INDONESIA – MEASURES RELATING TO RAW MATERIALS

(DS592)

THIRD PARTY INTEGRATED EXECUTIVE SUMMARY OF THE UNITED STATES OF AMERICA

January 10, 2022

EXECUTIVE SUMMARY OF THE U.S. THIRD PARTY SUBMISSION

I. INTERPRETATION OF ARTICLE XI:1 OF THE GATT 1994

1. The European Union claims that the export prohibition of nickel ore (implemented by MEMR Regulation 11/2019 and MOT Regulation 96/2019), and the domestic processing requirement on nickel ore and iron ore (implemented by MEMR Regulation 25/2018) are inconsistent with Article XI:1 of the GATT 1994. Article XI:1 by its express terms sets out that a Member shall not institute or maintain any "prohibitions" on "the exportation or sale for export of any product destined for the territory of any other [Member]." The ordinary meaning of the term "prohibitions" in Article XI:1, in its context, is a "legal ban on the trade or importation of a specified commodity".

2. Similarly, Article XI:1 by its express terms sets out that a Member shall not institute or maintain any "restrictions" on "the exportation or sale for export of any product destined for the territory of any other [Member]." The pertinent definition of "restriction" in relation to the acts of importation or exportation is "a limitation on action, a limiting condition or regulation".

3. Further, Article XI:1 applies to *any* "restriction", including those "made effective through quotas, import or export licenses *or other measures*", other than "duties, taxes, or other charges". Accordingly, Article XI:1 bans any measure that prohibits exportation or constitutes a limitation on action or a limiting condition on exportation, other than duties, taxes or other charges.

4. Indonesia argues, with respect to the domestic processing requirement, that the European Union has not made a *prima facie* case because the measure does not have any "limiting effect" on the exportation of nickel ore since the exportation "is legally prohibited in the first place" by the export ban also at issue.

5. The text of Article XI:1, however, does not require a showing of actual trade effects of a measure at issue. Rather, the Panel could find a violation of Article XI:1 if the domestic processing requirement would constitute a limitation on action or a limiting condition on exports, without a need to show that the requirement has caused an *actual* decrease in exports.

6. Moreover, the European Union has challenged the export ban and the domestic processing requirement as two separate and independent restrictions on exportation – not as a single measure operating in combination. If the Panel agrees these measures operate independently, the Panel should evaluate the WTO-consistency of each of the two measures independently. The Panel is not precluded from finding a measure to be in breach of Article XI:1 simply because there is another measure whose operation may also prohibit or restrict exports

7. In summary, to the extent that the Panel finds that either of Indonesia's measures acts as a legal ban on exportation or constitutes a limitation on action or a limiting condition on exportation – and do not constitute "duties, taxes, or other charges" within the meaning of Article XI:1 of the GATT 1994 – the measures would be inconsistent with Article XI:1.

II. INTERPRETATION OF ARTICLE XI:2(A) OF THE GATT 1994

8. Indonesia argues that the measures at issue are justified under Article XI:2(a) of the GATT 1994 because they are "temporarily applied to prevent a critical shortage" of nickel, which is "a product that is essential to Indonesia."

9. Article XI:2(a) of the GATT 1994 provides that Article XI:1 "shall not extend to . . . export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting [WTO Member]". Therefore, the party invoking Article XI:2(a) must demonstrate three things: that the export prohibition or restriction at issue is (1) "temporarily applied"; (2) that it is applied "to prevent or relieve critical shortages of [a product]"; and (3) that the product is "essential to" the responding Member.

10. First, one of the requirements of Article XI:2(a) is that the measure is "temporarily applied". The dictionary definition of "temporarily" is "for a time (only); during a limited time". Accordingly, the requirement means that the measures at issue should have defined and limited time parameters, at the very least. The United States notes that the measures at issue do not themselves appear to specify when they would cease to be in effect, or otherwise indicate that they are being applied for a time only or during a limited time.

