

INDONESIA – MEASURES RELATING TO RAW MATERIALS

(DS592)

**THIRD PARTY SUBMISSION
OF THE UNITED STATES OF AMERICA**

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Short Title	Full Case Title and Citation
<i>Argentina – Import Measures (AB)</i>	Appellate Body Reports, <i>Argentina – Measures Affecting the Importation of Goods</i> , WT/DS438/AB/R / WT/DS444/AB/R / WT/DS445/AB/R, adopted 26 January 2015
<i>Argentina – Import Measures (Panel)</i>	Panel Reports, <i>Argentina – Measures Affecting the Importation of Goods</i> , WT/DS438/R and Add.1 / WT/DS444/R and Add.1 / WT/DS445/R and Add.1, adopted 26 January 2015, as modified (WT/DS438/R) and upheld (WT/DS444/R / WT/DS445/R) by Appellate Body Reports WT/DS438/AB/R / WT/DS444/AB/R / WT/DS445/AB/R
<i>Brazil – Retreaded Tyres (AB)</i>	Appellate Body Report, <i>Brazil – Measures Affecting Imports of Retreaded Tyres</i> , WT/DS332/AB/R, adopted 17 December 2007
<i>China – Raw Materials (AB)</i>	Appellate Body Reports, <i>China – Measures Related to the Exportation of Various Raw Materials</i> , WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, adopted 22 February 2012
<i>China – Raw Materials (Panel)</i>	Panel Reports, <i>China – Measures Related to the Exportation of Various Raw Materials</i> , WT/DS394/R, Add.1 and Corr.1 / WT/DS395/R, Add.1 and Corr.1 / WT/DS398/R, Add.1 and Corr.1, adopted 22 February 2012, as modified by Appellate Body Reports WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R
<i>Colombia – Ports of Entry</i>	Panel Report, <i>Colombia – Indicative Prices and Restrictions on Ports of Entry</i> , WT/DS366/R and Corr.1, adopted 20 May 2009
<i>Colombia – Textiles (Panel)</i>	Panel Report, <i>Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear</i> , WT/DS461/R and Add.1, adopted 22 June 2016, as modified by Appellate Body Report, WT/DS461/AB/R
<i>Colombia – Textiles (AB)</i>	Appellate Body Report, <i>Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear</i> , WT/DS461/AB/R and Add.1, adopted 22 June 2016
<i>Dominican Republic – Cigarettes (Panel)</i>	Panel Report, <i>Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes</i> , WT/DS302/R, adopted 19 May 2005, as modified by Appellate Body Report WT/DS302/AB/R

<i>EC – Asbestos (Panel)</i>	Panel Report, <i>European Communities – Measures Affecting Asbestos and Asbestos-Containing Products</i> , WT/DS135/R and Add.1, adopted 5 April 2001, as modified by Appellate Body Report WT/DS135/AB/R
<i>EC – Seal Products (AB)</i>	Appellate Body Reports, <i>European Communities – Measures Prohibiting the Importation and Marketing of Seal Products</i> , WT/DS400/AB/R / WT/DS401/AB/R, adopted 18 June 2014
<i>EC – Seal Products (Panel)</i>	Panel Reports, <i>European Communities – Measures Prohibiting the Importation and Marketing of Seal Products</i> , WT/DS400/R / WT/DS401/R and Add.1, adopted 18 June 2014, as modified by Appellate Body Reports, WT/DS400/AB/R / WT/DS401/AB/R
<i>India – Autos (Panel)</i>	Panel Report, <i>India – Measures Affecting the Automotive Sector</i> , WT/DS146/R, WT/DS175/R, and Corr.1, adopted 5 April 2002
<i>India – Quantitative Restrictions (Panel)</i>	Panel Report, <i>India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products</i> , WT/DS90/R, adopted 22 September 1999, upheld by Appellate Body Report WT/DS90/AB/R
<i>India – Solar Cells (AB)</i>	Appellate Body Report, <i>India – Certain Measures Relating to Solar Cells and Solar Modules</i> , WT/DS456/AB/R and Add.1, adopted 14 October 2016
<i>Japan – Trade in Semi-conductors (GATT Panel Report)</i>	GATT Panel Report, <i>Japan – Trade in Semi-Conductors</i> , L/6309- 35S/116, adopted 4 May 1988
<i>Korea – Various Measures on Beef (AB)</i>	Appellate Body Report, <i>Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef</i> , WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001
<i>US – Gambling (AB)</i>	Appellate Body Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , WT/DS285/AB/R, adopted 20 April 2005
<i>US – Gasoline (AB)</i>	Appellate Body Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/AB/R, adopted 20 May 1996

