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INDONESIA – MEASURES RELATING TO RAW MATERIALS

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to C to the Report of the Panel to be found in document WT/DS592/R.

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WORKING PROCEDURES OF THE PANEL

Adopted on 28 May 2021

General

1. (1) In this proceeding, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"). In addition, the following Working Procedures apply.

(2) The Panel reserves the right to modify these procedures or adopt additional procedures as necessary, after consultation with the parties.

Confidentiality

2. (1) In accordance with the DSU, the deliberations of the Panel shall be confidential, and the documents submitted to it shall be treated as confidential and shall be made available to the parties and, to the extent provided for in Article 10.3 of the DSU, to the third parties. Members shall treat as confidential information that is submitted to the Panel which the submitting Member has designated as confidential.

(2) In accordance with the DSU, nothing in these Working Procedures shall preclude a party or third party from disclosing statements of its own positions to the public.

(3) If a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public. A party should endeavour to promptly[1] provide a non-confidential summary to any Member requesting it. The Panel may, upon request, fix a time-limit within which the party should endeavour to provide such summary.

(4) Upon request, the Panel may adopt appropriate additional procedures for the treatment and handling of confidential information after consultation with the parties.

Submissions

3. (1) Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which it presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel.

(2) Each party shall also submit to the Panel, before the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

(3) Each third party that chooses to make a written submission before the first substantive meeting of the Panel with the parties shall do so in accordance with the timetable adopted by the Panel.

(4) The Panel may invite the parties or third parties to make additional submissions during the proceeding, including with respect to requests for preliminary rulings in accordance with paragraph 4 below, and, if necessary for comments from the other party or third parties on such additional submission.

[1] Normally within 10 working days of the request.

Preliminary rulings

4. (1) If Indonesia considers that the Panel should make a ruling before the issuance of the Report that certain measures or claims in the panel request or the complainant's first written submission are not properly before the Panel, the following procedure applies. Exceptions to this procedure shall be granted upon a showing of good cause.

   a. Indonesia shall submit any such request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. The European Union shall submit its response to the request before the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request.

   b. The Panel may issue a preliminary ruling on the issues raised in such a preliminary ruling request before, during or after the first substantive meeting, or the Panel may defer a ruling on the issues raised by a preliminary ruling request until it issues its Report to the parties.

   c. If the Panel finds it appropriate to issue a preliminary ruling before the issuance of its Report, the Panel may provide reasons for the ruling at the time that the ruling is made, or subsequently in its Report.

   d. Any request for such a preliminary ruling by the respondent before the first meeting, and any subsequent submissions of the parties in relation thereto before the first meeting, shall be served on all third parties. The Panel may provide all third parties with an opportunity to provide comments on any such request, either in their submissions as provided for in the timetable or separately. Any preliminary ruling issued by the Panel before the first substantive meeting on whether certain measures or claims are properly before the Panel shall be shared with all third parties.

   (2) This procedure is without prejudice to the parties' right to request other types of preliminary or procedural rulings during the proceeding, and to the procedures that the Panel may follow with respect to such requests.

Evidence

5. (1) Each party shall submit all evidence to the Panel no later than during the first substantive meeting, except evidence necessary for purposes of rebuttal, or evidence necessary for answers to questions or comments on answers provided by the other party. Exceptions may be granted upon a showing of good cause.

   (2) Parties seeking to provide additional evidence must make a showing of good cause. If the new evidence is admitted, the Panel shall accord

6. (1) If the original language of an exhibit or portion thereof is not a WTO official working language, the submitting party or third party shall simultaneously submit a translation of the exhibit or relevant portion into the WTO official working language of the proceeding. The Panel may grant reasonable extensions of time for the translation of exhibits upon a showing of good cause.

   (2) Any objection as to the accuracy of a translation should be raised as soon as possible in writing, preferably no later than the next submission or meeting (whichever occurs earlier) following the submission which contains the translation in question. Only upon a showing of good cause may objections be raised at a later stage of the proceedings. Any objection shall be accompanied by an explanation of the grounds for the objection and an alternative translation.

7. (1) To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute, indicating the submitting Member and the number of each exhibit on its cover page. Exhibits submitted by the European Union should be numbered EU-1, EU-2, etc. Exhibits submitted by Indonesia should be numbered IDN-1, IDN-2, etc. If the last exhibit in

connection with the first submission was numbered EU-5, the first exhibit in connection with the next submission thus would be numbered EU-6. If a party withdraws an exhibit or leaves one or more exhibits intentionally blank, it should indicate this on the cover page that provides the number of the blank exhibit.

(2) With each of its submissions, statements, and responses to questions attaching new exhibits, a party shall provide an updated list of exhibits (in Word or Excel format).

(3) If a party submits a document that has already been submitted as an exhibit by the other party, it should explain why it is submitting that document again, particularly if the translation of that document differs from the one already provided (see paragraph 6(2) above).

(4) If a party includes a hyperlink to the content of a website in a submission, and intends that the cited content form part of the official record, the cited content of the website shall be provided in the form of an exhibit along with the date that it was last accessed.

Editorial Guide

8. To facilitate the work of the Panel, each party and third party is invited to make its submissions in accordance with the WTO Editorial Guide for Panel Submissions (electronic copy provided).

Questions

9. The Panel may pose questions to the parties and third parties at any time, including:

a. Before any meeting, the Panel may send written questions, or a list of topics it intends to pursue in questioning orally during a meeting. The Panel may ask different or additional questions at the meeting.

b. The Panel may put questions to the parties and third parties orally during a meeting, and in writing following the meeting, as provided for in paragraphs 15 and 21 below.

Substantive meetings[2]

10. The Panel shall meet in closed session.

11. The parties shall be present at the meetings only when invited by the Panel to appear before it.

12. (1) Each party has the right to determine the composition of its own delegation when meeting with the Panel.

(2) Each party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceeding and the submissions of the parties and third parties.

13. Each party shall provide to the Panel the list of members of its delegation no later than 5.00 p.m. (Geneva time) three working days before the first day of each meeting with the Panel.

14. A request for interpretation by any party should be made to the Panel as early as possible, preferably at the organizational stage, but no later than three weeks before the meeting, to allow sufficient time to ensure availability of interpreters.

[2] The deadlines for providing notice to the Panel in this section may be modified in the event of a virtual hearing or in light of any sanitary protocols adopted for future access to the WTO premises.

15. The first substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall invite the European Union to make an opening statement to present its case first. Subsequently, the Panel shall invite Indonesia to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. If interpretation is needed, each party shall provide additional copies for the interpreters before taking the floor.

b. Each party should avoid lengthy repetition of the arguments in its submissions. Each party is invited to limit the duration of its opening statement to not more than 75 minutes. If either party considers that it requires more time for its opening statement, it should inform the Panel and the other party at least three working days before the meeting, together with an estimate of the expected duration of its statement. The Panel will accord equal time to the other party.

c. After the conclusion of the opening statements, the Panel shall give each party the opportunity to make comments or ask the other party questions.

d. The Panel may subsequently pose questions to the parties.

e. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement. The party that presented its opening statement first shall present its closing statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its closing statement, if available.

f. Following the meeting:

i. Each party shall submit a final written version of its opening statement and any prepared closing statement no later than 5.00 p.m. (Geneva time) on the first working day following the meeting.

ii. Each party shall send in writing, within the timeframe established in the timetable adopted by the Panel or as adjusted by the Panel before the end of the meeting, any questions to the other party to which it wishes to receive a response in writing.

iii. The Panel shall send in writing, within the timeframe established in the timetable adopted by the Panel or as adjusted by the Panel before the end of the meeting, any questions to the parties to which it wishes to receive a response in writing.

iv. Each party shall respond in writing to the questions from the Panel, and to any questions posed by the other party, within the timeframe established in the timetable adopted by the Panel or as adjusted by the Panel before the end of the meeting.