11. The second requirement of Article XI:2(a) is that the restriction at issue apply to "prevent or relieve critical shortages" of a product. Indonesia argues that the measures are applied to prevent a critical shortage of nickel ore, which was anticipated because "the surge in demand for Indonesian nickel ore has caused a dramatic expansion of extraction and production levels in Indonesia". The United States notes that the evidence Indonesia has submitted to show a "critical shortage" appears to indicate that the anticipated shortage would have, at least in part, resulted from the increase in nickel ore processing capacity within Indonesia. For example, Indonesia states that "[i]n the next few years, domestic processing capacity will continue to expand, placing increased strain on Indonesia's nickel reserves." In assessing Indonesia's "critical shortage" argument, the Panel should take into account whether any "critical shortage" is the result of the creation of increased processing capacity within Indonesia's own territory. Moreover, given that Indonesia considers its processing capacity will continue to expand, and processing capacity once introduced would generate demand commensurate with that expanded capacity, it is unclear how an export restriction would be applied for a limited time. Expanded capacity and resulting demand would rather suggest the measures would be applied for an unlimited time.

12. Third, Article XI:2(a) also requires that the restriction at issue apply to "foodstuffs or other products essential to the exporting [Member]". The dictionary definition of "essential" is "absolutely indispensable or necessary". In addition, the inclusion of "foodstuffs" in Article XI:2(a) is important context for conveying the level of importance of the product that is contemplated by this provision. Therefore, the Panel should examine whether Indonesia has shown that nickel arises to the level of importance that makes it absolutely indispensable or necessary to Indonesia.

13. In summary, the Panel should only find that Indonesia has shown that its measures fall under Article XI:2(a) if Indonesia has demonstrated that the measures are "temporarily applied to prevent . . . critical shortages of" nickel, and that it is a product "essential to" Indonesia.

III. INTERPRETATION OF ARTICLE XX(D) OF THE GATT 1994

14. Indonesia also argues that the measures at issue are justified under Article XX(d) of the GATT 1994 because they are "measures necessary to secure compliance with WTO-consistent

laws or regulations" – namely Indonesia's "comprehensive policy framework for mining activities, in particular sustainable mining and mineral resource management requirements."

15. To establish that a measure is justified under Article XX(d), the respondent must demonstrate that: (1) the measure is applied consistently with the chapeau of Article XX; (2) the measure was adopted or enforced to pursue the objective covered by the subparagraph, *i.e.*, to "secure[] compliance with 'laws or regulations' that are themselves consistent with the GATT 1994"; and (3) the measure must be "necessary" to the achievement of that objective, *i.e.*, to secure such compliance.

A. Whether the Measures Meet the Requirements Set Out in the Chapeau of Article XX

16. Pursuant to the chapeau of Article XX, the party invoking Article XX has the burden of showing (1) that any measure purportedly justified under an Article XX subparagraph does not discriminate "between countries where the same conditions prevail"; (2) that such discrimination is not "arbitrary or unjustifiable"; and (3) that the measure is not a "disguised restriction on international trade".

17. Indonesia argues that the measures at issue are applied in a manner that is consistent with the requirements in the chapeau of Article XX because they "do not reflect *any* discrimination" since they do not "distinguish between Indonesia's trading partners"; and because the measures do not "confer[] any direct or indirect protection to Indonesian nickel producers", but instead "*disadvantage* domestic mining companies by restricting their ability to compete in foreign markets." However, the discrimination referred to in the chapeau is not limited to distinguishing between trading partners only, but also includes discrimination between Indonesian and foreign producers and other entities. Second, that a measure operates to the disadvantage of domestic producers does not mean it cannot be inconsistent with the chapeau. To the contrary, by (in Indonesia's words) "restricting their ability to compete in foreign markets" the measure may serve as a (not very well) disguised restriction on trade.

18. Third, and more important in the context of this dispute, Indonesia's measures not only prohibit the exportation of nickel ore and restrict the exportation of nickel through conditions on processing, but also affect the consumers and purchasers of nickel that may operate in other industries. The Panel's examination of whether the measures constitute a disguised restriction on international trade is not limited to the measures' impact on nickel trade or to nickel producers only, but should include impact on international trade as a whole. For instance, nickel is an essential component in most stainless steel, and also comprises more than 50 percent of the price for stainless steel. Indonesia is the largest producer of nickel in the world, and therefore any measures impacting the processing and exportation of nickel, such as those at issue in this dispute, will also have repercussions on the production and trade of stainless steel globally. In assessing Indonesia's measures under the chapeau, this impact also must be considered.

