



INDONESIA – MEASURES RELATING TO RAW MATERIALS

REQUEST FOR CONSULTATIONS BY THE EUROPEAN UNION

The following communication, dated 22 November 2019, from the delegation of the European Union to the delegation of Indonesia, is circulated to the Dispute Settlement Body in accordance with Article 4.4 of the DSU.

My authorities have instructed me to request consultations with the Government of Indonesia pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXII:1 of the General Agreement on Tariffs and Trade 1994 (GATT 1994) and Article 4.1 of the Agreement on Subsidies and Countervailing Measures (ASCM) with regard to various measures concerning certain raw materials necessary for the production of stainless steel, as well as a cross-sectoral import duty exemption scheme conditional upon the use of domestic over imported goods.

1. Measures at issue

This Request covers restrictions on exports of nickel, including an actual prohibition to export and additional requirements enforced during a partial relaxation of the prohibition, notably domestic processing requirements and a domestic marketing obligation; as well as export licensing requirements. Domestic processing requirements also apply to iron ore and chromium, as well as to coal; while the domestic marketing obligations also extend to coal products. With regard to export licensing requirements, this Request also covers metal waste and scraps as well as coal and coke.

In addition, this Request covers a preferential import duty exemption scheme for companies engaged in either the establishment or modernisation of a factory, including an extended duty exemption period conditional upon certain local content requirements in terms of the use of machinery, installation, appliances or utensils.

a. Quantitative restriction on exports

As part of the implementation of a national plan to develop certain downstream industry sectors including that of stainless steel production, Indonesia introduced a number of limitations on exports of raw materials. In particular, exports of nickel ore were prohibited in Indonesia in 2014. In 2017, Indonesia partially relaxed the export ban by temporarily allowing exports of certain minerals, including nickel ore with a concentration below 1.7%, subject to certain additional requirements (see below). It was foreseen that these requirements be temporary and that the full export prohibition be reinstated on 11 January 2022. However, in August 2019 Indonesia's Ministry of Energy and Mineral Resources (MEMR) established that the validity of certain documents necessary to export low-concentration nickel ore expire on 31 December 2019, thereby effectively reinstating the total export prohibition of nickel ore as of 1 January 2020.

The temporary permission to export low-concentration nickel ore has been without prejudice to the continued prohibition to export nickel ore with a concentration above 1.7%, which may not be exported even during the temporary relaxation of the export ban. Exports of nickel ore is also subject to the additional export requirements as described below.

b. Domestic processing requirements

Exports of certain mining products are subject to them undergoing an added value enhancement through certain processing and/or purification activities in Indonesia as determined by the MEMR. This obligation is directed to holders of production permits and applies, among others, to nickel ore, iron ore and chromium, as well as to coal and coal products. As a result, minerals that have not undergone such processing and/or purification operations, as required by law, may not be exported. This obligation does not apply in cases of domestic interest or research and development.

c. Domestic marketing obligation

The MEMR stipulates the quantities and types of minerals and coal that are necessary to fulfil domestic needs in Indonesia and, on that basis, the quantities and types of minerals and coal that may be exported. Exports of the relevant products may therefore only occur once domestic needs for minerals and coal have been satisfied and consequently in the quantities determined accordingly. This obligation appears to apply to a number of minerals including nickel as well as to coal.

d. Export licensing

Licenses from the Indonesian authorities are required to export certain raw materials for the production of stainless steel, notably nickel ore, metal waste and scraps, and coal and coke. In all cases, the legislative framework in Indonesia lacks necessary details on the granting of export approval.

Nickel ore with a concentration lower than 1.7%

Nickel ore with a concentration lower than 1.7% may only be exported provided that the holder of the production permit has used nickel with such level of concentration in at least 30% of its total input capacity in the purifying facility; and that it has built or is building a purifying facility, whether independently or in cooperation with others.

Exports of nickel ore are subject to approval by the Director General of Foreign Trade at Indonesia's Ministry of Trade (MOT). The application for export approval must contain a number of information and documents including a recommendation from the Director General for Minerals and Coal at the MEMR. Such recommendation is conditional upon holders of the permits building refining facilities in Indonesia. There are no additional details in the applicable legal documents on whether any additional criteria apply in the decision-making process.

Metal waste and scraps

In order to obtain the export approval of metal waste and scraps,¹ exporters are required to submit an application to the MOT enclosing a number of information and documents including a recommendation from the Director of Industry at the Directorate-General of Metal, Machinery, Transportation Equipment and Electronics Industries in Indonesia's Ministry of Industry (hereinafter, MOI). The applicable legislative instruments contain no further details on whether the issuance of the recommendation by the MOI is automatic or not for applications that are complete and correct.