16. The second substantive meeting of the Panel with the parties shall be conducted in the same manner as the first substantive meeting with the Panel, except that Indonesia shall be given the opportunity to present its opening statement first. The party that presented its opening statement first shall present its closing statement first.

17. The Panel reserves the right to adopt additional working procedures governing substantive meetings with remote participation, as necessary.

Third party session[3]

18. The third parties have the right to be present during the third-party session mentioned in the next paragraph, as well as when invited by the Panel to appear before it.

19. Each third party may present its views orally during a session of the first substantive meeting with the parties set aside for that purpose.

20. (1) Each third party shall indicate to the Panel no later than 5.00 p.m. five working days before the third-party session, unless otherwise indicated by the Panel, whether it intends to make a statement during this session.

(2) To ensure the availability of interpreters, the third parties shall also indicate as soon as possible and preferably three weeks before the third-party session whether they intend to make their statement in a WTO official working language other than English, which is the language in which these panel proceedings are being conducted, and whether they would require interpretation from English to any other WTO official working language.

21. (1) Each third party has the right to determine the composition of its own delegation when meeting with the Panel.

(2) Each third party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU, these Working Procedures and any other Working Procedures adopted by the Panel, particularly with regard to the confidentiality of the proceeding and the submissions of the parties and third parties.

(3) Each third party shall provide, no later than five working days before the third-party session, unless otherwise indicated by the Panel, a list of members of its delegation who will attend the session.

22. The third-party session shall be conducted as follows:

a. All parties and third parties may be present during the entirety of this session.

b. The Panel shall first hear the statements of the third parties. Each third party making a statement at the third-party session shall provide the Panel and other participants with a provisional written version of its statement before it takes the floor. If interpretation of a third party's statement is needed, that third party shall provide additional copies for the interpreters before taking the floor.

c. Each third party should limit the duration of its statement to 15 minutes and avoid repetition of the arguments already in its submission. If a third party considers that it requires more time for its statement, it should inform the Panel and the parties at least five working days before the meeting, together with an estimate of the expected duration of its statement. The Panel will accord equal time to all third parties for their statements.

d. After the third parties have made their statements, the parties shall be given the opportunity to pose questions, through the Panel, to any third party for clarification on any matter raised in that third party's submission or statement.

e. The Panel may subsequently pose questions to any third party.

f. Following the third-party session:

i. Each third party shall submit the final written version of its statement, no later than 5.00 p.m. (Geneva time) on the first working day following the meeting.

[3] The deadlines for providing notice to the Panel in this section may be modified in the event of a virtual hearing or in light of any sanitary protocols adopted for future access to the WTO premises.

ii. Each party may send in writing, within the timeframe established in the timetable adopted by the Panel or as adjusted by the Panel before the end of the meeting, any questions to one or more third parties to which it wishes to receive a response in writing.

iii. The Panel may send in writing, within the timeframe established in the timetable adopted by the Panel or as adjusted by the Panel before the end of the meeting, any questions to one or more third parties to which it wishes to receive a response in writing.

iv. Each third party choosing to do so shall respond in writing to questions from the Panel or a party, within the timeframe established in the timetable adopted by the Panel or as adjusted by the Panel before the end of the meeting.

23. The Panel reserves the right to adopt additional working procedures governing third-party sessions with remote participation, as necessary.

Descriptive part and executive summaries

24. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

25. Each party shall submit a single integrated executive summary of the facts and arguments as presented to the Panel. The timing of the submission of the integrated executive summary shall be indicated in the timetable adopted by the Panel.

26. The single integrated executive summary shall not exceed 30 pages. The Panel will accept additional pages upon request and with good cause.

27. Each third party shall submit an integrated executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This integrated executive summary may also include a summary of responses to questions. The executive summary to be provided by each third party shall not exceed ten pages. If a third-party submission and statement do not exceed six pages in total, there is no need for a separate executive summary of that third party's arguments. That third party may, however, provide a separate executive summary if it so wishes.

28. The Panel may request the parties and third parties to provide executive summaries of facts and arguments presented in any other submissions to the Panel for which a deadline may not be specified in the timetable.

Interim review

29. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

30. If no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review. Such written comments shall be limited to the other party's written request for review and shall be submitted in accordance with the timetable adopted by the Panel.

Interim and Final Report

31. The interim report, as well as the final report before its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

32. The following procedures regarding service of documents apply to all documents submitted by parties and third parties during the proceeding:

a. Each party and third party shall submit all documents to the Panel by submitting them via the Disputes On-Line Registry Application (DORA) https://dora.wto.org by 5:00 p.m. (Geneva time) on the due dates established by the Panel. The electronic version uploaded into DORA shall constitute the official version for the purposes of submission deadlines and the record of the dispute. Upload of a document into DORA shall constitute service on the Panel, the other party, and the third parties.

b. Each party and third party shall submit one paper copy of all documents it submits to the Panel in a WTO official working language (i.e. English, French or Spanish), including the exhibits, with the DS Registry (office No. 2047) for the DS Registry's archive within three working days following the electronic submission, by 5:00 p.m. (Geneva time). The DS Registrar shall stamp the documents with the date and time of receipt. If an exhibit is in a format that is impractical to submit as a paper copy, then the party may submit such exhibit in a format agreed upon with the DS Registry and the Panel Secretary. In this case, the party should still submit a cover page with the exhibit number indicating that the exhibit is only available in electronic format or such format agreed upon with the DS Registry and the Panel Secretary. If, for any reason, the DS Registry office is unavailable for the service of paper copies, the "next working day" shall mean the day that the Panel determines for such delivery once normal operations have resumed.

c. The Panel shall provide the parties with the Descriptive Part of the Report, the Interim Report, and the Final Report, as well as all other documents or communications issued by the Panel during the proceeding, via DORA. In addition, the Panel shall provide to the parties paper copies of the Descriptive Part of the Report, the Interim Report, and the Final Report on the date that these documents are uploaded in DORA.

d. If the parties or third parties have any questions or technical difficulties relating to DORA, they are invited to contact the DS Registry (DSRegistry@wto.org).