B. Whether the Measures are Necessary to Secure Compliance with GATT-Consistent Laws or Regulations

19. Under subparagraph (d) of Article XX, Indonesia must show that (1) the measure was adopted or enforced to "secure[] compliance with 'laws or regulations' that are themselves

consistent with the GATT 1994"; and (2) the measures are "necessary" to secure such compliance.

20. The first element requires an initial, threshold examination of the relationship between the challenged measures and the "laws or regulations" that are not WTO-inconsistent. Indonesia must identify what constitutes "compliance" with its identified laws and regulations and explain how the challenged measures "secure" such compliance. Understanding which aspect(s) of the "laws and regulations" is implicated will allow the Panel to assess whether those laws and regulations are in fact WTO-inconsistent. Once that has been established, the Panel must assess how the challenged measures secure compliance with the identified laws or regulations. To the extent that Indonesia's arguments relate to how the challenged measures support the general objectives of sustainability and conservation, rather than compliance with the specific laws and regulations identified by Indonesia, those arguments might support a defense, not under Article XX(d), but under Article XX(g) – a defense Indonesia has not raised in this dispute.

21. With respect to "necessity", the Panel must continue its examination of the relationship between the measures and the objective at issue – in this case determining whether the challenged measures are "necessary" to securing compliance with Indonesia's identified "laws or regulations". A panel assessing the "necessity" of a measure may look at several factors, including "the extent to which the measure sought to be justified contributes to the realization of the end pursued" and "the trade-restrictiveness of the challenged measure". This review would include whether any alternative measures exist "that achieve an equivalent level of protection while being less trade restrictive" than the challenged measure.

22. Indonesia, while acknowledging that the measures at issue are trade-restrictive, asserts that the societal values protected by the Indonesian mining and mineral resource management laws and regulations (*i.e.*, environmental protection and conservation) are "values of the highest importance"; and the measures, "as part of a comprehensive policy, are apt to make a material contribution to securing compliance with Indonesia's sustainable mining and mineral resource management requirements." Indonesia further asserts that it is incumbent upon the European Union as the complaining Member to propose alternative measures that are reasonably available to Indonesia and are less trade restrictive while at the same time "'preserving for [Indonesia] its right to achieve its desired level of protection with respect to the objective pursued.'" Additionally, Indonesia notes that no available remedial measures would be able to "make an equivalent contribution to the enforcement of Indonesia's sustainable mining and mineral resource management requirements."

23. The United States agrees that responding Members maintain the right to determine their own level of protection with respect to objectives pursued, and that it rests on the European Union to propose reasonably available, less trade-restrictive alternatives for achieving an equivalent level of protection. However, this burden on the European Union does not relieve Indonesia of its own burden of demonstrating that the measures at issue are in fact necessary to the objective of securing compliance with its identified laws or regulations.

EXECUTIVE SUMMARY OF THE U.S. RESPONSES TO PANEL QUESTIONS TO THIRD PARTIES

24. Response to Question 1: In this dispute, the European Union has asserted that the domestic processing requirement is inconsistent with Article XI:1 because it establishes an

independent restriction on exportation because the holders of a mining business license may not "conduct[] export activities" without satisfying certain processing conditions. The European Union has challenged the export ban and the domestic processing requirement as two individual measures and not as a single measure operating in combination. The fact that two separate measures are in force and apply to a product at the same time does not make them a single measure for purposes of the Panel's analysis. Furthermore, the Panel is not precluded from finding a measure to be in breach of Article XI:1 simply because there is another measure whose operation may also prohibit or restrict exports.

25. Response to Question 2: Based on the dictionary definition of "temporarily," which is "for a time (only); during a limited time", the Panel should consider whether a measure has defined and limited time parameters, or otherwise indicates that it is being applied for a time only or during a limited time. Moreover, the phrase "temporarily applied" in Article XI:2(a) is linked to the following phrase "to prevent or relieve critical shortages", which indicates the application of the measure should be limited to the time a Member is pursuing those goals through the export prohibition or restriction. As part of the analysis, the Panel should take into account whether any "critical shortage" is the result of the creation of increased processing capacity within the respondent Member's territory. For instance, given that Indonesia considers its nickel ore processing capacity will continue to expand, and processing capacity once introduced would generate demand commensurate with that expanded capacity, the Panel may find that Indonesia's export restrictions applied to prevent or relieve a critical shortage of nickel ore are, in fact, unlikely to be applied for a limited time

