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An Analysis of Export Restriction Policies for Indonesian Nickel: Strengthening Indonesia's Opportunities from the European Union's Lawsuit Regarding Export Restrictions for Nickel

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Abstract

Indonesia's international trade disputes do not just happen once. It has been recorded that Indonesia has entered the WTO's green table several times in the trade dispute settlement. Then, what needs attention is that the Indonesian government was defeated in the trial at the WTO in most of the many disputes facing Indonesia. The main reason for the defeat of the dispute was the weak arguments presented by representatives of the Indonesian government. Indonesia has entered a new lawsuit from the European Union at the WTO regarding the Nickel Export Restriction with Dispute Settlement (DS) Complaint Number 592 on November 22, 2019, on the grounds of violating Article XI: I GATT agreement, related to the prohibition of quantitative restrictions. At the moment, the dispute must be won by Indonesia because it concerns the State's sovereignty regarding natural resources, which are very limited in number and cannot be renewed. This research objective was to provide input in ideas or statements in juridical theories and norms, which were strengthened by doctrines as a refutation of the allegations raised by the European Union in the WTO Session. Furthermore, this research used a normative juridical research method, with secondary data based on writings from some electronic mass media.

Keywords: Trade Disputes, Nickel, Quantitative Restrictions.

A. Introduction

As one of the active countries in establishing international relations with other countries in the world, Indonesia has a strong commitment to providing the most significant benefit to the international community, in maintaining peace and in international trade and human rights. Indonesia also actively joins and carries out international relations through international organizations or bilateral and multilateral relations. Indonesia's activeness in international relations has been established since Indonesia's independence. It is affirmed in the fourth paragraph of the Preamble of the 1945 Constitution, which states, "...the Government/State obligates to protect all Indonesian people and for the entire homeland of Indonesia and to promote the general welfare, educate the nation's life and participate in implementing world order based on freedom, eternal peace, and social justice". The heavy-duty mandated by the founders of the Indonesian nation through the 1945 Constitution is clearly stated in that paragraph, particularly in the sentence "...to promote general welfare...," giving a sign of meaning that Indonesia must be beneficial for other nations, contributing positively to building international prosperity.

Based on the motto "free and active foreign policies," Indonesia carries out diplomacy and foreign relations as long as it does not conflict with the Indonesian nation's ideology and other countries to realize the Indonesian people's welfare. In this case, free means that Indonesia does not take sides with forces incompatible with the nation's personality, as reflected in Pancasila. Active means that Indonesia is not passive-reactive to international events but is active in carrying out foreign policy (Kusumaatmadja, 1983). Since the expression of this motto, many international relations and regulations have been oriented towards supporting and guaranteeing legal certainty in international relations. Of course, international relations begin with international agreements.

International agreements made by Indonesia are increasing nowadays. They essentially become cross-sectoral and reach several disciplines, such as Constitutional Law, State Administrative Law, Economic Law, and even Civil Law. This condition essentially means all policymakers in the government, legislative and judiciary have involved in international relations" (Agusman, 2010)

The development of time, circumstances, and domestic policies accompanying and influencing Indonesia's international relations with other countries, had significant effects on international relations so that there were third parties or other parties who felt disadvantaged by the policies because international relations are legal relations indeed with legal consequences for rights and obligations.

The Indonesian Government policies that have caused serious problems in international trade were the export restriction policies for nickel raw materials. These policies have become the focus of the government's dispute resolution to prepare to face the European Union's lawsuit. This problem begins from government policies as outlined in the Regulation of the Minister of Energy and Mineral Resources of the Republic of Indonesia Number 11 of 2019 concerning the Second Amendment to the Regulation of the Minister of Energy and Mineral Resources No. 25 of 2018 concerning Mineral and Coal Mining Business. It was then strengthened by the speech of the President of the Republic of Indonesia, Joko Widodo, "Nickel ore can be processed into ferrous nickel, stainless steel slabs, steel sheets, and developed into the main material for lithium batteries. It will improve our current account deficit, increase job opportunities, and reduce the dominance of fossil energy. It will make Indonesia a very strategic position in developing lithium batteries, world electric cars, and technology manufacturers in the future." The statement above is one of the paragraphs from President Joko Widodo's speech at the Annual Session of the People's Consultative Assembly of the Republic of Indonesia and the Joint Session of the House of Representatives and the Regional House of Representatives of the Republic of Indonesia in the framework of the 75th Anniversary of the Proclamation of Independence of the Republic of Indonesia, 14 August 2020. (www.asiatoday.id, Nickel Exports Banned, September 8, 2020)