e. If any party or third party is unable to meet the 5:00 p.m. deadline because of technical difficulties in uploading these documents into DORA, the party or third party concerned shall inform the DS Registry (DSRegistry@wto.org) without delay and provide an electronic version of all documents to be submitted to the Panel by email including any exhibits. The email shall be addressed to DSRegistry@wto.org, the Panel Secretary, the other party and, if appropriate, the third parties. The documents sent by email shall be submitted no later than 5:30 p.m. on the due date established by the Panel. If the file size of specific exhibits makes transmission by email impossible, or it would require more than five email messages, owing to the number of exhibits to be filed, to transmit all of them by email, the specific large file size exhibits, or those that cannot be attached to the first five email messages, shall be filed with the DS Registry (office No. 2047) and provided to the other party and, if appropriate, the third parties by no later than 9:30 a.m. the next working day on an electronic medium acceptable to the recipient. In that case, the party or third party concerned shall send a notification to the DS Registrar, copying the Panel Secretary, the other party, and the third parties, as appropriate, via email, identifying the numbers of the exhibits that cannot be transmitted by email.

f. In case any party or third party is unable to access a document filed through DORA because of technical difficulties, it shall promptly, and in any case no later than 5:00 p.m. on the next working day after the due date for the filing of the document, inform the DS Registrar, the Panel Secretary, and the party or third party that filed the document, of the problem by email and shall, if possible, identify the relevant document(s). The DS Registrar will promptly try to identify a solution to the technical problem. In the meantime, the party or third party that filed the document(s) shall, promptly after being informed of the problem, provide an electronic version of the relevant document(s) to the affected party or third party by email, with a copy to the DS Registry (DSRegistry@wto.org) and the Panel Secretary to allow access to the document(s) while the technical problem is being addressed. The DS Registrar may provide an electronic version of the relevant

document(s) by email if the affected party or third party so requests. The DS Registrar shall in that case copy the party or third party that filed the document(s) on the email message.

Correction of clerical errors in submissions

33. The Panel may grant leave to a party or third party to correct clerical errors in any of its submissions (including paragraph numbering and typographical mistakes). Any such request should identify the nature of the errors to be corrected and should be made promptly following the filing of the submission in question.

ANNEX A-2

ADDITIONAL WORKING PROCEDURES CONCERNING BUSINESS CONFIDENTIAL INFORMATION

Adopted on 28 May 2021

1. These procedures adopted in accordance with paragraph 2(4) of the Panel's working procedures are additional to the general protection of confidential information set forth in paragraph 2(1) of the Panel's working procedures and apply to any business confidential information (BCI) that a party or a third party submits in the course of the present Panel proceedings.

2. For the purposes of these proceedings, BCI means any information that has been designated as such by a party or a third party submitting the information to the Panel, that is not available in the public domain, and the release of which could reasonably be considered to cause or threaten to cause serious harm to the interests of the originator(s) of the information.

3. Each party and third party shall act in good faith and exercise restraint in designating information as BCI. The Panel shall have the right to intervene in any manner that it deems appropriate, if it is of the view that restraint in the designation of BCI is not being exercised.

4. No person shall have access to BCI, except a member of the Panel or the WTO Secretariat[1] assigned to work on the present dispute, an employee of a party or a third party, an outside advisor or an expert providing assistance to the Panel, a party, or a third party and their clerical staff for the purposes of this dispute. A person having access to BCI shall not disclose that information other than to persons authorized to have access to it pursuant to these procedures. Any information designated as BCI shall only be used for the purposes of this dispute. Each party and third party is responsible for ensuring that its employees, outside advisors, and experts comply with these procedures.

5. An employee of a party or a third party, an outside advisor, or an expert assisting the Panel, a party or a third party is not permitted access to BCI if that employee, outside advisor, or expert is an officer or employee of an enterprise, or an association of enterprises, engaged in the production, distribution, sale, export, or import of the products affected by the measures at issue in this dispute.

6. The party or third party submitting BCI, including referring to or quoting BCI already submitted by another party or third party, shall mark the cover or first page, and each page of the document containing BCI to indicate the presence of such information in any document submitted to the Panel. Documents containing BCI should be marked as follows:

    a. The cover or first page of the document shall state in bold "**Contains Business Confidential Information on pages xxxxx**".

    b. Each page of the document which contains BCI shall indicate in bold "**Contains Business Confidential Information**" at the top of the page.

    c. Where the document contains both BCI and non-BCI information, the specific BCI in question shall be placed between double square brackets, as follows: [[xx,xxx.xx]]; and

    d. The party or third party shall indicate that the document contains BCI when uploading the document into the Dispute Online Registry Application (DORA).

7. Representatives of, and outside advisers to, each of the parties and, where relevant under paragraphs 9 and 11, representatives of, and outside advisers to, the third parties shall be

[1] Including translators and interpreters.

notified to the Panel, other party, and third parties in a list containing the names, titles, and employers of persons legitimately requiring access to the BCI. The list for each party is to be first submitted at the latest by one week before the due date of the first written submission of the complainant. The list of each party or third party shall be subsequently amended and re-submitted if the names, titles, or employers are changed. Parties and third parties may give access to BCI only to outside advisers and experts providing assistance to the parties in these proceedings and their clerical staff.

8. On the request of either party, the Panel will review whether particular confidential information it has submitted is so sensitive that it should not be provided to the third parties, taking into consideration the need for the third party to have access to the particular information. If the Panel finds such information to be particularly sensitive, it will direct the party submitting the information to provide a summary of the contents of the redacted information that will be made available to the third parties.

9. A party or a third party submitting BCI in the form of, or as part of, an exhibit shall, in addition to the above, so indicate by putting "BCI" next to the exhibit number (e.g. Exhibit IDN-1 (BCI)) in the Exhibit list. The party or third party shall also indicate that the exhibit contains BCI when uploading it into DORA. If the entire content of an exhibit constitutes BCI, the cover page and the top of each page of the exhibit shall state in bold "**All of the information included in this exhibit is Business Confidential Information**" without it being necessary to place all of the specific information in that exhibit between double brackets.

10. Any BCI that is submitted in binary-encoded form shall include the terms "Business Confidential Information" or "BCI" in the file name. Upon uploading to DORA of a document in binary-encoded form containing BCI, the confidentiality level for the document shall be selected as "BCI". In addition, where applicable, the label of the storage medium shall be clearly marked with the statement "Business Confidential Information" or "BCI".

11. If an oral statement contains BCI, the party or third party making such a statement shall inform the Panel accordingly three working days in advance of the Panel meeting so appropriate arrangements can be made. The Panel will ensure that only persons authorized to have access to BCI pursuant to these procedures can hear that statement. The written versions of such oral statements submitted to the Panel shall be marked as provided for in paragraphs 6 through 10 above.

12. If a party or a third party considers that information submitted by the other party or a third party should have been designated as BCI and objects to its submission without BCI designation, it shall forthwith bring this objection to the attention of the Panel, the other party, and, where relevant, the third parties, together with the reasons for the objection. The Panel shall address the objection, as appropriate. The same procedure should be followed if a party or a third party considers that the other party or a third party identified as BCI information which should not be so designated. Unless impracticable, if a party, a third party, or the Panel, contests the non-designation or designation of information as BCI, the party making the objection shall do so within five working days of the information having been submitted.

13. Any person authorized to have access to documents containing BCI under the terms of these procedures shall store such documents, including in electronic form, so as to prevent unauthorized access to such information.