26. Response to Question 3: Nothing in the text of Article XI:2(a) suggests that a "critical shortage" within the meaning of Article XI:2(a) must stem from an "exceptional and temporary exogenous event" or exclude "a definitive and unavoidable outcome." While the text of Article XI:2(a) does not specifically exclude critical shortages stemming from any particular causes, the text does require that any measures taken to address them be "temporarily applied." In the present dispute, given that Indonesia considers its processing capacity will continue to expand, and processing capacity once introduced would generate demand commensurate with that expanded capacity, it is unclear how the challenged measures could be seen as applying for a limited time.

27. Response to Question 4: In an Article XI:2(a) analysis, the Panel must examine, on a case by case basis, whether the respondent Member has shown that the product at issue is "essential" within the meaning of Article XI:2(a) – *i.e.*, that it is absolutely indispensable or necessary to the Member. In the course of the examination, the fact that a product is one of the input products for an industry which the Member desires to develop can be a supporting factor for the product's "essentialness" to the Member. The term "essential" should only cover those products that are "essential" within the meaning of Article XI:2(a). The inclusion of "foodstuffs" in Article XI:2(a) conveys the level of importance of the product that is contemplated by the provision.

28. Response to Question 5: A series of export restrictions that apply for extended periods of time with some small breaks would appear not in fact to be "temporarily applied" within the meaning of Article XI:2(a). Were a Member allowed to avoid its obligations under Article XI:1 simply by operationalizing an otherwise long-term export restriction through a series of formally

"temporary" measures, the narrow exception provided for in Article XI:2(a) would render the substantive obligation in Article XI:1 meaningless.

29. Response to Question 6: Nothing in the text of Article XX suggests that an Article XX analysis must begin with an examination under one or more Article XX subparagraphs and then proceed to an examination of consistency with the chapeau. The chapeau and the subparagraphs are two independent but related requirements, both of which must be satisfied for a measure to be found justified under Article XX.

30. Response to Question 7: The text of Article XX(d) requires an initial, threshold examination of the relationship between the challenged measures and the "laws or regulations" that are not WTO-inconsistent. The Panel must assess how the challenged measures secure compliance with the identified "laws or regulations". Accordingly, the respondent Member must identify what constitutes "compliance" with its identified laws or regulations and explain how the challenged measures "secure" such compliance. It may be difficult to demonstrate the requisite relationship between the identified laws or regulations and the challenged measures if the identified laws or regulations merely lay out broad policy goals without requiring specific actions because it would be less clear what constitutes compliance with such laws or regulations.

31. Response to Question 8: An argument that the challenged measure is "apt to produce a material contribution" toward securing compliance with the underlying laws or regulations may not, on its own, establish that the measure is in fact "necessary" within the meaning of Article XX(d). The dictionary definition of "necessary" is "indispensable, vital, essential; requisite". Therefore, the Panel should examine whether the respondent Member has shown that the challenged measures are indispensable, vital, essential, and requisite for the objective of securing compliance with the underlying laws or regulations. If the Panel finds that there is at least one reasonably available alternative that achieves an equivalent level of protection while being less trade restrictive, that would mean that the challenged measure is not in fact indispensable, vital, essential, and requisite for achieving the respondent Member's desired level of protection with respect to the objective pursued.

32. Response to Question 9(a): The text of Article XX(d) requires that any measure taken pursuant to that provision be taken to secure compliance with WTO-consistent "laws or regulations." In that way, the laws or regulations at issue must have some specificity and identifiability.

33. Response to Question 9(b): Under Article XX(d), the respondent Member must identify what constitutes "compliance" with its identified laws or regulations and explain how the challenged measures "secure" such compliance. If the identified laws or regulations merely lay out aspirational or general objectives without any specific requirements – if they do not contain any "normative content", to use the Panel's language – it would be difficult to determine what constitutes "compliance" with such laws or regulations, and thus less clear how the respondent Member might demonstrate the requisite relationship between the identified laws or regulations and the challenged measures under Article XX(d).