

*INDONESIA – MEASURES RELATING TO RAW MATERIALS*

**(DS592)**

**ORAL STATEMENT OF THE UNITED STATES OF AMERICA  
AT THE THIRD-PARTY SESSION**

**November 18, 2021**

Ms. Chairperson, Members of the Panel:

1. The United States appreciates the opportunity to appear before you to provide our views as a third party in this dispute. Today, we will briefly address several interpretative issues concerning Articles XI:1, XI:2(a), and XX(d) of the GATT 1994.

## **I. MEASURES AT ISSUE**

2. In this dispute, the European Union (EU) has challenged two Indonesian measures: the export prohibition of nickel ore, and the domestic processing requirement on nickel ore and iron ore.

3. The EU claims that these measures are inconsistent with Article XI:1 of the GATT 1994.

## **II. INTERPRETATION OF ARTICLE XI:1 OF THE GATT 1994**

4. As the United States explained in its third party written submission, Article XI:1 by its express terms sets out that a Member shall not institute or maintain any “prohibitions” on exportation. The ordinary meaning of the term “prohibitions”, in its context, is a “legal ban on the trade or importation of a specified commodity”.<sup>1</sup>

5. Similarly, the Article by its express terms sets out that a Member shall not institute or maintain any “restrictions” on exportation. The ordinary meaning of “restriction” in relation to the acts of importation or exportation is “a limitation on action, a limiting condition or regulation”.<sup>2</sup>

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<sup>1</sup> *Shorter Oxford English Dictionary*, 6<sup>th</sup> edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2007), Vol. 2, p. 2363); see also *China – Raw Materials (AB)*, para. 319, and *Argentina – Import Measures (AB)*, para. 5.217.

<sup>2</sup> *Shorter Oxford English Dictionary*, 6<sup>th</sup> edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2007), Vol. 2, p. 2553); see also *China – Raw Materials (AB)*, para. 319, and *Argentina – Import Measures (AB)*, para. 5.217.

6. Further, the Article applies to *any* “restriction”, including those “made effective through quotas, import or export licenses *or other measures*”,<sup>3</sup> other than “duties, taxes, or other charges”.

7. 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).

8. In response to the EU’s claims, Indonesia has argued that the EU has not made a *prima facie* case with respect to the domestic processing requirement because that measure does not have any “limiting effect” on the exportation of nickel ore since such exportation “is legally prohibited in the first place”<sup>4</sup> by the export ban also at issue.<sup>5</sup>

9. The text of Article XI:1, however, does not require a showing of actual trade effects of a measure. 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.<sup>6</sup>

10. Moreover, the EU 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

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<sup>3</sup> Emphasis added.

<sup>4</sup> See Indonesia’s First Written Submission, para. 83.

<sup>5</sup> See Indonesia’s First Written Submission, paras. 77-84.

<sup>6</sup> See Third Party Submission of the United States of America (September 21, 2021) (“U.S. Third Party Submission”), para. 13.

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.<sup>7</sup>

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

11. Separately, Indonesia argues that the export ban and the domestic processing requirement 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.”<sup>8</sup>

12. Article XI:2(a) 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]”.

13. Accordingly, the party invoking Article XI:2(a) must demonstrate three things: (1) that the export prohibition or restriction at issue is “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.<sup>9</sup>

14. To start with the first of these, Article XI:2(a) requires that a measure be “temporarily applied”. The dictionary definition of “temporarily” is “for a time (only); during a limited time”.<sup>10</sup> Accordingly, this means that the measures at issue should have defined and limited time parameters, at the very least.

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<sup>7</sup> See U.S. Third Party Submission, paras. 14–15.

<sup>8</sup> Indonesia’s First Written Submission, para. 85.

<sup>9</sup> See U.S. Third Party Submission, para. 18.

<sup>10</sup> “Temporarily,” *Oxford English Dictionary Online*, Oxford University Press, [www.oed.com/view/Entry/198957](http://www.oed.com/view/Entry/198957) (last retrieved September 20, 2021).

15. Indonesia argues that the measures are applied “only for limited time-periods”<sup>11</sup> because related prior restrictions had been “relaxed” after a period of time, before the current measures at issue were implemented to once again restrict exports.<sup>12</sup> However, if the Panel were to conclude that the measures do not contain a defined and limited time parameter – for example, where 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<sup>13</sup> – Indonesia would not satisfy this requirement and its measures would not fall within the scope of Article XI:2(a).

16. 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”.<sup>14</sup> In this respect, the United States recalls 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.<sup>15</sup> 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.”<sup>16</sup> In assessing Indonesia’s 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.<sup>17</sup>

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<sup>11</sup> See Indonesia’s First Written Submission, para. 94.

<sup>12</sup> See Indonesia’s First Written Submission, paras. 100, 103.