14. The Panel will not disclose BCI, in its report or in any other way, to persons not authorized under these procedures to have access to BCI. The Panel may, however, make statements of conclusion drawn from such information. Before the Panel circulates its final report to the Members, it shall give each party an opportunity to review the report to ensure that it does not disclose any information that the party has properly designated as BCI.

15. At the conclusion of the dispute[2], and within a period to be fixed by the Panel, each party and third party shall either return all documents (including electronic material) containing BCI,

[2] Where this is defined as when (a) the Panel or Appellate Body report is adopted by the DSB, or the DSB decides by consensus not to adopt the Panel or the Appellate Body report; (b) the authority for the

submitted during the Panel proceedings, to the party that submitted such documents or certify in writing to the Panel and the other parties that all such documents have been destroyed, or otherwise protect the BCI against public disclosure, consistent with the party's obligations under its domestic laws. The WTO Secretariat shall have the right to retain the documents containing BCI for the archives of the WTO.

16. Documents containing information designated as BCI form part of the official record of the dispute for purposes of any further proceedings under the DSU. Parties seeking to have that information protected in a similar way in further proceedings should address such a request to the appropriate body and should do so as early as possible so as to ensure procedures are in place before the DS Registry transmits the record of the proceeding. When transmitting the record, the DS Registry will indicate which documents contain BCI.

17. The Panel reserves the right, after consulting with the parties, to amend or supplement these Additional Working Procedures concerning BCI.

establishment of the Panel lapses under Article 12.12 of the DSU; or (c) a mutually satisfactory solution is notified to the DSB under Article 3.6 of the DSU.

ANNEX A-3

ADDITIONAL WORKING PROCEDURES CONCERNING SUBSTANTIVE MEETINGS WITH REMOTE PARTICIPATION

Adopted on 5 October 2021

General

1. These Additional Working Procedures set out terms for holding the substantive meetings of the Panel remotely.

Definitions

2. For the purposes of these Additional Working Procedures:

"DORA" means the Disputes Online Registry Application.

"Host" means the designated person within the WTO Secretariat responsible for the management of the platform for participants to take part in the meeting with the Panel.

"Participant" means any authorized person taking part in the meeting, including the Members of the Panel, the WTO Secretariat staff involved in the dispute and the organization of the meeting, members of the parties' and third parties' delegations, and interpreters.

"Platform" means the Cisco Webex platform.

Equipment and technical requirements

3. Each party and third party shall be responsible for ensuring that the members of its delegation join the meeting using the designated platform and satisfy the minimum equipment and technical requirements of the platform provider for the effective conduct of the meeting.

4. Technical questions, including the minimum equipment and technical requirements for the usage of the platform, will be addressed in the advance testing sessions between the host and participants provided for in paragraph 7 below.

Technical support

5. (1) The Secretariat has limited ability to offer remote assistance during, and in advance of the meeting. Each party and third party, therefore, is responsible for providing its own technical support to the members of its delegation.

(2) The host will assist participants in accessing and using the platform in preparation for, and during the course of, the meeting with the Panel. The host will prioritize assisting those participants designated as main speakers on the delegations' lists.

Pre-meeting

Registration

6. Each party and third party shall provide to the Panel the list of the members of its delegation on the dedicated form in Annex 1 below, no later than 5:00 p.m. (Geneva time) ten working days before the start of the meeting. The list shall indicate those participants designated as main speakers.

Advance testing

7. The Secretariat will hold two testing sessions with participants before the substantive meeting with the Panel. One of these sessions will be a joint session with all participants in the meeting. These testing sessions will seek to reflect, as far as possible, the conditions of the proposed meeting. Participants should make themselves available for the testing sessions. The Secretariat will be in contact with the participants to set the schedule of the testing sessions in due course.

Confidentiality and security

8. The meeting shall be confidential and the rules of the DSU continue to apply during the remote session of the meeting.

9. Each party and third party shall follow any security and confidentiality protocols set by the Panel in advance of the meeting.

10. The participants shall connect to the meeting through a secure internet connection and shall avoid the use of an open or public internet connection.

Conduct of the meeting

Recording

11. The Secretariat will record the meeting in its entirety. The recording of the meeting shall form part of the panel record.

12. Any recording of the meeting or any part thereof other than that referred to in paragraph 11, through any means, including audio or video recording, or screenshot, is prohibited.

Access to the virtual meeting

13. Participants shall access the virtual meeting in accordance with these Additional Working Procedures.

14. (1) The host will invite participants via email to join the virtual meeting.

(2) For security reasons, access to the virtual meeting will be password-protected and limited to participants. Participants shall not forward or share the virtual meeting link or password with unauthorized persons.

(3) Each party and third party shall ensure that only participants from its delegation access the virtual meeting.

Advance log-on

15. (1) The virtual meeting room will be accessible 60 minutes in advance of the scheduled start time of the meeting.

(2) To ensure that the meeting starts as scheduled, participants must login to the platform at least 30 minutes in advance of the scheduled start time of the meeting.

(3) Participants will be placed in a virtual lobby where they will remain until the Panel is ready to start the meeting, at which time the host will admit them to the meeting.

Document sharing

16. (1) Before each party or third party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement through DORA, including any exhibits.

(2) Any participant wishing to share a document with the other participants during the meeting – including via screen sharing - shall upload the document to DORA and confirm that

the other participants have received the document, before first referring to the document at the meeting.

(3) Participants are encouraged to have DORA open to facilitate upload and download of shared documents.

Pauses for internal coordination and consultation

17. Parties are free to internally coordinate and consult while the meeting is ongoing so long as it is not disruptive to the proceedings, but they should be aware that the chat feature of the platform is visible to all participants. The Panel may briefly pause a session at any time, on its own initiative or upon request of a party, to enable any necessary internal coordination and consultation.

Participation

18. Participants who are not speaking are expected to have their microphone on mute. They may also wish to turn off their camera to preserve bandwidth. If a participant wishes to take the floor, they should use the "raise a hand" function in the platform. Once the chairperson gives the floor to the participant, they should unmute their microphone and turn their camera on.

Communication breakdown

19. Each party and third party will designate a contact person who can liaise with the host during the course of the meeting to report any technical issues that arise with respect to the platform. The parties and third parties shall immediately notify the Panel of any technical or connectivity issues affecting the participation of their delegation, or a member of their delegation, in the meeting. To do so, the party or third party that experiences the technical or connectivity issue shall:

(1) if possible, immediately intervene at the meeting and briefly state the nature of the issue experienced; or

(2) if doing so is not possible, immediately contact the host and explain the nature of the issue experienced. The host can be contacted via the platform chat, by sending an email to @wto.org, or by telephone at +41 22 739 .

20. The Panel may suspend the proceedings until the technical issue is resolved or continue the proceedings with those that are connected.

Relationship with the Working Procedures adopted by the Panel or Relationship with the adopted Working Procedures

21. These Additional Working Procedures complement the Working Procedures adopted by the Panel, and to the extent of any conflict between the two, supersede them.