Coal and coke

Obtaining a license to export specific coal and coke products is conditional upon registration as a "recognised exporter" ("ET-Batubara") at the MOT, which is in turn conditional upon submitting an application to the Director General of the MOT attaching the relevant documents, including a recommendation from the Director General at the MEMR. The relevant legal instruments include no further indication on how such recommendation is to be obtained.

e. Prohibited subsidy scheme

The current regulatory framework from the Ministry of Finance (MOF) provides for certain import duty exemptions (1) in general for companies engaged in building or modernisation of factories, as

¹ Including waste and scraps of stainless steel; waste and scraps of alloy steel other than stainless steel and waste and scraps of nickel.

well as (2) more specifically in support of "Industrial Development Areas" ("WPIs"). The relevant legal instruments as introduced and amended since 2009 provide that companies that are engaged in the establishment of a new factory ("building") or modernisation ("development") of an existing factory may be exempted from import duties on machines, goods and materials for industrial production over a period of two years with a possible extension of one additional year (2+1). At the same time, both the general and the specific support schemes provide for the possible extension of such import duty exemption by another two years (4+1) or even three years (5+1) for establishments situated in "WPI Potensial II". Such extension is however conditional upon the use by the importing company benefitting from the duty exemption of at least 30% locally produced "machinery, ...installation, appliances or ...utensils...".

While the former scheme appears to be applicable in general, the more specific one appears to apply to "Industrial Development Areas" ("WPI"s) only. The instruments regulating these schemes provide however that the determination of compliance with any such local content requirement – as a condition for the extended subsidy measure – is to be issued "by the minister in charge of industry or the appointed official".

2. Legal and other instruments relevant to the measures at issue

The various measures at issue described above are put in place and evidenced by, and are implemented and administered through, *inter alia*, the following legal and other instruments, considered alone and in any combination:

- Law No. 4/2009 "On Mineral Coal and Mining" of 12 January 2009;²
- Government Regulation No. 23/2010 "On the Implementation of Mineral and Coal Mining Business Activities" of 1 February 2010, as amended by Government Regulation No. 24/2012 of 21 February 2012;³
- Government Regulation No. 1/2017, "On Fourth Amendment of the Government Regulation No. 23/2010 about the Operation of Mineral and Coal" of 11 January 2017;⁴
- Ministry of Trade Regulation No. 1/2017 "On Export Provisions for Processed and Purified Mining Products";⁵
- Ministry of Energy and Mineral Resources Regulation No. 5/2017 "On Enhancement of Value Added of Minerals Through Activities of Processing and Purification of Minerals Inside the Country";
- Ministry of Energy and Mineral Resources Regulation No. 11/2018 "On Procedure for the Granting of Area, Licensing and Reporting in the Business Activity of Mineral and Coal Mining";
- Ministry of Energy and Mineral Resources Regulation No. 25/2018 "On Minerals and Coal Business", as amended, including by the Ministry of Energy and Mineral Resources Regulation No. 50/2018 of 5 December 2018 and Ministry of Energy and Mineral Resources Regulation No. 11/2019 of 28 August 2019;
- "Ministry of Energy and Mineral Resources Regulation No. 11/2019, dated 30 August 2019, Regarding the Second Amendment of the Regulation of the Minister of Energy and Mineral

² Available in English at http://www.apbi-icma.org/uploads/files/old/2013/11/uu_no_4_2009_en.pdf, last accessed on 19 November 2019.

³ Available in Indonesian and English at http://www.qbgindonesia.com/en/main/useful_resources/documents/regulations/Government%20Regulation%20No.%2023%20of%202010%20with%20Amendment%20No.24%20of%202012%20on%20Mineral%20and%20Coal%20Mining%20Business%20in%20Indonesia.pdf, last accessed on 19 November 2019.

⁴ Available in Indonesian at https://papua.kemenaq.go.id/files/papua/file/file/ProdukHukum/pp_1_2017.pdf, last accessed on 19 November 2019.

⁵ Available in English at http://jdih.kemendag.go.id/backendx/image/regulasi/25000728_Permendag_No._01_Tahun_2017.pdf, last accessed on 19 November 2019.

Resources No. 25/2018 on Mineral and Coal Mining Business" published on 5 September 2019;

- Ministry of Trade Regulation No. 4/2018 "On Provisions on Exports of Waste and Metal Scraps" of 10 January 2018;⁶
- Ministry of Trade Regulation No. 39/2014 "Concerning Provisions on Exports of Coal and Coal Products" of 15 July 2014,⁷ as amended by Ministry of Trade Regulation No. 49/2014 amending Ministry of Trade Regulation No. 39/2014 "Concerning Provisions on Exports of Coal and Coal Products", Ministry of Trade Regulation No. 52/2018 amending Ministry of Trade Regulation No. 39/2014 "Concerning Provisions on Exports of Coal and Coal Products" and Ministry of Trade Regulation No. 95/2018 amending Ministry of Trade Regulation No. 39/2014 "Concerning Provisions on Exports of Coal and Coal Products" of 19 September 2018⁸;
- Minister of Finance Regulation No.176/PMK.011/2009 "Concerning the Exemption of Import Duty on Imported Machines, Goods and Materials for the Building or Development of Industries within the Framework of Investment" of 16 November 2009,⁹ as amended by Minister of Finance Regulation No.76/PMK.011/2012 of 21 May 2012¹⁰;
- Regulation of the Minister of Finance No.105/PMK.010/2016 "Concerning the provision of taxation and customs facilities for companies in industrial development areas and for industrial areas' companies" of 30 June 2016;¹¹
- Any other instruments through which Indonesia implements and administers the measures at issue, including letters, circulars or other documents whereby requests are made, decisions are communicated and/or instructions are imparted; whether between Indonesian authorities or to individual or groups of companies directly or indirectly involved in exports of raw materials relevant for the production of stainless steel.