I. INTRODUCTION

1. The United States welcomes the opportunity to present its views on certain issues raised in this dispute. In this third party submission, the United States provides its view of the proper legal interpretation of Articles XI:1, XI:2(a), and XX(d) of the *General Agreement on Tariffs and Trade 1994* (the “GATT 1994”).

II. MEASURES AT ISSUE

2. The European Union challenges two Indonesian measures: the export prohibition of nickel ore (implemented by MEMR¹ Regulation 11/2019 and MOT² Regulation 96/2019), and the domestic processing requirement on nickel ore and iron ore (implemented by MEMR Regulation 25/2018). The export ban, effective January 1, 2020, prohibits the exportation of nickel ore, among other enumerated mining products.³ Separately, under the domestic processing requirement, the holders of a mining business license may not “conduct[] export activities” before carrying out “the Value Added Enhancement through Processing and/or Refining activities in accordance with the minimum thresholds” specified in the relevant appendices, which list nickel.⁴ In other words, unprocessed and unrefined raw mineral products including nickel are restricted from exportation.

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

3. The complainant claims that the measures at issue are inconsistent with Article XI:1 of the GATT 1994.

4. The United States recalls the text of Article XI:1 of the GATT 1994, which 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 [WTO Member] on the importation of any product of the territory of any other [Member] or on the exportation or sale for export of any product destined for the territory of any other [Member].

5. 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

¹ Ministry of Energy and Mineral Resources.

² Ministry of Trade.

³ See First Written Submission by the European Union (July 13, 2021), paras. 23-26, 47 (“European Union’s First Written Submission”); Exhibits EU-10(b) and EU-11(b); see also First Written Submission of Indonesia (September 6, 2021), para. 54 (“Indonesia’s First Written Submission”). Indonesia does not appear to contest the European Union’s characterization of the operation of the measures.

⁴ See European Union’s First Written Submission, paras. 31, 50; Exhibit EU-9(b); see also Indonesia’s First Written Submission, paras. 60-61. Indonesia does not appear to contest the European Union’s characterization of the operation of the measures.

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”.⁵

6. 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 ordinary meaning of the term “restriction”, in its context, can capture a number of forms of measures. The pertinent definition of “restriction” in relation to the acts of importation or exportation is “a limitation on action, a limiting condition or regulation”.⁶

7. Further, Article XI:1 applies to *any* “restriction”, including those “made effective through quotas, import or export licenses *or other measures*”,⁷ other than “duties, taxes, or other charges”.⁸ As the panel report in *India – Quantitative Restrictions* put it:

[T]he text of Article XI:1 is very broad in scope, providing for a general ban on import or export restrictions or prohibitions “other than duties, taxes or other charges”. As was noted by the panel in *Japan – Trade in Semi-conductors*, the wording of Article XI:1 is comprehensive: it applies ‘to all measures instituted or maintained by a [Member] prohibiting or restricting the importation, exportation, or sale for export of products other than measures that take the form of duties, taxes or other charges.’⁹

Subsequent reports have reached similar interpretations.¹⁰

8. 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.

9. The United States notes that previous panels have found measures that are similar to the measures at issue here to be inconsistent with Article XI:1. For instance, the panel report in *China – Raw Materials* found that China’s export ban on certain forms of zinc – which resulted

⁵ *Shorter Oxford English Dictionary*, 6th 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.

⁶ *Shorter Oxford English Dictionary*, 6th 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.

⁷ Emphasis added.

⁸ Article XI:2 contains a list of restrictions or prohibitions that are not prohibited under Article XI:1, and measures complying with certain other provisions of the WTO Agreements also may not be found to breach Article XI:1. *See Argentina – Import Measures (AB)*, paras. 5.219-5.221.

⁹ *India – Quantitative Restrictions (Panel)*, para. 5.128 (quoting *Japan – Trade in Semi-conductors (GATT Panel Report)* and *The New Shorter Oxford English Dictionary* at 2569 (1993)).