INDONESIA — MEASURES RELATING TO RAW MATERIALS (DS592)

FIRST SUBSTANTIVE MEETING WITH THE PANEL

DATE

DELEGATION LIST OF [MEMBER]

Full name	Position / Title	Email address	Phone number where the participant can be reached on meeting day	Whether the participant plans to attend the virtual meeting remotely or from the WTO premises

Using boldface, please indicate who on the above list will deliver statements or is likely to take the floor during the meeting.

Name and contact details of the person who will liaise with the host on technical issues:

ANNEX A-4

ADDITIONAL WORKING PROCEDURES CONCERNING SUBSTANTIVE MEETINGS WITH REMOTE PARTICIPATION

Adopted on 5 October 2021

General

1. These Additional Working Procedures set out terms for holding the substantive meetings of the Panel remotely.

Definitions

2. For the purposes of these Additional Working Procedures:

"DORA" means the Disputes Online Registry Application.

"Host" means the designated person within the WTO Secretariat responsible for the management of the platform for participants to take part in the meeting with the Panel.

"Participant" means any authorized person taking part in the meeting, including the Members of the Panel, the WTO Secretariat staff involved in the dispute and the organization of the meeting, members of the parties' and third parties' delegations, and interpreters.

"Platform" means the Cisco Webex platform.

Equipment and technical requirements

3. Each party and third party shall be responsible for ensuring that the members of its delegation join the meeting using the designated platform and satisfy the minimum equipment and technical requirements of the platform provider for the effective conduct of the meeting.

4. Technical questions, including the minimum equipment and technical requirements for the usage of the platform, will be addressed in the advance testing sessions between the host and participants provided for in paragraph 7 below.

Technical support

5. (1) The Secretariat has limited ability to offer remote assistance during, and in advance of the meeting. Each party and third party, therefore, is responsible for providing its own technical support to the members of its delegation.

(2) The host will assist participants in accessing and using the platform in preparation for, and during the course of, the meeting with the Panel. The host will prioritize assisting those participants designated as main speakers on the delegations' lists.

Pre-meeting

Registration

6. Each party and third party shall provide to the Panel the list of the members of its delegation on the dedicated form in Annex 1 below, no later than 5:00 p.m. (Geneva time) ten working days before the start of the meeting. The list shall indicate those participants designated as main speakers.

Advance testing

7. The Secretariat will hold two testing sessions with participants before the substantive meeting with the Panel. One of these sessions will be a joint session with all participants in the meeting. These testing sessions will seek to reflect, as far as possible, the conditions of the proposed meeting. Participants should make themselves available for the testing sessions. The Secretariat will be in contact with the participants to set the schedule of the testing sessions in due course.

Confidentiality and security

8. The meeting shall be confidential and the rules of the DSU continue to apply during the remote session of the meeting.

9. Each party and third party shall follow any security and confidentiality protocols set by the Panel in advance of the meeting.

10. The participants shall connect to the meeting through a secure internet connection and shall avoid the use of an open or public internet connection.

Conduct of the meeting

Recording

11. The Secretariat will record the meeting in its entirety. The recording of the meeting shall form part of the panel record.

12. Any recording of the meeting or any part thereof other than that referred to in paragraph 11, through any means, including audio or video recording, or screenshot, is prohibited.

Access to the virtual meeting

13. Participants shall access the virtual meeting in accordance with these Additional Working Procedures.

14. (1) The host will invite participants via email to join the virtual meeting.

(2) For security reasons, access to the virtual meeting will be password-protected and limited to participants. Participants shall not forward or share the virtual meeting link or password with unauthorized persons.

(3) Each party and third party shall ensure that only participants from its delegation access the virtual meeting.

Advance log-on

15. (1) The virtual meeting room will be accessible 60 minutes in advance of the scheduled start time of the meeting.

(2) To ensure that the meeting starts as scheduled, participants must login to the platform at least 30 minutes in advance of the scheduled start time of the meeting.

(3) Participants will be placed in a virtual lobby where they will remain until the Panel is ready to start the meeting, at which time the host will admit them to the meeting.

Document sharing

16. (1) Before each party or third party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement through DORA, including any exhibits.

(2) Any participant wishing to share a document with the other participants during the meeting – including via screen sharing - shall upload the document to DORA and confirm that

the other participants have received the document, before first referring to the document at the meeting.

(3) Participants are encouraged to have DORA open to facilitate upload and download of shared documents.

Pauses for internal coordination and consultation

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Participation

18. Participants who are not speaking are expected to have their microphone on mute. They may also wish to turn off their camera to preserve bandwidth. If a participant wishes to take the floor, they should use the "raise a hand" function in the platform. Once the chairperson gives the floor to the participant, they should unmute their microphone and turn their camera on.

Communication breakdown

19. Each party and third party will designate a contact person who can liaise with the host during the course of the meeting to report any technical issues that arise with respect to the platform. The parties and third parties shall immediately notify the Panel of any technical or connectivity issues affecting the participation of their delegation, or a member of their delegation, in the meeting. To do so, the party or third party that experiences the technical or connectivity issue shall:

(1) if possible, immediately intervene at the meeting and briefly state the nature of the issue experienced; or

(2) if doing so is not possible, immediately contact the host and explain the nature of the issue experienced. The host can be contacted via the platform chat, by sending an email to @wto.org, or by telephone at +41 22 739 .

20. The Panel may suspend the proceedings until the technical issue is resolved or continue the proceedings with those that are connected.

Relationship with the Working Procedures adopted by the Panel or Relationship with the adopted Working Procedures

21. These Additional Working Procedures complement the Working Procedures adopted by the Panel, and to the extent of any conflict between the two, supersede them.

INDONESIA — MEASURES RELATING TO RAW MATERIALS (DS592)

THIRD-PARTY SESSION OF THE FIRST SUBSTANTIVE MEETING WITH THE PANEL

DATE

DELEGATION LIST OF [MEMBER]

Full name	Position / Title	Email address	Phone number where the participant can be reached on meeting day	Whether the participant plans to attend the virtual meeting remotely or from the WTO premises

Using boldface, please indicate who on the above list will deliver statements or is likely to take the floor during the meeting.

Name and contact details of the person who will liaise with the host on technical issues:

_____

ANNEX B

ARGUMENTS OF THE PARTIES

ANNEX B-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

1 INTRODUCTION

1. The case concerns two measures of the Republic of Indonesia ("Indonesia"), namely *firstly* the export prohibition of nickel ore ("the Export Prohibition") and *secondly* the domestic processing requirements on nickel ore ("the Domestic Processing Requirement"). These measures are inconsistent with Article XI:1 of the General Agreement on Tariffs and Trade 1994 (the "GATT 1994") and Indonesia cannot advance any justification for them. Because of these inconsistencies, Indonesia's measures nullify and impair the benefits accruing to the European Union, directly or indirectly, under the covered agreements.

2 THE MEASURES ARE INCONSISTENT WITH ARTICLE XI:1 OF THE GATT 1994

2.1 The Legal standard

2. The terms of Article XI:1 of the GATT 1994 show that that provision contains a broad prohibition on export prohibitions and export restrictions. It is not necessary to quantify the limiting effect of the measures at issue in order to demonstrate that a measure is inconsistent with the provision.

