehicles and renewable energy storage solutions, thereby fostering sustainable economic growth and technological advancement within the country.

2.2. The Impact of Chinese Nickel Smelters in Indonesia and the European Union's Lawsuit at the World Trade Organization regarding the Ban on Nickel Ore Exports.

The impact of Chinese companies building nickel smelters or refining and processing plants in Indonesia with a large investment value has an impact on mutual benefits between Indonesia and China. In the other side, however, the EU felt disadvantaged for the ban of nickel export, coupled with its encouragement of domestic processing of nickel ore to add value to nickel products which is stated at the Regulation. Indonesia imposed a ban on the export of nickel ore on January 1, 2020. That there is a multilateral trading system under the WTO.²¹ Regarding this ban, the EU filed a lawsuit against the World Trade Organization (WTO) on December 22, 2019. The EU argued that Indonesia had committed a violation by limiting the export of nickel ore.²²

In *Indonesia - Raw Materials*,²³ the EU contended that Indonesia had violated Article 11, paragraph 1 of the General Agreement on Tariffs and Trade (GATT) 1994 by restricting the export of nickel ore which explicitly prohibits the WTO member countries from imposing limitations on tariffs, taxes, and other duties, as well as any other restrictions, including quotas and licensing, within the framework of exports and sales.²⁴ The policy of banning nickel ore exports carried out by the Indonesian government is considered to violate Article XI of the 1994 General Agreement on Tariffs and Trade (GATT) concerning the commitment not to hamper international trade.

It is worth noting that Indonesia's nickel ore production saw a substantial increase from 345 thousand metric tons in 2017 to 1 million metric tons in 2021. Additionally, Indonesia is known to possess nickel reserves of up to 21 million metric tons. However, this incident resulted in the European Union feeling disadvantaged. This is because, in recent years, Indonesia has banned the export of nickel ore, coupled with its encouragement of domestic processing of nickel ore to add value to nickel products. Indonesia as one of the world's largest nickel producers has regulations in terms of nickel exports. This is stated in the Regulation of the Minister of Energy and Mineral Resources Number 11 of 2019 concerning the Second Amendment to the Regulation of the Minister of Energy and Mineral Resources Number 25 of 2018 concerning the Business of Mineral and Coal Mining. In this regulation, Indonesia imposed a ban on the export of nickel ore starting January 1, 2020. Regarding this ban, the European

²¹ Ke Li, 2023, *The WTO's National Security Exception and Its Implication to the China-EU Dispute: With Special References to Lithuania's Taiwan Representative Office*, China and WTO Review, Vol. 9 No. 2 September, YIJUN Institute of International Law. p.255. DOI: <http://dx.doi.org/10.14330/cwr.2023.9.2.03>

²² Panel Report, Indonesia—Measures Relating to Raw Materials, WTO Doc. WT/DS592/1 (adopted Des. 25, 2023), <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/5921.pdf&Open=True>

²³ Panel Report, Indonesia — Measures Relating to Raw Materials, WTO Doc. WT/DS592/R (adopted Des. 20, 2023), https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds592_e.htm

²⁴ Dendi Adisuryo, 2023. Lost in Nickel Lawsuit at the WTO, Indonesia Forced to Export Raw Nickel. Adco Law. <https://adcolaw.com/blog/lost-in-nickel-lawsuit-at-the-wto-indonesia-forced-to-export-raw-nickel/>

Union also reacted by filing a lawsuit against the World Trade Organization (WTO). On 22 December 2019, the European Union formally initiated the lawsuit, submitting it to the Indonesian ambassador in Geneva. The European Union argued that Indonesia had committed a violation by limiting the export of nickel ore.

It is important to criticize that an International Organization as a forum for countries to discuss international trade issues is not always beneficial. In reality, increasing world trade does not mean increasing welfare and development of developing and poor countries. In fact, now it is starting to feel that the welfare of developing countries is declining and the development process is increasingly hampered by the rules, conditions and sanctions made by International Organizations. Products still find it difficult to penetrate the markets of developed countries.