¹⁰ *Argentina – Import Measures (Panel)*, para. 6.251; *India – Autos (Panel)*, para. 7.264; *Colombia – Ports of Entry*, para. 7.233; *Dominican Republic – Cigarettes (Panel)*, para. 7.248.

from the maintenance of zero export quota by failing to set the quota amount¹¹ – constituted a restriction or prohibition on exportation that is inconsistent with Article XI:1.¹²

10. As another example, the same panel in *China – Raw Materials* found that China’s minimum export price requirement for certain forms of raw minerals constituted a restriction on exportation inconsistent with Article XI:1 because such a requirement prohibited exportation if the price of the export was lower than the floor established by the coordinated minimum export price.¹³ The minimum export price requirement in that case is comparable to the domestic processing requirement at issue in this proceeding in that both measures restrict the exportation of products that do not meet certain conditions: exports below a minimum price level and exports without domestic processing, respectively.

11. Indonesia argues, with respect to the domestic processing requirement, that the European Union has not made a *prima facie* case because the requirement does not have any “limiting effect” on the exportation of nickel ore given the existence of the export ban on the same product.¹⁴ Indonesia contends that because MEMR Regulation 11/2019 already prohibits the exportation of nickel ore, the domestic processing requirement “neither operates as a precondition for the exportation of nickel ore nor restricts said exports because the exportation of nickel ore, regardless of concentration, is legally prohibited in the first place.”¹⁵

12. The text of Article XI:1, however, does not require a showing of actual trade effects of a measure at issue. Rather, Article XI:1 prohibits any measure that constitutes a limitation on action or a limiting condition on exportation. As the panel report in *Colombia – Ports of Entry* found:

[T]o the extent [the complainant] were able to demonstrate a violation of Article XI:1 based on the measure’s design, structure, and architecture, the Panel is of the view that it would not be necessary to consider trade volumes or a causal link between the measure and its effects on trade volumes.

In support of its approach, the Panel recalls that a number of panels have previously determined the existence of a restriction on importation based on the design of the measure and its potential to adversely affect importation, as opposed to the actual resulting impact of the measure on trade flows.¹⁶

13. Accordingly, 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 domestic processing requirement has caused an *actual* decrease in exports.

¹¹ See *China – Raw Materials (Panel)*, para.7.217.

¹² See *China – Raw Materials (Panel)*, paras. 7.218, 7.224.

¹³ See *China – Raw Materials (Panel)*, paras. 7.1070-7.1082.

¹⁴ See Indonesia’s First Written Submission, paras. 77-84.

¹⁵ See Indonesia’s First Written Submission, para. 83.

¹⁶ *Colombia – Ports of Entry*, paras. 7.252-7.253.

14. Moreover, Indonesia’s argument appears to disregard the fact that 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 European Union has asserted that the domestic processing requirement measure establishes an independent restriction on exportation because the holders of a mining business license may not “conduct[] export activities” without satisfying certain processing conditions. If the Panel agrees these measures operate independently, the Panel should evaluate the WTO-consistency of each of the two measures independently.

15. 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 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.

16. 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.

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

17. 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.”¹⁷

18. 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.

19. 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”.¹⁸ Accordingly, the requirement means that the measures at issue should have defined and limited time parameters, at the very least.

20. Indonesia argues that the measures are applied “only for limited time-periods”¹⁹ because related prior restrictions had been “relaxed” after a period of time, before the measures at issue were implemented to once again restrict exports.²⁰ The United States takes no position on the

¹⁷ Indonesia’s First Written Submission, para. 85.

¹⁸ “Temporarily,” *Oxford English Dictionary Online*, Oxford University Press, www.oed.com/view/Entry/198957 (last retrieved September 20, 2021).

¹⁹ See Indonesia’s First Written Submission, para. 94.

²⁰ See Indonesia’s First Written Submission, paras. 100, 103.

merits of Indonesia’s arguments, but notes that the measures at issue do not themselves appear to specify when the export ban and the domestic processing requirement would cease to be in effect, or otherwise indicate that they are being applied for a time only or during a limited time.²¹ And 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.