3. Nothing in the text of Article XI:1 of the GATT 1994 indicates that it only captures "border measures" and that therefore "internal measures" are excluded from its scope of application, as Indonesia claims. On the contrary, several aspects of the very wording of this provision show that "internal" measures are within the scope of application of this provision.

2.2 The Export Prohibition is inconsistent with Article XI:1 of the GATT 1994

4. Indonesia has restricted the export of nickel ore since at least 2014. This measure has been implemented through a variety of Indonesian legal instruments.

5. Currently and since January 2020, Indonesia prohibits all exports of nickel ore. In the period Between at least 2014 and January 2020, the scope of the Export Prohibition has been adapted at times for low-grade ore with a nickel content of less than 1,7 %, under conditions.

6. The Export Prohibition is inconsistent with Article XI:1 of the GATT 1994, as it legally prohibits the exportation of nickel ore.

2.3 The Domestic Processing Requirement is inconsistent with Article XI:1 of the GATT 1994

7. The Domestic Processing Requirement consists in a legal obligation imposed on all holders of mining licences in Indonesia to process/refine nickel ore in a manner specified in the relevant domestic Indonesian regulations, in particular MEMR Regulation 25/2018. Unprocessed nickel ore cannot be exported.

8. The Domestic Processing Requirement is an export prohibition/restriction within the meaning of Article XI:1 of the GATT 1994 because the legal obligation to purify and/or process raw mining products in Indonesia prior exporting the relevant goods is designed and operates so as to restrict the possibility to export the unpurified and unprocessed nickel ore. A legal requirement to process nickel ore domestically – the existence of which Indonesia does not contest – is by its very design, architecture and revealing structure an export prohibition or restriction within the meaning of Article XI:1 of the GATT 1994: such requirement automatically means that the nickel ore in question cannot be exported anymore, as it is subject to mandatory processing.

9. Indonesia's argument that the Domestic Processing Requirement does not have a 'limiting effect' because the temporal application of the Export Prohibition overlaps with the Domestic Processing Requirement should be rejected: Indonesia seems to consider that the two measures at issue in the present case (the Export Prohibition and the Domestic Processing Requirement) necessarily have to be assessed together. This is incorrect: the subject-matter of the present dispute are two distinct measures, and the Panel should assess them separately.

3 THE MEASURES ARE NOT JUSTIFIED UNDER ARTICLE XI:2 (A) OF THE GATT 1994

10. The measures at issue do not meet any of the requirements of Article XI:2 (a) of the GATT 1994. Indonesia has failed to demonstrate: (1) that there is a "critical shortage" of nickel ore; (2) that nickel ore is an "essential product" for Indonesia; and (3) that the measures at issue are "applied temporarily".

3.1 The measures are not designed to prevent a critical shortage of nickel ore, but instead to develop Indonesia's processing industry

11. The measures at issue are not designed to prevent a "critical shortage" of nickel ore. Rather, they are part of a long-standing Government policy aimed at assisting and promoting the development of Indonesia's processing industry of mineral products, including nickel ore. This is evidenced by the explicit motivation included in the legal instruments through which the measures at issue are implemented; by repeated and consistent public statements made by high-ranking Government officials, including Indonesia's President; and by numerous Government policy document including planning documents. Moreover, an examination of the structure and design of the measures at issue reveals that, in practice, they are incapable of achieving the objective of preventing the alleged "critical shortage" of nickel ore. The measures at issue cannot, and will not, limit the production of nickel ore in Indonesia. The only practical effect of the measures at issue (and the only reason why they have been adopted) is replacing exports of nickel ore with exports of higher added value processed products, including stainless steel.

3.1.1 The alleged risk of shortage is too remote

12. In its first written submission Indonesia alleged that the measures seek to "prevent" a risk of shortage at some uncertain point in the future. In later submissions, however, Indonesia appears to be arguing that the measures at issue seek to address an existing critical shortage. Indonesia bases this new allegation on the assertion that, according to the Maryono report, in 2020 domestic demand for nickel ore exceeded domestic production.

13. As explained by the European Union, this assertion is highly misleading. The mere fact that in 2020 the maximum theoretical processing capacity of the Indonesian smelters exceeded the production of nickel ore does not prove the existence of a shortage of nickel ore. There are other reasons, besides a shortage of nickel ore, which may explain why the Indonesian smelters did not process nickel ore up to their maximum processing capacity in 2020. World demand and consumption of stainless steel, the main final use of nickel ore, fell significantly during the first half of 2020, largely due to the impact of the COVID 19 pandemic. This may explain why production of nickel ore in Indonesia was slightly less in 2020 than in 2019 and, consequently, the capacity utilization rate of the smelting facilities was lower. According to the U.S. Geological Survey, mine production in Indonesia increased by an estimated 30% between 2020 and 2021 and was, therefore, much higher in 2021 than at any time prior to the introduction of the Export Ban in 2019.

3.1.2 The alleged risk of shortage is not temporary

14. Furthermore, the "critical shortage" alleged by Indonesia does not stem from a temporary event (such as a "natural disaster") that causes a "passing need". Indonesia has alleged that, in the absence of the measures in dispute, a "critical shortage" was "likely to ensue" because Indonesia's usable reserves "have a total lifespan of merely 6 years at current production and consumption levels". The progressive depletion reserves alleged by Indonesia is not, however, a "passing need". It is a definitive and unavoidable outcome, as long as mining continues. That

outcome cannot be "prevented" by applying export restrictions "temporarily", as required by Article XI:2(a).

3.1.3 The alleged risk of shortage has been self-created by Indonesia through the application of the measures at issue

15. As shown by the European Union, there is no shortage of nickel ore, whether "existing" or "imminent". In any event, the alleged shortage could not be regarded as "critical" because it would be a structural and durable shortage self-created by Indonesia through the use of export restrictions. In essence, Indonesia argues that it needs to maintain export restrictions in place in order to ensure the future supply of a domestic processing industry created by applying those export restrictions. Upholding that justification would be tantamount to rewarding Indonesia for the persistent breach of one of its most fundamental WTO obligations.

3.1.4 The alleged "deficiency in quantity" is neither likely nor serious

16. Indonesia has failed to show that the alleged risk of "deficiency in quantity" of nickel ore is sufficiently likely and grave so as to rise to the level of a "critical shortage".

17. As just explained, Indonesia's most recent allegation that there is a "current imbalance" between supply and demand of nickel ore is entirely baseless.

18. As regards Indonesia's allegation that Indonesia's usable reserves of nickel have a total lifespan of merely 6 years from 2019, the European Union has shown that the Maryono report underestimates considerably Indonesia's current reserves.

19. The complete exclusion of limonite and LGSO from the estimate of reserves over the period 2020-2026 is unwarranted.

20. The lack of CP verification might justify a reasonable downward adjustment of the reserves reported to the Geological Agency. On the other hand, excluding entirely any reserves which do not comply with that requirement is manifestly disproportionate in order to address the "shortcomings" invoked by Indonesia. Moreover, it is counterproductive, as it results in an estimate that is far less accurate and credible than the Geological Agency's estimate, which does include those reserves.

21. Moreover, the Maryono report uses an asymmetrical methodology where supply and demand are assessed on a different basis. Whereas the report takes into account a projected (and massive) increase in smelter ore consumption between 2020 and 2026, it assumes that no new reserves of nickel ore will be added during the same period. That assumption, however, is manifestly unreasonable.