<sup>13</sup> See U.S. Third Party Submission, para. 20.

<sup>14</sup> Indonesia’s First Written Submission, para. 130.

<sup>15</sup> See Indonesia’s First Written Submission, paras. 124-128.

<sup>16</sup> Indonesia’s First Written Submission, para. 126.

<sup>17</sup> See U.S. Third Party Submission, para. 22.

17. 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 the export restrictions would be applied for a limited time. Rather, expanded capacity and resulting demand would suggest the measures would be applied for an *unlimited* time.<sup>18</sup>

18. 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”.<sup>19</sup> In light of this and the inclusion of “foodstuffs” in the provision, 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.<sup>20</sup>

#### **IV. INTERPRETATION OF ARTICLE XX(D) OF THE GATT 1994**

19. Next, the United States would like to address Indonesia’s argument that the challenged measures are justified under Article XX(d) of the GATT 1994 as “measures necessary to secure compliance with WTO-consistent laws or regulations”<sup>21</sup> – namely Indonesia’s “comprehensive policy framework for mining activities, in particular sustainable mining and mineral resource management requirements.”<sup>22</sup>

20. Article XX sets out the circumstances in which measures that have been found to be inconsistent with another provision of the GATT 1994 will nevertheless be justified and therefore not be found inconsistent with a Member’s WTO obligations.

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<sup>18</sup> See U.S. Third Party Submission, para. 22.

<sup>19</sup> *Shorter Oxford English Dictionary*, 6th edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2007), Vol. 1, p. 865; see also *China – Raw Materials (AB)*, para. 326.

<sup>20</sup> See U.S. Third Party Submission, para. 23.

<sup>21</sup> Indonesia’s First Written Submission, para. 141.

<sup>22</sup> Indonesia’s First Written Submission, para. 145.

21. To establish that a measure is justified under Article XX(d), the respondent must demonstrate that: (1) the measure is applied consistently with the requirements of the chapeau; (2) it 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.<sup>23</sup>

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

22. Pursuant to the chapeau of Article XX, the party invoking the Article 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 any such discrimination is not “arbitrary or unjustifiable”; and (3) that the measure is not a “disguised restriction on international trade”.<sup>24</sup>

23. 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”<sup>25</sup>; and because the measures do not “confer[] any direct or indirect protection to Indonesian nickel producers”.<sup>26</sup>

24. Indonesia’s arguments appear to misunderstand the scope of the Panel’s review under the chapeau. First, the discrimination referred to in the chapeau is not limited to distinguishing

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<sup>23</sup> See U.S. Third Party Submission, para. 27.

<sup>24</sup> See U.S. Third Party Submission, para. 28.

<sup>25</sup> Indonesia’s First Written Submission, para. 226 (*italics in original*).

<sup>26</sup> Indonesia’s First Written Submission, para. 227.

between trading partners only, but also includes discrimination between Indonesian and foreign producers (and other entities).<sup>27</sup>

25. Also, more important in the context of this dispute, Indonesia’s measures also affect the consumers and purchasers of nickel that may operate in other industries. The Panel’s examination of whether or not the measures constitute a disguised restriction on 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.<sup>28</sup> As noted in the United States’ third party submission, 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.<sup>29</sup>

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

26. Now turning to 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.<sup>30</sup>

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<sup>27</sup> See U.S. Third Party Submission, para. 30.

<sup>28</sup> See U.S. Third Party Submission, paras. 30–31.

<sup>29</sup> See U.S. Third Party Submission, para. 32.

<sup>30</sup> See U.S. Third Party Submission, para. 33.



27. 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 or regulations” and must explain how the challenged measures “secure” such compliance.<sup>31</sup>

28. With respect to “necessity”, the Panel must examine 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 contributes to the realization of the end pursued, and the trade-restrictiveness of the measure.<sup>32</sup>

29. The United States agrees with Indonesia that responding Members maintain the right to determine their own level of protection with respect to objectives pursued. We also agree that it rests on the EU to propose reasonably available, less trade-restrictive alternatives for achieving an equivalent level of protection. However, this burden on the EU 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.<sup>33</sup>

## V. CONCLUSION

30. This concludes the U.S. oral statement. We thank the Panel for its consideration of the views of the United States and look forward to answering in writing any questions the Panel may have.

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<sup>31</sup> See U.S. Third Party Submission, paras. 34–36.

<sup>32</sup> See, e.g., *India – Solar Cells (AB)*, para. 5.59; *Dominican Republic – Import and Sale of Cigarettes (AB)*, paras. 70–71; *Dominican Republic – Import and Sale of Cigarettes (Panel)*, paras. 7.214, 7.216–7.226; *Korea – Various Measures on Beef (AB)*, paras. 161-163; *Brazil – Retreaded Tyres (AB)*, para. 141.

<sup>33</sup> See U.S. Third Party Submission, para. 40.