21. The second requirement of Article XI:2(a) is that the restriction at issue apply to “prevent or relieve critical shortages” of a product. The dictionary definition of the word “shortage” is “deficiency in quantity; an amount lacking”.²² The word “critical” is defined as “of, pertaining to, or constituting a crisis; of decisive importance, crucial; involving risk or suspense”.²³ 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.²⁴ Furthermore, the word “prevent” is defined as “provide beforehand against the occurrence of (something); make impracticable or impossible by anticipatory action; stop from happening”.²⁵ Thus, Article XI:2(a) encompasses preventive or anticipatory measures applied to stop a critical shortage from happening.

22. Indonesia argues that the measures are applied to prevent a critical shortage of nickel ore, which “would [have] imminently ensue[d] if Indonesia had not acted promptly”.²⁶ Indonesia asserts that such a critical shortage was anticipated because “the surge in demand for Indonesian nickel ore has caused a dramatic expansion of extraction and production levels in Indonesia”.²⁷ The United States takes no position on the merits of Indonesia’s arguments, but notes that the evidence Indonesia submits 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.²⁸ 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.”²⁹ 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 the respondent Member’s territory. 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 also unclear how an export restriction

²¹ See MEMR Regulation 11/2019 - English translation (Exhibit EU-10(b)); MT Regulation 96/2019 - English translation (Exhibit EU-11(b)); MEMR Regulation 25/2018 - English translation (Exhibit EU-9(b)).

²² *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.

²³ *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.

²⁴ 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”).

²⁵ *Shorter Oxford English Dictionary*, 6th edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2007), Vol. 2, p. 2341; see also *China – Raw Materials (AB)*, para. 327.

²⁶ Indonesia’s First Written Submission, para. 130.

²⁷ Indonesia’s First Written Submission, para. 130.

²⁸ See Indonesia’s First Written Submission, paras. 124-128.

²⁹ Indonesia’s First Written Submission, para. 126.

would be applied for a limited time. Expanded capacity and resulting demand would rather suggest the measure would be applied for an unlimited time.

23. 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”.³⁰ 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.³¹ In light of this context, 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). Therefore, the Panel should examine whether Indonesia has shown that nickel is absolutely indispensable or necessary to it.

24. 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.

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

25. 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”³² – namely Indonesia’s “comprehensive policy framework for mining activities, in particular sustainable mining and mineral resource management requirements.”³³

26. 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. Article XX(d) states:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

. . .

(d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement . . .

³⁰ *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.

³¹ 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”).

³² Indonesia’s First Written Submission, para. 141.

³³ Indonesia’s First Written Submission, para. 145.

27. Thus, 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 measures must be “necessary” to the achievement of that objective, *i.e.*, to secure such compliance.³⁴ While Article XX analyses typically begin with an examination under one or more Article XX subparagraphs and then proceed to an examination of consistency with the chapeau, this order of analysis is not mandatory. Nothing in the text of Article XX suggests that it is not possible to conduct an appropriate legal analysis beginning 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.

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

28. 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 trade”. Thus, while the subparagraphs of Article XX relate to specific objectives, the chapeau of Article XX may serve “to prevent the abuse or misuse of a Member’s right to invoke the exceptions contained in the [Article XX] subparagraphs.”³⁵

29. 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”³⁶; and because the measures do not “confer[] any direct or indirect protection to Indonesian nickel producers”.³⁷ According to Indonesia, the measures at issue do not “offer an advantage or protection under the guise of a legitimate objective” because they in fact “*disadvantage* domestic mining companies by restricting their ability to compete in foreign markets.”³⁸

30. 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 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.

31. 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

³⁴ See *EC – Seal Products (AB)*, para. 5.169; *Brazil – Retreaded Tyres (AB)*, paras. 144-145; *Korea – Beef (AB)*, para. 157.

³⁵ *EC – Seal Products (AB)*, para. 5.297.

³⁶ Indonesia’s First Written Submission, para. 226 (italics in original).

³⁷ Indonesia’s First Written Submission, para. 227.

³⁸ Indonesia’s First Written Submission, para. 227 (italics in original).

processing, but also affect the consumers and purchasers of nickel that may operate in other industries. The Panel’s examination of the impact of those measures is not limited to trade in nickel or to nickel producers only. Whether or not a measure constitutes a disguised restriction on trade must be examined in the context of the trade impacted by the measure, beyond just the product directly subject to the measure at issue.

