



12 December 2022

(22-9218)

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Original: English

INDONESIA – MEASURES RELATING TO RAW MATERIALS

NOTIFICATION OF AN APPEAL BY INDONESIA UNDER ARTICLE 16.4 AND ARTICLE 17 OF THE UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES (DSU), AND UNDER RULE 20(1) OF THE WORKING PROCEDURES FOR APPELLATE REVIEW

The following communication, dated 8 December 2022, from the delegation of Indonesia, is being circulated to Members.

Notification of an Appeal by Indonesia under Article 16.4 and Article 17 of the
Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU),
and Under Rule 20(1) of the Working Procedures for Appellate Review

1. Pursuant to Articles 16.4 and 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") and Rule 20 of the Working Procedures for Appellate Review (WT/AB/WP/6) ("Working Procedures"), Indonesia hereby notifies the Dispute Settlement Body ("DSB") of its decision to appeal certain issues of law and legal interpretation in the report of the Panel in *Indonesia – Measures Relating to Raw Materials* (WT/DS592) ("Panel Report").
2. In accordance with Rules 20(1) and 21(1) of the Working Procedures, Indonesia files this Notice of Appeal together with its Appellant's Submission with the Appellate Body Secretariat.
3. As there are no Appellate Body Members to compose a Division to hear Indonesia's appeal at this time, Indonesia awaits further instructions from the Division, once composed, on any further steps to be taken by Indonesia in this appeal. Indonesia reserves the right to re-file or amend this Notice of Appeal and its Appellant's Submission.
4. The measures at issue consist of an export prohibition and a domestic processing requirement ("DPR") in respect of nickel ore.¹
5. The issues that Indonesia raises in this appeal relate to the Panel's findings and conclusions in respect of:
 - The applicability of Article XI:1 of the General Agreement on Tariffs and Trade 1994 ("GATT 1994") to the DPR and the consistency of that measure with the obligation in Article XI:1;
 - the *exemption* of the measures at issue from the obligation in Article XI:1 by virtue of Article XI:2(a) of the GATT 1994; and
 - the *justification* of the measures at issue under Article XX(d) of the GATT 1994 in the event that they are inconsistent with the obligation under Article XI:1 of the GATT 1994.

¹ The export prohibition at issue is implemented in MEMR Regulation 11/2019 and MOT Regulation 96/2019, while the DPR is implemented in MEMR Regulation 25/2018.

6. Non-appeal of any issue contained in the Panel Report does not signify Indonesia's agreement therewith.

7. Pursuant to Rule 20(2)(d)(iii) of the Working Procedures, this Notice of Appeal provides an indicative list of the paragraphs of the Panel Report containing the alleged errors of law and legal interpretation developed by the Panel, without prejudice to Indonesia's ability to rely on other paragraphs of the Panel Report in its appeal.

I. REVIEW OF THE PANEL'S FINDINGS UNDER ARTICLE XI:1 OF THE GATT 1994

8. Indonesia seeks review by the Appellate Body of the Panel's conclusion that the DPR is inconsistent with Article XI:1 of the GATT 1994.² The Panel's errors of law and legal interpretation include:

- The Panel erred in its interpretation of Article XI:1 in finding that the term "sale for export" in that provision covers non-discriminatory internal measures;³
- The Panel erred in its application of Article XI:1 in finding that the DPR is a measure on the "sale for export" within the meaning of Article XI:1 of the GATT 1994;⁴
- The Panel erred in its application of Article XI:1 in finding that the DPR by its very nature has a limiting effect on exports.⁵

9. Indonesia respectfully requests the Appellate Body to reverse the above Panel findings under Article XI:1 of the GATT 1994.⁶

10. Indonesia further requests the Appellate Body to declare moot and of no legal effect the Panel's ultimate conclusion in paragraph 8.3 of the Panel Report that the DPR is inconsistent with Article XI:1 of the GATT 1994.

11. Consequently, Indonesia requests the Appellate Body to declare moot and of no legal effect the Panel's conclusions in paragraph 8.3 of the Panel Report that: (i) the DPR is not a prohibition or restriction temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to Indonesia within the meaning of Article XI:2(a) of the GATT 1994; and (ii) the DPR is not justified under Article XX(d) of the GATT 1994.

