INDONESIA – MEASURES RELATING TO RAW MATERIALS
(DS592)

U.S. RESPONSES TO QUESTIONS FROM THE PANEL TO THE THIRD PARTIES FOLLOWING THE THIRD-PARTY SESSION

December 16, 2021

1. What are your views on Indonesia's argument that the domestic processing requirements constitute a law, regulation or requirement affecting the internal sale of nickel ore subject to Article III:4 of the GATT 1994, rather than an export restriction within the meaning of Article XI:1 of the GATT 1994? Can the proper provision under which to assess a measure change because of the existence of a different measure?

Response:

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.

2. The Panel is not precluded from finding a measure to be in breach of Article XI:1 of the GATT 1994 simply because there is another measure whose operation may also prohibit or restrict exports.[1] A measure may be found to be in breach of Article XI:1 because it prohibits or restricts exportation notwithstanding the existence of any other measure that is also found to prohibit or restrict exportation. And no trade effects are necessary to show that a measure imposes a restriction – that is, a limitation or limiting condition – on exportation. Therefore, the existence of Indonesia's export ban does not prevent the Panel from evaluating the domestic processing requirement under Article XI:1.

2. How should the Panel determine if a measure is temporarily applied? What are relevant factors for the Panel to consider?

Response:

3. As noted in the U.S. third-party submission, the dictionary definition of "temporarily" is "for a time (only); during a limited time".[2] Accordingly, 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.[3]

4. Further, 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

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[1] *See* U.S. Third-Party Submission, para. 15.

[2] "Temporarily," *Oxford English Dictionary Online*, Oxford University Press, www.oed.com/view/Entry/198957 (last retrieved September 20, 2021).

[3] *See* U.S. Third-Party Submission, para. 20.

shortage" is the result of the creation of increased processing capacity within the respondent Member's territory.[4] 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.

3. With respect to the definition of a critical shortage within the meaning of Article XI:2(a) of the GATT 1994, must the shortage stem from an exceptional and temporary exogenous event or can the shortage be due to a definitive and unavoidable outcome – such as the depletion of ore reserves if mining continues?

Response:

5. 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. As noted in the U.S. third-party submission, the dictionary definition of the word "shortage" is "deficiency in quantity; an amount lacking".[5] The word "critical" is defined as "of, pertaining to, or constituting a crisis; of decisive importance, crucial; involving risk or suspense".[6] Thus, taken together, the term "critical shortage" refers to a deficiency in quantity that is of decisive importance or pertaining to or constituting a crisis.[7] Nothing in the text would otherwise limit the shortage to an "exceptional and temporary exogenous event" or exclude "a definitive and unavoidable outcome."

6. 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, as explained in the U.S. third-party submission, 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 could be seen as applying for a limited time.[8] Rather, expanded capacity and resulting demand would suggest the measures would be applied for an unlimited time. Moreover, the measures do not themselves appear to specify when they would cease to be in effect, or otherwise indicate that they are being applied for a limited time.

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[4] *See* U.S. Third-Party Submission, para. 22.

[5] *Shorter Oxford English Dictionary*, 6th edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2007), Vol. 2, p. 2813; *see also China – Raw Materials (AB)*, para. 324.

[6] *Shorter Oxford English Dictionary*, 6th edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2007), Vol. 1, p. 562; *see also China – Raw Materials (AB)*, para. 324.

[7] *See also China – Raw Materials (AB)*, para. 324 ("Taken together, 'critical shortage' thus refers to those deficiencies in quantity that are crucial, that amount to a situation of decisive importance, or that reach a vitally important or decisive stage, or a turning point").

[8] *See* U.S. Third-Party Submission, para. 17.

4. Is the desire to develop a particular industry in a Member enough to make an input product in that industry "essential" to the Member within the meaning of Article XI:2(a) of the GATT 1994? Is Article XI:2(a) of the GATT 1994 meant to address a Member's development goals?

Response:

7. 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.[9] 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. As explained in the U.S. third-party submission, the term "essential" should not be interpreted to cover any product that may be "important to" the responding Member, but should only cover those products that are "essential" within the meaning of Article XI:2(a).[10] The inclusion of "foodstuffs" in Article XI:2(a) conveys the level of importance of the product that is contemplated by the provision.[11]

5. If a Member imposes a series of temporary measures that ban exports for extended periods of time with some small breaks, would those measures be considered to have been applied temporarily within the meaning of Article XI:2(a) of the GATT 1994?