The Indonesian government is right to continue its commitment to continuing the policy of downstreaming the mining sector industry, including nickel downstreaming, by gradually stopping the export of raw materials for mining products. By stopping the export of raw nickel materials, it produces very large added value and can be felt by the people. The opening of a new nickel ore management industry will provide very broad employment opportunities for tens of thousands or even millions of workers who can be recruited. Another advantage is income for the state in the form of taxes. It is hoped that with the downstreaming of the industry, all nickel derivative products such as batteries, steel and others can be produced. The transfer of technology and the growth of small and medium enterprises in the surrounding area have an impact on increasing people's welfare. As stipulated in Article 33 of the 1945 Constitution, natural resources are used for the greatest possible welfare of the people. The government is right to have a policy so that mining products can be processed into high-value commodities. By stopping nickel ore exports, nickel ore processing industries will be built into high-value commodities.

2.3. The rationale for implementing trade globalization.

The rationale for implementing trade globalization is based on Adam Smith's concept of thinking, specifically trade through specialization (comparative advantage) in trade by concentrating on the field of absolute advantage or absolute advantage it has. A country will be successful in trade if it specializes in production and exports, with lower costs than its trading partner countries.²⁵ Furthermore, Adam Smith's thought was developed by David Ricardo,²⁶ that the country will still benefit (gain from trade) if it concentrates activities with relatively lower costs than other alternative activities in the country, even though its partner countries have an absolute advantage in all fields. Conversely, to meet internal needs for other products, the country concerned can import. The view that supports the globalization of trade is acknowledged by Paul Smeul winner of the Nobel Prize in economics that the theory of comparative advantage is "*...the most beautiful idea in economics*"²⁷

25 Adam Smith, 1989, *The Wealth of Nations*, Harvard University Press, Ed. Edward, Boston, p.121.

26 David Ricardo, 1987, *Principles of Political Economy and Taxation 1817*, Harvard University Press, Boston, p. 10

27 Robert Gilpin, 1987, *The Political Economy of Internasional Relations*, Princeton University Press, p.172

Regarding free trade and investment between one country and another in the world, it can be understood through an in-depth analysis of Karl Marx's speeches. An in-depth analysis of Karl Marx's²⁸ speeches and writings on free trade and his understanding of the relation between the bourgeoisie and working class in the bourgeoisie economy suggests a few key points: Firstly, Marx was not a capitalist supporter because he thought capitalist economic system enriches itself by exploiting the working class.²⁹ Secondly, he agreed that free trade has the essence to bring development and thus could be called a progressive plan. Thirdly, he believed that free trade in a bourgeoisie economy would ultimately destroy the system because of its capitalist nature. And lastly, free trade of socialist nature could bring mutual exchange, equality, and benefit. In line with Marx's socialist perspective on free trade, China has developed its free trade strategy by being an active partner and engaging in continuous negotiation for developing a win-win free trade agreement. An analysis of China's free trade agreements with other countries supports the idea that Marx's socialist vision of free trade, as a progressive plan, fosters mutual exchange, equality, and mutual benefit.³⁰

The moderating role of the rule of law in the country is highly important in regulating foreign direct investment. The results mostly indicate that the moderation of the rule of law in the country has a positive and significant effect on a country's exports. This also shows that the rule of law moderates the performance relationship of export,³¹ as exemplified by the moderation of legal regulations in Indonesia regarding the exploitation of mineral and coal mining. Regulation of the Minister of Energy and Mineral Resources Number 11 of 2019 concerning the Second Amendment to the Regulation of the Minister of Energy and Mineral Resources Number 25 of 2018 concerning Mineral and Coal Mining Business, imposes a ban on the export of nickel ore starting from January 1, 2020. The moderation of legal regulations in Indonesia regarding the exploitation of mineral and coal mining is carried out to enhance the benefits of nickel exports, which have been domestically processed, by discontinuing the export of nickel raw materials or nickel ore, which have significantly lower prices. The government implemented this policy to increase the added value of exports, leading to higher foreign exchange and tax revenue for Indonesia.

2.4. Chronology of Lawsuits Related to Nickel Ore (European Union vs Indonesia) & Legal Analysis of the DS 592 Decision on the European Union's Lawsuit Against Indonesia at the WTO.