The export ban is not aimed at hindering trade but aims to utilize nickel resources for the nation's prosperity through the domestic processing chain. The ban on nickel ore exports aims to meet the needs of smelter raw materials in Indonesia. The prohibition policy cannot be postponed because mineral wealth, especially nickel, can be depleted and renewed (Izzaty & Suharsono, 2019). These export restriction policies are, of course, very influential on the international community, which rely heavily on

Nickel as a staple in the steel and battery industry currently. Consequently, those who depend on Indonesian exports, especially the European Union, have lost some of their sources of basic needs for their domestic industries. Therefore, the Union Europe tried to find a way to influence the Indonesian government to revoke or relax policies related to nickel exports. Furthermore, the European Union sued Indonesia through the WTO by submitting a consultation on the Dispute Settlement Understanding (DSU). In this case, the European Union discussed the articles allegedly violated by Indonesia against the principles and provisions of The General Agreement on Tariffs and Trade (GATT).

One of them was related to the prohibition of quantitative restrictions in the provisions of Article XI: I of the GATT (Azis & Abrianti, 2021)

B. Method

Based on the research background, this research discussed and provided the best solutions for the Indonesian people regarding the dispute. Moreover, this research tried to provide relevant opinions and determine the opportunity strength level of the Indonesian government from juridical and theoretical perspectives of international law.

1. Research Design

This research was normative research, namely research intended to focus on the implementation of the applied rules or norms (Ibrahim, 2006)

2. Research Methodology

This research used the descriptive normative research method by reviewing the law and its application. This research hopefully could obtain detailed and accurate figures of the research problem and related symptoms.

3. Data and Data Source

This research used secondary data supported by:

- a) Primary legal materials, including library materials that contain new or current scientific knowledge as well as new understandings of a known fact or idea.
- b) Secondary legal materials, including legal materials that explain primary legal materials.
- c) Tertiary legal material, including legal materials used both as a guide and an explanation of primary and secondary legal materials.

C. Result and Discussion

Indonesia was sued with The Complaint on Dispute Settlement (DS) No. 592 on November 22, 2019. The European Union claimed that the measures of export restriction of certain raw materials appeared to be inconsistent with Article XI.1 of the General Agreement Tariffs and Trade (GATT, 1994) because it will harm and makes it difficult for countries in the European region to obtain nickel (ore) raw materials, the prohibited subsidy scheme seemed inconsistent with article 3.1(b) of the Subsidy Countervailing Measures agreement, and the failure to immediately issue the countervailing measures were inconsistent with Article X.1 GATT of 1994. (www.wto.org, 2020)

The followings are the substances of the problems of the European Union protests:

- a) The various actions at issue above were inconsistent with Indonesia's obligations under the closed agreement, in particular:
- b) Article XI: 1 PUTP 1994, because by restricting the export of nickel ore; by requiring nickel ore, iron ore, and chromium as well as coal and coal products to undergo specific processing activities before being exported; by requiring that a certain amount of nickel and coal be sold domestically before being exported; and by imposing specific export license requirements on nickel ore, metal waste and scrap and coal and coke, Indonesia has imposed some measures that restrict the export of relevant raw materials for the production of stainless steel;
- c) Article 3.1 b) of the ASCM, due to the particular import duty exemption scheme introduced by Indonesia in the context of promoting industrial development and investment and promotion of economic development in some areas of the country ("Industry Development Areas" or "WPI"), grants duty relief additional (extended) periods contingent on the use of locally produced machinery, installations, tools or equipment; where the additional support constitutes the provision of a subsidy within the meaning of Article 1.1 of the ASCM and makes the subsidy contingent on the use of domestic goods over imported goods, in violation of Article 3.1 b) of the ASCM; and
- d) Article X:1 PUTP 1994, because Indonesia has failed to promptly publish all general application acts relating to the operation of export restrictions and the issuance of export licenses in such a way as to enable the government and traders to become acquainted with them.
- e) The various measures relating to the raw materials required for stainless steel production identified in this Request invalidated or undermined the benefits from the EU directly or indirectly under the covered agreements. The European Union reserved the right to address actions and other claims additional to the provisions of the closed agreement on such matters above during consultations.