Response:

8. 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.

6. What is your view on the sequence of analysis under Article XX of the GATT 1994? In this respect, see e.g. paragraph 27 of the United States' third-party submission.

Response:

9. As explained in the U.S. third-party submission, nothing in the text of Article XX suggests that an Article XX analysis must begin with an examination under one or more Article

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[9] *See* U.S. Third-Party Submission, para. 23.

[10] *See* U.S. Third-Party Submission, para. 23.

[11] *See China – Raw Materials (AB)*, para. 326 (concluding that the inclusion of the word "foodstuffs" in Article XI:2(a) "provides a measure of what might be considered a product 'essential to the exporting Member,'" though it "does not limit the scope of other essential products to only foodstuffs).

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.

7. Can a measure that lays out broad policy goals without requiring specific actions be the law or regulation not inconsistent with the GATT 1994 for the purposes of an affirmative defence under Article XX(d) of the GATT 1994?

Response:

10. As explained in the U.S. third-party submission, 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.[12] As a first step, the Panel must determine whether the identified "laws or regulations" are in fact WTO-consistent.

11. Further, the Panel must assess the relationship between the challenged measures and the laws or regulations with which those measures are designed to secure compliance – in particular, 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.

8. If the challenged measures are "apt to produce a material contribution" toward securing compliance with the underlying laws and regulations, is this sufficient to satisfy the necessity test under Article XX(d) of the GATT 1994? Is no actual contribution required? Is the standard the same for assessing the reasonably available alternative?

Response:

12. Under Article XX(d), the respondent Member bears the burden of demonstrating that the challenged measure is necessary to the objective of securing compliance with its identified laws or regulations. Therefore, an argument that the challenged measure is "apt to produce a material contribution" toward securing compliance may not, on its own, establish that the measure is in fact "necessary" in the context of subparagraph (d). The dictionary definition of "necessary" is "indispensable, vital, essential; requisite".[13] 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.

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[12] *See* U.S. Third-Party Submission, para. 34.

[13] "Necessary," *Oxford English Dictionary Online*, Oxford University Press, https://www.oed.com/view/Entry/125629 (last retrieved December 10, 2021).

13. A panel assessing the "necessity" of a measure within the meaning of Article XX(d) 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".[14] This review would include whether any alternative measures exist "that achieve an equivalent level of protection while being less trade restrictive"[15] than the challenged measure.[16] If 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.

9. With respect to the meaning of "law or regulation" under Article XX(d) of the GATT 1994:

a. Is there a requirement that those laws and regulations have specificity or normative content?

b. Can compliance with aspirational or general objectives be secured within the meaning of Article XX(d) of the GATT 1994?

Response:

14. 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. In the present dispute, Indonesia has asserted that the challenged measures are designed to secure compliance with certain of its mining and mineral resources management and conservation laws and regulations.[17] Indonesia has explained that the measures at issue contain an express reference to Law 4/2009 on Mineral and Coal Mining and/or Law 32/2009 Concerning the Protection and Management of the Environment,[18] and are "capable of contributing to securing compliance" with those laws and related laws and regulations.[19]

15. The Panel's question (b) appears to address the separate issue of whether the measures at issue in fact secure compliance with those laws or regulations. As explained in our answer to

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[14] *India – Solar Cells (AB)*, para. 5.59; *see also Korea – Various Measures on Beef (AB)*, paras. 161-163; *Brazil – Retreaded Tyres (AB)*, para. 141.

[15] *India – Solar Cells (AB)*, para. 5.59, fn. 214 (citing *Colombia – Textiles (AB)*, para. 5.74); *see also EC – Seal Products (AB)*, para. 5.169 (referring to *US – Gambling (AB)*, para. 307, in turn referring to *Korea – Various Measures on Beef* (*AB)*, para. 166).

[16] *India – Solar Cells (AB)*, para. 5.59.

[17] *See* Indonesia's First Written Submission, paras. 151-173.

[18] *See* Indonesia's First Written Submission, para. 179.

[19] *See* Indonesia's First Written Submission, paras. 176-178.

question 7, above, 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 broad policy goals 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.

16. As also explained in the U.S. third-party submission, 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.[20]

[20] *See* U.S. Third-Party Submission, para. 36.