22. Indonesia's allegations of a critical shortage of nickel "in the short term" are refuted by other evidence, including evidence supplied by Indonesia in this dispute. For example, according to Indonesia's "Mining Guidance (2020)", published in 2020 by Indonesia's Directorate General of Mineral and Coal, "The investment opportunity of smelter in Indonesia is very promising since the mineral mining production is very high and the reserves availability is still abundant for a long term".

23. Indonesia's allegations are further contradicted by the massive investments made in recent years in additional capacity for processing nickel ore in Indonesia, including by Indonesia's state owned enterprises.

3.2 Nickel is not an "essential product" for Indonesia

24. Indonesia has failed to demonstrate that nickel is an "essential product" within the meaning of Article XI:2(a) of the GATT 1994. As explained by the European Union, the relative economic importance of the product concerned is irrelevant for the purposes of Article XI:2(a). That provision is not designed to enable Members to use export restrictions as an instrument of industrial policy with a view to promoting the development of sectors which each Member regards as being of particular importance to its economic development.

25. Contrary to Indonesia's assertions, there is nothing in the report of the Appellate Body in China-Raw Materials which may lend support to Indonesia's misguided reading of the term "essential product". The issue of whether a product can be regarded as "essential" within the meaning of Article XI:2(a) by reason of its relative economic importance was not before the Appellate Body. The mere fact that, as clarified by the Appellate Body, Article XI:2(a) may be invoked with regard to a critical shortage of an exhaustible natural resource caused by extraordinary circumstances, such as a "natural disaster"[1], does not have the implication that the "essential" character of a product is to be determined in view of its relative economic importance.

26. Furthermore, the measures at issue do not help Indonesia's nickel ore sector. To the contrary, they limit demand for Indonesia's nickel ore and depress prices in Indonesia's domestic market. It is illogical to invoke the economic importance of the nickel ore sector in order to justify a measure which is detrimental to that sector. It is even more illogical to invoke that Indonesia is one of the largest exporters of nickel as a justification for banning those exports. As regards other economic indicators cited by Indonesia in its second written submission, the European Union notes that the nickel mining industry could be a larger source of government revenue and employment in the absence of the measures at issue.

27. The measures at issue are designed to assist Indonesia's processing industry, and in particular the stainless steel industry. Indonesia's production of stainless steel already exceeds by far Indonesia's present and foreseeable future domestic needs. Largely as a result of the measures at issue, Indonesia has become one of the world's largest exporters of stainless steel. Furthermore, Indonesia's exports of stainless steel are projected to continue to increase massively over the next few years. Even assuming that the relative economic importance of the product concerned was relevant for the purposes of Article XI:2(a), none of these developments might be regarded as "essential" within the meaning of that provision.

3.3 Indonesia has failed to demonstrate that the measures are temporarily applied

3.3.1 The Legal Standard

28. It is apparent from the wording of Art. XI:2(a) of the GATT 1994 that the defence which that rule provides for only applies to measures which are "temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party".

29. The very drafting of this provision shows that the limitation to measures which are "temporarily applied" is linked to the objective pursued by the measures, namely to prevent or relieve the critical shortages to which that provision makes reference.

30. It must be possible to clearly identify the temporal limitation of the measure from its design, architecture and objective. It cannot be sufficient in this respect that the Member in question simply alleges that the measure is temporal. Rather, objective aspects of the measure, capable of being properly scrutinised by a panel, must indicate that the measure is only temporarily applied.

3.3.2 The Measures at issue are not applied only temporarily

3.3.2.1 The Export Prohibition is not applied only temporarily

31. Indonesia supplies no valid argument why the Export Prohibition was adopted in order to address a "passing need", or to face a situation which was expected to last only a limited amount of time. On the contrary, the record before the Panel demonstrates that the Indonesian measures pursue a different objective, and that they are not only "temporarily applied".

32. Indonesia argues that the Export Prohibition on nickel ore is applied only temporarily, because – according to Indonesia – previous export prohibitions on nickel ore were applied only temporarily. This argument is conceptually wrong, and it relies on an incomplete and misleading description of the past application of export prohibitions on nickel ore.

[1] Appellate Body Report, *China- Export Restrictions*, para. 337.

33. *First*, it is unpersuasive to refer to the way in which export prohibitions were applied in the past to argue that the current export prohibition is also only applied temporarily.

34. *Second*, in any event, Indonesia's argument relies on a misleading description of the way in which the export prohibition on nickel ore was applied in the past. Indonesia suggests that since 2014 the export prohibition has been in force only on an interim basis. But Indonesia's policy is best described as a (complete) ban on nickel ore export at least since January 2014, which was however slightly relaxed with regard to low-grade nickel ore, for limited periods of time, and under strict conditions. Indeed, what is apparent is that Indonesia has been applying an export prohibition on nickel ore for a significant number of years, with slight modulations of the scope of that policy. This can hardly be seen as evidence for the proposition that the export prohibition was only temporarily applied in the past.

35. Further, Indonesia argues that the export ban implemented by MEMR Regulation 11/2019 and MOT Regulation 96/2019 was only in application for 14 days at the time of panel establishment. This argument is also misguided and should be rejected.

36. The amount of time during which a measure was applied before panel establishment cannot be a persuasive argument when determining whether that measure is only temporarily applied.

37. In any event, Indonesia's argument is based on an incorrect description of the length of application of the Export Ban on nickel ore currently being applied by Indonesia. Indonesia pretends that that ban has only been applied for "merely 14 days" at the time of panel establishment.

3.3.2.2 The domestic processing requirement is not only temporarily applied

38. Indonesia's argument concerning the duration of application of the Domestic Processing Requirement is based on the proposition that that requirement was only 'applied' in those periods of time when no export prohibition on nickel ore was applied. This proposition is unconvincing as it is based on an incorrect description of the relationship between the Domestic Processing Requirement and the Export Prohibition.

4 THE MEASURES ARE NOT JUSTIFIED UNDER ARTICLE XX (D) OF THE GATT 1994

4.1 Introduction

39. Indonesia claims that the two measures are justified under Article XX (d) of the GATT 1994 as they are "preventative measures" adopted to secure compliance with its "comprehensive policy for [the] sustainable mining and mineral resource management".[2]

40. The European Union maintains that Indonesia has not demonstrated that the legal standard under Article XX (d) is met and, in any event, there are less trade restrictive and reasonably available alternatives to the highly trade restrictive measures it has applied.

4.1.1 Any "law or regulation" relied upon under Article XX (d) must be sufficiently identified and must contain a sufficient degree of normative content

41. A party invoking Article XX (d) must, as a preliminary step, identify the "laws or regulations" with which it contends the measure at issue are designed (and necessary) to secure compliance. For the purposes of Article XX (d), the term "laws or regulations" has been held to refer to "*rules that form part of the domestic legal system of a WTO Member*". As the concept of securing compliance is central to the defence embodied in Article XX (d), the rules in question must contain a sufficient degree of normative content. Indeed, the concept of "compliance" denotes a link with enforceability. The Appellate Body has recognised that the broader the terms in which a law or regulation is drafted, the more complex the task of identifying that normative content becomes (India Solar cells, paragraph 5.110).