1. The Issued Legal Instruments

The various measures at issues above were enforced and evidenced by, and were being implemented and administered through, among other things, the following legal and other instruments, considered itself in any combination:

- a) Law Number 4 the Year 2009 concerning Coal and Mineral Mining, January 12, 2009;
- b) Government Regulation no. 23/2010 "Regarding the Implementation of Mineral and Coal Mining Business Activities," February 1, 2010, as amended by Government Regulation No. 24/2012 February 21, 2012
- c) Government Regulation No. 1/2017, "On the Fourth Amendment of Government Regulation 23/2010 concerning Mineral and Coal Operations," January 11, 2017
- d) Regulation of the Minister of Trade No. 1/2017 "Regarding Export Provisions for Processed and Refined Mining Products"
- e) Regulation of the Minister of Energy and Mineral Resources No. 5/2017 "concerning Increasing Value Added Minerals through Mineral Processing and Refining Activities in the Country";

- f) Regulation of the Minister of Energy and Mineral Resources No. 11/2018 “on Procedures for Territorial Granting, Licensing and Reporting in Mining Mineral and Coal Business Activities”
- g) Regulation of the Minister of Energy and Mineral Resources No. 25/2018 “on Mineral and Coal Business,” as amended, including by the Ministry of Energy and Mineral Resources Regulation No. 50/2018 dated December 5, 2018, and the Ministry of Energy and Mineral Resources Regulation No. 11/2019 August 28, 2019
- h) “Regulation of the Minister of Energy and Mineral Resources No. 11/2019, dated 30 August 2019, regarding the Second Amendment of the Regulation of the Minister of Energy and Mineral Resources No. 25/2018 concerning Mineral and Coal Mining Business,” issued on September 5, 2019
- i) Regulation of the Minister of Trade No. 4/2018 “regarding Provisions for Export of Waste and Scrap Metal,” January 10, 2018
- j) Regulation of the Minister of Finance No.176/PMK.011/2009 “regarding the Exemption of Import Duty on Machinery, Goods and Imported Materials for Building or Industrial Development within the Investment Framework,” November 16, 2009, 9 as amended by Regulation of the Minister of Finance No. 76/PMK.011/2012 on May 21, 2012
- k) Regulation of the Minister of Finance No.105/PMK.010/2016 “concerning provisions on Tax and Customs Facilities for Companies in Industrial Development and for Industrial Estate Companies,” June 30, 2016
- l) Other instruments that Indonesia implements and administers the issued actions, including letters, circulars, or other documents by which requests were made, decisions were communicated, and instructions were given;

(WTO, 2021)

2. Theoretical and Juridical Review of Indonesia's Nickel Export Policy

As one of the world's largest producers of mining materials by supplying 20% of the world's nickel needs, Indonesia's nickel export policy has been running for about 40 years in various countries. The export was carried out with the consideration that the raw material processing resources could not be carried out due to constraints on human resources and technology, as well as domestic policies. Along with technological developments and global changes, as well as changes in Indonesian government policies, Indonesia has made policies related to the ban on exports of nickel raw materials, which makes consumer countries short of raw materials supplies.