32. Nickel is an essential component in most stainless steel. According to the Nickel Institute, the most common stainless steel grade (*i.e.*, Type 304), requires approximately 8 percent nickel, and nickel-containing grades make up 75 percent of stainless steel production.³⁹ Moreover, nickel has an outsized effect on the price of stainless steel, comprising 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

33. 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.⁴⁰

34. 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, including that the measures at issue do not appear, in their design, to be “incapable of securing compliance” with the identified, WTO-consistent laws or regulations.⁴¹ As a first step, however, the Panel must determine whether the identified “laws or regulations” are in fact WTO-consistent.

35. Indonesia asserts that the measures at issue are designed to secure compliance with certain of its mining and mineral resources management and conservation laws and regulations, which are WTO-consistent.⁴² Indonesia explains 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,⁴³ and are “capable of contributing to securing compliance” with those laws and related laws and regulations.⁴⁴ Indonesia also states that those mining and mineral resources management laws and regulations not only are consistent with the

³⁹ Nickel Institute, “Stainless steel: The role of nickel,” <https://nickelinstitute.org/about-nickel/stainless-steel/> (last retrieved on September 20, 2021).

⁴⁰ *EC – Seal Products (AB)*, para. 5.169; *Brazil – Retreaded Tyres (AB)*, paras. 144-145; *Korea – Beef (AB)*, para. 157.

⁴¹ *India – Solar Cells (AB)*, para. 5.58.

⁴² See Indonesia’s First Written Submission, paras. 151-173.

⁴³ See Indonesia’s First Written Submission, para. 179.

⁴⁴ See Indonesia’s First Written Submission, paras. 176-178.

GATT 1994 but also further “the principles of the sustainable use of natural resources and the preservation of the environment” enshrined in the GATT 1994.⁴⁵

36. Given the text of Article XX(d), 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 the relationship between the challenged measures and the laws and 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”. 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.

37. 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”.⁴⁶ This review would include whether any alternative measures exist “that achieve an equivalent level of protection while being less trade restrictive”⁴⁷ than the challenged measure.⁴⁸

38. Indonesia, while acknowledging that the measures at issue are trade-restrictive,⁴⁹ 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”⁵⁰; and the export ban on nickel ore and the domestic processing requirement, “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.”⁵¹ To demonstrate the “material contribution” made by the measures, Indonesia submits evidence concerning environmental degradation resulting from predatory mining, which according to Indonesia is “closely associated with export-oriented nickel production”,⁵² as well as concerning the positive impact of the measures on compliance with Indonesia’s mining and mineral resource

⁴⁵ See Indonesia’s First Written Submission, paras. 170-172.

⁴⁶ *India – Solar Cells (AB)*, para. 5.59; see also *Korea – Various Measures on Beef (AB)*, paras. 161-163; *Brazil – Retreaded Tyres (AB)*, para. 141.

⁴⁷ *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).

⁴⁸ *India – Solar Cells (AB)*, para. 5.59.

⁴⁹ Indonesia’s First Written Submission, para. 188.

⁵⁰ Indonesia’s First Written Submission, para. 187.

⁵¹ Indonesia’s First Written Submission, para. 194.

⁵² Indonesia’s First Written Submission, paras. 195-211.

management requirements, such as a reduction in the amount of nickel extractions and unsustainable mining practices.⁵³

39. 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.”⁵⁴ 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.”⁵⁵

40. The United States agrees 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 European Union to propose reasonably available alternatives for achieving that 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 Indonesia’s mining and mineral resource management laws.⁵⁶

VI. CONCLUSION

41. The United States appreciates the opportunity to submit its views in connection with this dispute on the proper interpretation of relevant provisions of the GATT 1994.

⁵³ Indonesia’s First Written Submission, paras. 212-216.

⁵⁴ Indonesia’s First Written Submission, paras. 219-220 (referring to *Brazil - Retreaded Tyres (AB)*, para. 156).

⁵⁵ Indonesia’s First Written Submission, para. 220.

⁵⁶ See *Korea – Various Measures on Beef (AB)*, para. 161; *Brazil – Retreaded Tyres (AB)*, para. 141.