Chronology of Lawsuits Related to Nickel Ore (European Union vs Indonesia). The legal dispute between the European Union and Indonesia, which led to the European Union filing a lawsuit at the WTO, originated from Indonesia's decision to ban the export of raw minerals, including nickel ore. This decision was stipulated in the Regulation of the Minister of Energy and Mineral Resources Number 11 of 2019. Under this new

28 Karl Marx, 1859, *A Contribution to the Critique of Political Economy*, Progress Publishers, p. 6-7

29 Sadiya S. Silvee, 2022, *China's Socialist Free Trade Strategy: A Marxist Analysis*, China and WTO Review, Vol. 8 No. 2 September, YIJUN Institute of International Law, p. 416

30 Sadiya S. Silvee., p. 416

31 Op.Cit., Belay Seyoum & Rebecca Abraham, p. 573

policy, holders of mining business permits (IUP) for production operations can only export nickel with a grade below 1.7%. Even then, such exports were permissible only after the ore underwent refining up to 70% at a domestic smelter, managed by a nickel smelting company.

In the lawsuit presented by the European Union to the WTO, it contended that Indonesia had violated international trade agreements by restricting the export of nickel ore. This alleged violation was specifically cited under Article 11, paragraph 1 of the General Agreement on Tariffs and Trade (GATT) 1994. Article 11, paragraph 1 of GATT 1994 explicitly prohibits WTO member countries from imposing limitations on tariffs, taxes, and other duties, as well as any other restrictions, including quotas and licensing, within the framework of exports and sales.

In the lawsuit presented by the European Union to the WTO, it contended that Indonesia had committed a violation by limiting the export of nickel ore. This was stated in Article 11 paragraph 1 of the General Agreement on Tariffs and Trades (GATT) 1994 that WTO member countries are prohibited from imposing restrictions on tariffs, taxes, and other duties, as well as any other restrictions, including quotas and licensing, within the framework of exports and sales.

Finally, on October 17, 2022, the results of the WTO panel decision recorded in the DS 592 dispute came out, stating that Indonesia had lost the lawsuit. The contents of the Final Panel Report recorded in the DS 592 dispute decided that the export policy and obligations for processing and refining nickel minerals in Indonesia were proven to violate WTO provisions in Article XI paragraph 1 of the GATT. These violations cannot be justified by Article XI paragraph 2 letter a and Article 20 letter d GATT 1994.

Based on the author's study and legal analysis, Decision DS 592 concerning the European Union's lawsuit against Indonesia at the WTO regarding the ban on nickel ore exports, concludes that the export policy and obligations for processing and refining nickel minerals in Indonesia were proven to violate WTO provisions in Article XI paragraph 1 of the GATT. These violations cannot be justified by Article XI paragraph 2 letter a and Article XX letter d GATT 1994.

Article XI paragraph (1) of the GATT 1994 states: *"No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or the exportation or sale for export of any product destined for the territory of any other contracting party."* This indicates that WTO member countries are prohibited from introducing or maintaining any form of export ban or restriction other than duties, taxes, or other fees. In the context of the European Union's lawsuit against Indonesia at the WTO concerning the ban on nickel ore exports, it is evident that a violation has occurred, as Indonesia has restricted not duties, taxes, or other charges but the product itself, namely nickel.

Furthermore, Article XI paragraph (2) letter a GATT 1994 states: *"The provisions of paragraph 1 of this Article shall not extend to the following: (a) Export prohibitions or*

restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party;” This provision stipulates that WTO member countries may apply temporary export bans or restrictions to prevent or reduce shortages of foodstuffs or other essential products in exporting countries. However, upon closer examination of the meaning of the provisions of Article XI paragraph (2) letter a GATT 1994, specifically the phrase *WTO member countries may apply temporary export bans or restrictions to prevent other important products*, it can be interpreted that nickel ore is an important product of Indonesia. It needs to be processed and managed domestically to increase the selling value when exported abroad.

The phrase an important product of a country for the welfare of the people in that country aligns with the Welfare State Theory according to Kranenburg that the state must actively strive for welfare, and act fairly which can be felt by all people equally and in balance. Permanent nickel downstreaming carried out by Indonesia despite being sued by the European Union at the WTO. Permanent nickel downstreaming is implemented based on the objective of achieving people’s welfare, which is in line with the Welfare State Theory according to Kranenburg that the state must actively strive for welfare.