Essential nickel is a basic need and has a broad impact on society in various fields, such as nickel which is the mother of the industry, because nickel can then be processed into various products that support the needs of people's lives (Matsushita et al., 2011)

Nickel is one of the potential mining materials for natural resources and natural wealth taken from Indonesia's land, whose legality has been regulated in Article 33 Paragraph 3 of the 1945 Constitution, which states, "Earth and water and the natural resources contained therein are controlled by the state and used for the greatest prosperity of the people." The two sentences tend to be “....controlled by the State....” and “....used for the greatest prosperity of the people.” The nickel export policies that had been implemented a long time ago were due to domestic technology that has not been able to process and maximize the benefits of the nickel for the greatest prosperity of the Indonesian people. The concept of "state control" in which Indonesia as a state

and legal subject in international trade has received a mandate to carry out policies (beleid), management actions (bestuursdaad), regulation (reglendaad), management (beheersdaad), and supervision (toezichthoudensdaad). In this case, this concept is one way to maximize the nickel resources owned by Indonesia for the greatest prosperity of the people (Magnar, et.al., 2010).

Naturally, the natural wealth of a country is the country's sovereignty, and a country is free to exercise that sovereignty as long as it does not conflict with international law. According to Mugerwa, following the concept of international law, sovereignty has three main aspects; external, internal, and territorial aspects. Each state freely determines relations with other States or groups without restraint, pressure, or control from other States. 2) The internal aspect which means the exclusive authority of a state to determine the form of its institutions, the workings of the institution, and the right to make the desired laws and actions to comply, 3) The territorial aspect which means the complete and exclusive power possessed by a State over individuals and objects in the area (Mugerwa, 1986)

Meanwhile, according to Prof. Boer Mauna, positively, sovereignty means 1). Sovereignty gives its titular state the highest leadership state over its citizens, and 2). Sovereignty gives the State the authority to exploit the natural resources of the national territory for the general welfare of the people at large, which is called sovereignty over natural resources (Mauna, 2015). State sovereignty is a manifestation of the interests of the entire nation and the attributes inherent in the nation, which contains the rights and interests of individuals that must be respected and upheld by every human being, nation, and even other countries.

It is in line with the declaration of principles in international law in 1970, which states, "Every country has the same sovereignty, equal rights, and obligations, as well as equality as members of international organizations, without considering differences in socio-political economy and other characteristics." The sovereign equality includes the following elements:

- a) The State is juridically equal
- b) Every State has rights inherent in full sovereignty (each State enjoys the rights inherent in full sovereignty)
- c) Every State must respect the other countries' integrity (each State must respect the personality of other states)
- d) The territorial integrity and political independence of the State are inviolable
- e) Every country has the freedom to choose and develop its political, cultural, social, and economic system (each State has the right freely to choose and develop its political, social, economic, and cultural system).
- f) Each State must fulfill its demands in full in good faith according to its international obligations, namely to live side by side in peace (each State must comply fully and in good faith with its international obligations and live in peace in other states). (Thontowi & Iskandar, 2016)

The review above is basically in line with the principle of "Par Im Parem Non-Habet Imperium," meaning that a sovereign State cannot exercise its jurisdiction over another sovereign State, except for the lower ones (Winarti, 2017). However, Starke does not add that exception statement (JG. Starke, 1986). This principle is universal not only limited to the exercise of jurisdiction over political immunity or legal immunity against representatives of a State in the realm of International Criminal Law, but also to the broader meanings, namely state sovereignty, sovereignty over the interests, and the right of a nation and State over available natural resources in managing and utilizing those natural resources for the nation's benefit. Moreover, this right is an absolute right that cannot be hindered by the interests of any country because on behalf of a nation from a sovereign state, between sovereign states, have the exact position of interest in law and international.

Apart from the issue of sovereignty over natural resources in their management and use, another reason that can be used is Article 62 of the Vienna Convention on the Fundamental Change of Circumstances.

- a) A fundamental change of circumstances that has occurred concerning those existing at the time of the conclusion of a treaty and which was not foreseen by the parties may not be invoked as a ground for terminating or withdrawing from the treaty unless:
 - 1) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and
 - 2) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.
- b) A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty: (a) if the treaty establishes a boundary, or (b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.
- c) If under the preceding paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty, it may invoke the change as a ground for suspending the treaty's operation.