This Request also covers any annexes, appendixes, attachments or schedules to the instruments listed above, as well as any amendments, supplements, replacements, renewals, extensions, implementing measures or any other related measures.

3. Legal basis for the complaint

The various measures at issue described above appear to be inconsistent with Indonesia's obligations under the covered agreements, in particular:

- Article XI:1 of the GATT 1994, because by prohibiting exports of nickel ore, by requiring that nickel ore, iron ore and chromium as well as coal and coal products undergo specific processing activities prior to being exported, by requiring that certain amounts of nickel and coal be sold domestically prior to being exported and by imposing certain export licensing requirements on nickel ore, metal waste and scraps and coal and coke, Indonesia imposes measures that restrict exports of raw materials relevant for the production of stainless steel;

⁶ Available in Indonesian at http://jdih.kemendag.go.id/backendx/image/regulasi/27010426_Permendag_No_04_Th_2018.PDF, last accessed on 19 November 2019.

⁷ Available in English at www.apbi-icma.org/uploads/files/old/2014/08/Permendag-39-2014_english-version.pdf, last accessed on 19 November 2019.

⁸ Available in Indonesian at <http://inatrade.kemendag.go.id/files/peraturan/240.pdf>, last accessed on 19 November 2019.

⁹ Available in Indonesian at: <https://jdih.kemenkeu.go.id/fullText/2009/176~PMK.011~2009Per.htm> and in English at: www.flevin.com/id/lqso/translations/JICA%20Mirror/english/4494_176_PMK.011_2009_e.html, last accessed on 19 November 2019.

¹⁰ Available in Indonesian at: <https://jdih.kemenkeu.go.id/fullText/2012/76~PMK.011~2012Per.HTM> and in English at: http://www.flevin.com/id/lqso/translations/JICA%20Mirror/english/4770_76_PMK.011_2012_e.html, last accessed on 19 November 2019.

¹¹ Available in Indonesian at <https://jdih.kemenkeu.go.id/fullText/2016/105~PMK.010~2016Per.pdf>, last accessed on 19 November 2019.

- Article 3.1 b) of the ASCM, because the specific import duty exemption scheme introduced by Indonesia in the context of promoting the development of industry and investment and/or the promotion of economic development in certain regions of the country ("Industrial Development Areas" or "WPIs"), provides for an additional (extended) duty exemption period which is contingent upon the use of locally produced machinery, installation, appliances or utensils; where such additional support represents the granting of a subsidy within the meaning of Article 1.1 of the ASCM and making that subsidy contingent upon the use of domestic goods over imported goods, violates Article 3.1 b) of the ASCM; and
- Article X:1 of the GATT 1994, because Indonesia has failed to promptly publish all measures of general application relating to the operation of export restrictions and the issuance of export licenses, in such a manner so as to enable governments and traders to become acquainted with them.

The various measures relating to raw materials necessary for the production of stainless steel identified in this Request appear to nullify or impair the benefits accruing to the European Union directly or indirectly under the covered agreements.

The European Union reserves the right to address additional measures and claims under other provisions of the covered agreements regarding the above matters during the course of the consultations.

ANNEX**STATEMENT OF AVAILABLE EVIDENCE**

For purposes of Article 4.2 of the ASCM, the European Union sets out below evidence available to it at this time regarding the existence and nature of the subsidies subject to this Request for consultations. The European Union reserves the right to supplement or alter this list in the future, as required:

- Regulation of the Minister of Finance No.176/PMK.011/2009 "Concerning the exemption of import duty on imported machines, goods and materials for the building or development of industries within the framework of investment" of 16 November 2009,¹² as amended by Regulation of the Minister of Finance No.76/PMK.011/2012 of 21 May 2012¹³;
- Regulation of the Minister of Finance No.105/PMK.010/2016 "Concerning the provision of taxation and customs facilities for companies in industrial development areas and for industrial areas' companies" of 30 June 2016;¹⁴ and
- Any other instruments through which Indonesia implements and administers the measures at issue, including letters, circulars or other documents whereby requests are made, decisions are communicated and/or instructions are imparted; whether between Indonesian authorities or to individual or groups of companies directly or indirectly benefitting from the import duty exemptions for the "building" or "development" of industry contingent upon the use of domestic goods and equipment.

¹² Available in English at: http://www.flevin.com/id/lqso/translations/JICA%20Mirror/english/4494_176_PMK.011_2009_e.html, last accessed on 19 November 2019.

¹³ Available in English at: http://www.flevin.com/id/lqso/translations/JICA%20Mirror/english/4770_76_PMK.011_2012_e.html, last accessed on 19 November 2019.

¹⁴ Available in Indonesian at <https://jdih.kemenkeu.go.id/fullText/2016/105~PMK.010~2016Per.pdf>, last accessed on 19 November 2019.