The United States Geological Survey (USGS) noted that Indonesia controls the largest nickel mineral reserves in the world in 2022. The amount reached 21 million metric tons. This means that Indonesia contributed 21 percent of the total global nickel reserves throughout that year. With that much nickel reserves, Indonesia is also the world’s number one nickel ore producer. Its total production is estimated to reach 1.6 million metric tons or 48.48 percent of the world’s total nickel ore production throughout 2022.³² Referring to this data, it is important to maintain the nickel downstreaming program. Upon analysis, it becomes evident that the European Union does not need to feel excessively disadvantaged because nickel products will also be exported in better product forms, simply because the desire of the European Union to gain large profits by receiving raw nickel ore through exports allows it to manage nickel ore domestically and achieve multiple profits in the process.

The narrative of national sovereignty and welfare state can be used as an argument in front of the WTO international forum but accompanied by a strong legal basis argument by using Article XIX of GATT 1994 regarding the exception in economic circumstances, a safeguard measure against domestic industry when there is a surge in imports that causes or threatens to cause serious losses. That based on Article XIX of GATT 1994 the purpose of a trade safeguard measure is to provide freedom to domestic industry in the country and to provide time for domestic industry to be able to adapt to new market conditions.

Industrial countries without barriers will find it easier to sell goods and services to developing countries. Therefore, at the same time, globalization will give rise to the grouping of people and countries into new classes based on economic capabilities, including in Indonesia. Consequently, in entering this era of free trade, Indonesia must

³² <https://money.kompas.com/read/2024/04/18/132319226/hilirisasi-nikel-bagaimana-dampaknya-bagi-per-tumbuhan-ekonomi>

have solid preparations to deal with influences that arise on the Indonesian economy and or trade in all aspects, including legal aspects, especially economic law as a legal institution that contains policies to direct economic activity in a certain direction.³³ In the context of the era of free trade (globalization) regarding the ban on exports of nickel ore by Indonesia through Minister of Energy and Mineral Resources Regulation Number 11 of 2019 concerning the Second Amendment to Regulation of the Minister of Energy and Mineral Resources Number 25 of 2018 concerning Mineral and Coal Mining Business, Indonesia has enforced a ban on the export of nickel ore starting January 1, 2020. This is done to increase the added value of nickel products which are managed through domestic smelters before being exported abroad

Regarding Indonesia's defeat in the European Union's lawsuit at the Dispute Settlement Body (DSB) of the World Trade Organization (WTO) regarding the nickel ore export ban, the only legal action that can be taken by Indonesia is to file an appeal. Disputing parties can appeal the panel's decision. Indonesia, as the losing party, can submit an appeal on the grounds of not accepting the DS 592 Decision.

However, an appeal must be based on certain rules, such as the legal interpretation of a provision/article in a WTO agreement. An appeal is not made to reexamine existing or emerging evidence, but to examine the arguments put forward by the previous panel. Each appeal is reviewed by three of the seven permanent members of the Appeal Body (AB) appointed by the DSB and comes from WTO members representing a diverse range of perspectives. The importance of presenting strong legal arguments against the provisions of Article XI paragraph (2) letter a GATT 1994, particularly in the phrase *WTO member countries may impose temporary export bans or restrictions to prevent other important products*, lies in the interpretation that nickel ore is an important product of Indonesia. It needs to be initially processed and managed domestically to enhance its selling value when exported abroad.

Throughout the appeal process, there is a requirement for arguments related to the phrase *important product of a country for the welfare of the people in that country*. This concept is connected with the Welfare State Theory, which states that the state must actively seek prosperity, and act fairly, ensuring equal benefits for all citizens in a balanced manner. Implementing a temporary export ban or restriction to protect other important products, namely nickel ore, is an important product of the Indonesian state which needs to be processed and managed domestically to be essential for the welfare of Indonesian society. his measure aims to increase the selling value of nickel and, in turn, contribute to the welfare of the population by enhancing the value of nickel exports

During the appeal, it is essential to clarify the argument that the European Union should not perceive itself as overly disadvantaged. This is because nickel products will also be exported in more refined forms. The European Union's desire to maximize profits by receiving raw materials for exported nickel ore, thus managing the nickel ore within its own country to generate multiple profits, might seem advantageous for the European Union. However, this situation could be detrimental to the Indonesian