Terjemahan Bahasa Indonesia: Perubahan Mendasar dari keadaan

- a) Suatu perubahan keadaan mendasar yang telah terjadi terhadap keadaan yang ada pada saat penutupan traktat, dan tidak dapat diduga oleh para pihak, tidak dapat dikemukakan sebagai dasar untuk pengakhiran atau penarikan diri dari perjanjian kecuali :
 - 1) Keberadaan keadaan-keadaan itu merupakan suatu dasar penting bagi para pihak untuk mengikat diri pada perjanjian; dan
 - 2) Akibat dari perubahan itu secara radikal memperluas kewajiban yang harus dilaksanakan di bawah perjanjian.
- b) Suatu perubahan keadaan mendasar tidak boleh dikemukakan sebagai dasar untuk mengakhiri atau menarik diri dari perjanjian, jika :
 - 1) Perjanjian tersebut menetapkan batas wilayah; atau
 - 2) Perubahan itu merupakan hasil dari pelanggaran oleh pihak yang mengemukakannya baik atas suatu kewajiban dalam perjanjian atau setiap kewajiban internasional lainnya terhadap pihak lain dari perjanjian tersebut.

- c) Jika sesuai dengan ayat-ayat di atas, suatu pihak boleh menuntut suatu perubahan keadaan sebagai dasar untuk mengakhiri atau menarik diri dari perjanjian, maka pihak tersebut juga dapat menuntut perubahan sebagai dasar untuk menunda berlakunya perjanjian tersebut.”

Such Pacta sunt servanda principle, the rebus sicstantibus principle, was transformed into part of the general legal principle, which later in its development was also manifested in the legal rules of the positive legal system so that the legal principle was in the system (Purwanto, 2011). This fundamental change in international law was known as the rebus sic stantibus doctrine, but among international jurists, there are differences regarding the status of the rebus sic stantibus. Some opinions say that rebus sic stantibus is an international moral, and some argue it is a legal matter. The opinion which states that rebus sic stantibus is a legal principle and not a positive moral was put forward by H. Lauterpacht, stating that: the application of the rebus sic stantibus doctrine in its jurisdiction aspect is a legal matter the circumstances that it involves, the consideration of facts does not change of course of its characters. (Prof. Dr. Sri Setianingsih, SH. MH & Dr. Ida Kurnia, SH. MH., 2019).

The rebus sicstantibus principle is not explicitly stated in Article 62 to avoid the subjectivity of interpretation from various interested parties. However, it is based on the description of Article 62 using "fundamental changes." It can be seen that an international agreement may change, expire or delay its implementation if the conditions at the time of preparation and approval change or differ from the conditions at the time of implementation of the agreement, alternatively. In other words, it reflects more justice for the various parties to an agreement if the agreement is implemented by considering natural conditions, technological developments, social changes in society, and the condition of the subject of the agreement itself. It is very unfair to implement the agreement if one of the parties continues to suffer losses by carrying out the agreement in changing circumstances and times. Concisely, the American Supreme Court Justice, Oliver Wendell Hoolmes, says, "the life of the law had not been logical. It has been experience." Dr. Adi Sulistiyono (2005) emphasizes that the existing law is what lives, takes place, and develops according to the people's social life. The law is not merely a written regulation that, in its implementation, is rigid and inflexible, also is not based on social conditions and community development.

The second legal reason that can be used as a basis for resistance to the EU's lawsuit is regarding the basic principles contained in the United Nations Charter and quoted in the 1969 Vienna convention, which states in Considering the Fundamental role of treaties in the history of international relations, paragraph t. 5.

“Having in mind the principles of international law embodied in the Charter of the United Nations, such as the principles of the equal rights and self-determination of peoples, of the sovereign equality and independence of all States, of non-interference in the domestic affairs of States, of the prohibition of the threat or use of force and universal respect for, and observance of, human rights and fundamental freedoms for all.”

Bearing in mind the principles of international law contained in the United Nations Charter, such as

- a) The principle of Equal rights and

- b) Self-determination of the people, of the Sovereignty of Equality and independence of all States,
- c) Non-interference in the domestic affairs of the State,
- d) Regarding the prohibition of the use or threat of violence and
- e) Universal respect for and observance of human rights and fundamental freedoms for all.