II. REVIEW OF THE PANEL'S FINDINGS UNDER ARTICLE XI:2(A) OF THE GATT 1994

12. Indonesia seeks review by the Appellate Body of the Panel's findings that the measures at issue are not exempted from the obligation in Article XI:1 of the GATT 1994 because Indonesia had not established that the measures at issue meet the requirements of Article XI:2(a) of the GATT 1994.⁷ The legal errors committed by the Panel include:

- The Panel erred in its application of Article XI:2(a), or, in the alternative, acted inconsistently with Article 11 of the DSU in finding that Indonesia had not established that nickel ore is "essential" to Indonesia within the meaning of Article XI:2(a) because the downstream industries that use it as an input were not yet sufficiently important;⁸
- The Panel erred in its application of Article XI:2(a) or, in the alternative, acted inconsistently with Article 11 of the DSU in finding that Indonesia had not established

² Panel Report, paras. 7.159-7.161.

³ Panel Report, paras. 7.59, 7.66 and 7.85.

⁴ Panel Report, paras. 7.66, 7.85 and 7.159.

⁵ Panel Report, paras. 7.75, 7.84, 7.85, 7.160, and 7.161. Indonesia appeals this finding of the Panel on a conditional basis, i.e., in the event that the Appellate Body *does not* reverse the Panel's findings that: (i) the term "sale for export" in Article XI:1 of the GATT 1994 covers non-discriminatory internal measures; and (ii) the DPR is a measure on the sale for export within the meaning of Article XI:1 of the GATT 1994.

⁶ Panel Report, paras. 7.75, 7.84, 7.85.

⁷ Panel Report, paras. 7.153 and 7.154.

⁸ Panel Report, para. 7.101

an imminent "critical shortage" of nickel ore within the meaning of Article XI:2(a) because future prospective demand was too attenuated;⁹

- The Panel erred in its application of Article XI:2(a) or, in the alternative, acted inconsistently with Article 11 of the DSU in finding that the measures at issue were not "temporarily applied" within the meaning of Article XI:2(a) because the Panel expected them to last an indefinite period.¹⁰

13. Accordingly, Indonesia respectfully requests the Appellate Body to reverse the above findings of the Panel under Article XI:2(a) of the GATT 1994¹¹ and declare moot and of no legal effect the Panel's finding that Indonesia had not established that the measures at issue meet the requirements of Article XI:2(a).¹²

14. Consequently, Indonesia respectfully requests the Appellate Body to declare moot and of no legal effect the Panel's ultimate conclusions in paragraphs 8.2 and 8.3 of its Report that the measures at issue are inconsistent with Article XI:1 of the GATT 1994 and are not justified under Article XX(d) thereof.

III. REVIEW OF THE PANEL'S FINDINGS UNDER ARTICLE XX(D) OF THE GATT 1994

15. Indonesia seeks review by the Appellate Body of the Panel's findings that the measures at issue are not justified under Article XX(d) of the GATT 1994 because they are not necessary to secure compliance with laws or regulations within the meaning of Article XX(d).¹³ The legal errors committed by the Panel include:

- The Panel erred in its application of Article XX(d) in finding that Article 96(d) of Law No. 4/2009 does not constitute a law or regulation within the meaning of Article XX(d) because it is not an enforceable obligation whose compliance can be secured;¹⁴
- The Panel erred in its application of Article XX(d) in finding that Indonesia had failed to demonstrate that the challenged measures are apt to make a material contribution to securing compliance with Article 96(c) of Law No. 4/2009;¹⁵
- The Panel erred in its application of Article XX(d) in finding that an alternative measure proposed by the European Union in the form of an export authorization system would achieve at the very least the same level of contribution as the challenged measures in terms of securing compliance with Article 96(c) of Law No. 4/2009.¹⁶

16. Accordingly, Indonesia respectfully requests the Appellate Body to reverse the above Panel findings under Article XX(d) of the GATT 1994 and declare moot and of no legal effect the Panel's ultimate conclusions in paragraphs 8.2 and 8.3 of its Report that the challenged measures are not justified under Article XX(d).

⁹ Panel Report, para. 7.151.

¹⁰ Panel Report, para. 7.122.

¹¹ Panel Report, para. 7.154, 8.2 and 8.3.

¹² Panel Report, paras. 7.153 and 7.154.

¹³ Panel Report, paras. 7.286, 7.299, 7.342, 8.2 and 8.3.

¹⁴ Panel Report, paras. 7.192 and 7.201.

¹⁵ Panel Report, paras. 7.280-7.286 and 7.295-7.300.

¹⁶ Panel Report, para. 7.335.