33 Bismar Nasutin, 2009, *Law of Economic activity*, Books Terrace & Library, Bandung, p. 3

side, resulting in minimal profit, which directly affects the welfare of the Indonesian people. Additionally, in the appeal, it's crucial to emphasize that the Indonesian state has a constitution, namely the 1945 Constitution, which serves as the foundation of the state. Article 33 states that natural resources should be utilized for the greatest possible welfare of the people. Therefore, the government's policy to promote the processing of mining products into high-value commodities, including nickel ore, aligns with the constitution's principles and objectives.

3. CONCLUSION

The impact of Chinese companies building nickel smelters or refining and processing plants in Indonesia with a significant investment value has an impact on mutual benefits between Indonesia and China. The Indonesian government's profit arises from the export of nickel which has been processed domestically, rather than exporting nickel raw materials or nickel ore, which have much lower prices. Both Indonesia and China benefit from having nickel smelters or refining and processing plants in Indonesia. These advantages encompass Chinese investments in Indonesia, job creation in Indonesia, and increased export results.

However, this situation has resulted in the European Union feeling disadvantaged. This is because, in recent years, Indonesia has imposed a ban on the export of nickel ore and encouraged domestic processing of nickel ore to add value to nickel products. Ultimately, on October 17, 2022, the results of the WTO panel decision recorded in the DS 592 dispute came out and it was stated that Indonesia had lost the lawsuit. The Final Panel Report recorded in the DS 592 dispute decided that the export policy and obligations for processing and refining nickel minerals in Indonesia were proven to violate WTO provisions in Article XI Paragraph 1 of the GATT, and these violations cannot be justified by Article XI paragraph 2 letter a and Article 20 letter d GATT 1994.

Regarding Indonesia's defeat in the European Union's lawsuit at the Dispute Settlement Body (DSB) of the World Trade Organization (WTO) concerning the nickel ore export ban, the only legal action that can be taken by Indonesia is to file an appeal. During the appeal process, it is essential to present arguments related to the phrase important product of a country for the welfare of the people in that country.

Based on the State sovereignty & Theory of Welfare State, the state must actively strive for welfare, and act fairly that can be felt by all people evenly and in balance. Therefore, the implementation of a ban or restriction on nickel ore exports is a way for the Indonesian government to improve people's welfare. The narrative of national sovereignty and welfare state can be used as an argument in front of the WTO international forum but accompanied by a strong legal basis argument by using Article XIX of GATT 1994 regarding the exception in economic circumstances, a safeguard measure against domestic industry when there is a surge in imports that causes or threatens to cause serious losses. That based on Article XIX of GATT 1994 the purpose of a trade safeguard measure is to provide freedom to domestic industry in the country and to provide time for domestic industry to be able to adapt to new market conditions.

Furthermore, it is also necessary to clarify the argument during the appeal that the European Union should not perceive itself as too disadvantaged by these measures. Nickel products will still be exported in more refined forms, primarily due to the desire of the European Union to gain larger profits by receiving the raw materials for exported nickel ore. Managing nickel ore domestically in their own countries, as the European Union does, to maximize profits, will naturally disadvantage Indonesia, resulting in minimal profit that impacts the welfare of the people in Indonesia. In addition, the appeal should emphasize that Indonesia's actions align with its constitution, particularly the 1945 Constitution. Article 33 of the constitution states that natural resources should be utilized for the greatest possible welfare of the people. The government's policy to process mining products, including nickel ore, into high-value commodities before export is a valid approach to achieving an increased selling value.