The very relevant principle to this dispute case is the people's self-determination and non-interference in domestic affairs, which can then be strengthened by the *ex aequo et bono* principle (Winarti, 2017), which can be interpreted with the principles of propriety and feasibility.

The history of nickel mining in Indonesia, based on the publication of the Indonesian Nickel Miners Association (APNI), began in 1901. At that time, Kruyt, a Dutch national, was researching iron ore in the Verbeek mountains, Sulawesi. Then, in 1909, EC Abendanon, a Dutch geologist, discovered nickel ore in Pomalaa District, Kolaka, Southeast Sulawesi. This discovery was followed by exploration activities in 1934 by Oost Borneo Maatschappij (OBM) and Bone Tole Maatschappij. In Soroako, in 1937, a geologist named Flat Elves researched the presence of laterite nickel. In 1938, OBM shipped 150,000 tons of nickel ore to Japan. However, it was only 30 years later, namely in 1968, that a Contract of Work (COW) was issued for laterite nickel mining to PT. International Nickel Indonesia Tbk. (INCO) with areas in South Sulawesi, Central Sulawesi, and Southeast Sulawesi Provinces. These areas included Soroako and Pomalaa. All PT. INCO shares had been taken over by a nickel mining company from Brazil and changed its name to PT. Vale Indonesia. The State-Owned Corporations (BUMN) with extensive nickel mining sites was PT. Aneka Tambang (Inc.) Tbk or ANTAM. The mines were located on Sulawesi and Halmahera islands (Ratriani, 2019). In 2018, the total nickel mining output was estimated to reach 560 thousand M/T. It was an increase from the previous year of 62.32%. Data from the Ministry of Energy and Mineral Resources assessed that the planned nickel export in 2019 was 15.07 million tons, with nickel reserves estimated to meet the needs of 7 to 8 years and the allocation of nickel reserves in the electric car industries' interests. The acceleration of these industries has been considered to increase the demand for nickel as a national need until 2022 (Izzaty & Suhartono, 2019)

Considering technological growth, especially in nickel processing, which has begun to provide progress with the construction of four mineral processing and refining facilities (smelters) which will be completed and operational in 2021. The project consists of three nickel smelters and one lead smelter. In 2021, it is targeted that there will be 23 smelters in total, with four new smelters. Of this amount, two projects have been completed 100 percent, namely, the smelter owned by PT Smelter Nickel Indonesia and the Nickel smelter PT Cahaya Modern Metal Industri (www.Indonesia.go.id, 2021). Then, it is appropriate for Indonesia to change the nickel export policy to provide greater foreign exchange and benefits for the community. It is in line with the mandate of Article 33, Paragraph 3 of the 1945 Constitution. So far, large profits have been obtained by many nickel export destination countries, such as China and Europe, while the benefits are minimal for the Indonesian people.

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Considering nickel is a non-renewable mining material, and if it is taken continuously for tens of years or even hundreds of years in thousands of tons per year, it will eventually run out. While the value gains obtained in exports is very small, and Indonesia is a developing country that requires significant foreign exchange to build and prosper the Indonesian people, it is appropriate for Indonesia to change its nickel export policy by processing itself into semi-finished raw materials or finished materials, with much higher added value. The world should respect Indonesia's domestic nickel processing policy. The international community has been accepting, processing, and enjoying the results of Indonesia's nickel mining exports.

D. Conclusion

Based on the discussion above, it can be concluded that the dispute between Indonesia and the European Union related to the ban on nickel exports had a greater chance of winning when compared to the disputes that were decided by the WTO a few years ago, which suffered many defeats. The possibility of winning the dispute, in this case, could be seen from the first indications of the disputed object in the form of Indonesia's natural resources, which ran out and could not be renewed and distinguish it from the disputed object in the previous cases. At the same time, it was strengthened by the protection of international law on the sovereignty of natural resources management, as the right of every country that must be respected and must not be disturbed by other countries. It was also strengthened by the time and history of Indonesia's exports of more than 40 years, as well as changes in living conditions and technology that required the government to change its nickel control policy from exporting raw materials to domestic processing or management until becoming finished or semi-finished materials.

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