REFERENCES

- Adam Smith, *The Wealth of Nations*, Harvard University Press, Ed. Edward, Boston, 1989.
- Athiq, Uummy. "Policy of Temporary Direct Aid Program Analyzed From Welfare State Concept." *Jurnal IUS Kajian Hukum dan Keadilan* 2, no. 2 (2014). <https://doi.org/10.12345/ius.v2i5.172>.
- Agung, Muhammad, and Emmanuel Ariananto Waluyo Adi. "Peningkatan Investasi Dan Hilirisasi Nikel Di Indonesia." *JISIP (Jurnal Ilmu Sosial dan Pendidikan)* 6, no. 2 (2022).
- Angelo Tritto, *How Indonesia Used Chinese Industrial Investments to Turn Nickel into the New Gold*. Carnegie Endowment for International Peace, 2023.
- Seyoum, Belay, and Rebecca Abraham. "US trade preference and export performance of Sub-Saharan Africa (SSA): evidence from the African growth and opportunity act (AGOA)." *World Trade Review* 21, no. 5 (2022): 573-596.
- Bismar Nasutin, *Law of Economic activity*, Books Terrace & Library, Bandung, 2009.
- David Ricardo, *Principles of Political Economy and Taxation 1817*, Harvard University Press, Boston, 1987.
- Deloitte Indonesia, *Overview of Indonesia's EV downstream sector: A focus on nickel (Deloitte Indonesia Perspectives | Third Edition, 2022)*
- Dendi Adisuryo. *Lost in Nickel Lawsuit at the WTO, Indonesia Forced to Export Raw Nickel*. Adco Law, 2023. <https://adcolaw.com/blog/lost-in-nickel-lawsuit-at-the-wto-indonesia-forced-to-export-raw-nickel/>
- Diah Cahyaningrum, 2023, *Larangan Ekspor Sumber Daya Alam Mineral Mentah: Nikel dan Bauksit*, Info Singkat. Vol. XV, No 4/II/Puslit/Februari/2023.
- Huala Adolf, *International Trade Law*, Raja Grafindo Persada, 2005.
- Jamilus, *Analysis Of The Function And Benefits Of WTO For Developing Countries (Especially Indonesia)*, Journal IKH, Vol. 11 No. 2 July, Jakarta, 2017.
- Jur Udin Silalahi, et.al, *Analysis and Evaluation of the Law Concerning the Protection*

of the Domestic Industry, National Legal Development Agency, Indonesian Ministry of Law and Human Rights, Jakarta, 2011.

- Karl Marx, *A Contribution to the Critique of Political Economy*, Progress Publishers, 1859.
- Ke Li, *The WTO's National Security Exception and Its Implication to the China-EU Dispute: With Special References to Lithuania's Taiwan Representative Office*, China and WTO Review, Vol. 9 No. 2 , 2023, September, YIJUN Institute of International Law. p.255. DOI: <http://dx.doi.org/10.14330/cwr.2023.9.2.03>
- Pribadi, A, *Hilirisasi Nikel Ciptakan Nilai Tambah dan Daya Tahan Ekonomi*, Kementerian ESDM RI, Jakarta., 2022.
- Rizani, Ahmad, et al. "PROFIT AND LOSSES OF THE NICKEL DOWNSTREAM PROGRAM FOR THE INDONESIAN ECONOMY." (*INTERNATIONAL JOURNAL OF SOCIETY REVIEWS* 2.5 (2024): 1094-1105.), 1099
- Robert Gilpin, *The Political Economy of Internasional Relations*, Princeton University Press, 1987.
- Rumiarta, I. Nyoman Prabu Buana. "Correlation Theory AV Dicey Perspective of the Rule of Law in Indonesia: Correlation Theory AV Dicey Perspective of the Rule of Law in Indonesia." *Focus Journal Law Review* 2, no. 1 (2022).
- Sri Kusuma dewi, A., & Anindita Purnama Ningtyas. (2023). The Fulfillment of The Clarity Principle Towards the Formulation Arrangement in The Recognition of Statutory Bodies Within the Limited Liability Company. *Jurnal IUS Kajian Hukum Dan Keadilan*, 11(1), 156–175. <https://doi.org/10.29303/ius.v11i1.1206>
- Sadiya S. Silvee, 2022, *China's Socialist Free Trade Strategy: A Marxist Analysis*, China and WTO Review, Vol. 8 No. 2 September, YIJUN Institute of International Law.
- Sandra, Vivi, Satria Unggul Wicaksana Prakasa, and MH SH. "Peran WTO Dalam Penyelesaian Sengketa Gugatan Uni Eropa Terhadap Indonesia Terkait Larangan Ekspor Bijih Nikel." (*Hukum Organisasi Internasional* 2021)