[2] Indonesia's first written submission, para. 145.

42. During the second substantive meeting, Indonesia clarified that the relevant laws or regulations that it contends the challenged measures seek to secure compliance with are set out in Article s 96(c) and (d) of Law No. 4/2009 and Article 57 of Law No. 32/2009.

43. The European Union does not contest that Article 96 (c) and (d) of Law No. 4/2009 and Article 57 of Law No. 32/2009 form part of the domestic legal system in Indonesia. Nor does it contest the WTO consistency of those laws as such. However, Indonesia has not sufficiently identify the rules or course of conduct which it claims those provisions prescribe.

44. Article 96 of Law No. 4/2009 sets out obligations that IUP and IUPK holders must implement. These include "c. mining environment management and monitoring, including reclamation and post-mining activities;" and "d. mineral and coal conservation efforts." These provisions are framed in general terms and define a broad task as opposed to specific rules or a course of conduct. Therefore, they are insufficiently specific to constitute a rule or regulation with which compliance is to be secured within the meaning of Article XX (d).

45. Article 57 of Law No. 32/2009 provides for different means by which the "maintenance of environment shall be conducted". This provision is formulated in very general terms, is potentially extremely broad in scope and as such also lacks the requisite degree of normative content or specificity for the purposes of Article XX (d). Moreover, whilst Indonesia asserts in its responses to the Panel questions that Article 57 contains sustainable mining requirement because it refers to "preservation of the function of the atmosphere", this is not substantiated.

4.2 Indonesia has not demonstrated that the measures are designed to secure compliance with rules relating to environmental protection or the management of natural resources

46. In the event that the Panel considers Indonesia has sufficiently identified "laws or regulations" within the meaning of Article XX (d), (quod non), Indonesia has, in any event, failed to demonstrate that the measures at issue are designed in terms of their "content, structure and expected operation", to secure compliance with laws or regulations aimed at environmental protection or the conservation of natural resources. As already explained, the measures are in fact designed to increase the added value of Indonesia's exports.

47. The European Union recalls that the Panel is not required to consider the aptitude of Article 96 and Article 57 to meet their stated environmental objectives, but rather the aptitude of the two measures to secure "compliance" with those rules. Therefore, prior panels have found that measures that may be consistent with or further the objectives of a law or regulation, but which do not enforce any obligations contained therein, do not fall within the scope of Article XX (d). In other words, even if a measure (such as a ban) has an incidental consequence on furthering a policy objective, this is not sufficient for it to fall within the scope of Article XX (d).

4.2.1 Export Ban

48. Indonesia's arguments can be distilled down to a claim that as in the past nickel ore extraction was export oriented and as there were documented issues of predatory mining practices in the Sulawesi and Maluku regions, the ban on all exports is "designed" to ensure compliance with domestic environmental standards and ensure compliance with rules relating to the conservation of natural resources. Indonesia links this claim to a further assertion that the ban "*reduces total nickel ore production and extraction, therefore contributing to the proper enforcement of good mining practice requirements and to the proper management of Indonesia's nickel reserves and resources*".[3]

49. Indonesia's arguments are misconceived and unsubstantiated.

50. Indonesia has not demonstrated that the export ban is 'designed' to secure compliance with domestic environmental standards. The evidence it has adduced confirms that it is designed to increase value of nickel ore.

[3] Indonesia's response to question 45.b.

51. The export ban is not 'designed' to reduce nickel ore production or extraction. There is no limit on domestic consumption or extraction. The export ban is designed to change the destination of ore once it is extracted and increase domestic smeltering.

52. Indonesia invites the panel to presume that because there have been issues with illegal mining in the past and because almost all ore was for export, it is the end destination of the ore which is the driver of compliance issues. However, the compliance issues it identified relate to the geography of Indonesia and essentially un-particularised and vague so-called "jurisdictional" issues. Moreover, whilst the European Union does not dispute that there is evidence of environmental damage on the record, Indonesia has not demonstrated that this is due to the destination of the ore as opposed to the process of mining and extraction itself.

4.2.2 Domestic Processing Requirement

53. Indonesia claims that the Domestic Processing Requirement is designed to secure compliance with Indonesia's sustainable mining and environmental rules by (i) creating vertical integration in the supply chain and (ii) by discouraging spot sales of nickel ore.

54. Indonesia has not demonstrated that the Domestic Processing Requirement was designed for this purpose. Indeed, Indonesia has not demonstrated the nexus between the "laws or regulations" with which it is seeking to secure compliance and this measure.

55. First, there are no specific references in the legislation establishing the domestic processing requirement to the provisions on which Indonesia relies for the purpose of its claim under Article XX (d).

56. Second, the documents on the record attest to the true objective of the domestic processing requirement, namely increasing domestic smelting capacity.

4.3 Indonesia has not demonstrated that the measures are necessary to secure compliance with rules relating to environmental protection or the management of natural resources

57. Indonesia has failed to show that these specific measures are necessary within the meaning of Article XX (d) of the GATT.

58. First, whilst the European Union does not dispute that environmental protection and the conservation of natural mineral resources in principle constitute legitimate societal interests, Indonesia has not shown that the actual objective pursued by the measures is to secure compliance with rules on environmental protection and the conservation of natural resources. Second, Indonesia has not shown that these particularly trade restrictive measures are necessary to achieve that purported objective in the sense that they contribute sufficiently to their achievement. Third, less trade restrictive alternatives are reasonably available to Indonesia to make an equivalent contribution to the compliance objective allegedly pursued. Indeed, in order to show that a measure is "necessary" under Article XX (d), a party relying on that exception must do more that demonstrate that the measure is capable of contributing towards that objective. The Panel is required to conduct a holistic assessment, taking in to account not only the objective pursued but also the degree of trade restrictiveness and the contribution of the measures.

4.3.1.1 Trade restrictiveness

59. The export ban is an extremely trade restrictive measure preventing all exports of all nickel ore. This does not appear to be disputed.

60. Indonesia invites the Panel to conclude that the Domestic Processing Requirement has no restrictive effects over the ban. As explained above, this is misconceived. The two measures fall to be assessed separately. It is also highly trade restrictive, preventing the export of unprocessed nickel ore.

4.3.1.2 Contribution

61. Indonesia appears to believe that as it contends the laws and regulations on which it relies form part of an overall mining policy, it is exonerated from the requirement to demonstrate the contribution, in quantitative or qualitative terms that the measures may make to securing their compliance objective. However, even if the Panel were to accept that the export ban and domestic processing requirement are part of a general 'sustainable' mining policy, Indonesia must still adduce evidence showing that there is a genuine relationship of ends and means as between the interest invoked (securing the enforcement of environmental/sustainable mining rules) and the measures themselves. It has failed to do so.

62. Indonesia claims that the export prohibition on nickel ore demonstrably reduces the amount of nickel extracted, which in turn mitigates the negative environmental consequences of nickel mining and the risks of resource depletion.

63. The relevant legal question, however, is the contribution of the measures to addressing the enforcement of the environmental/ conservation standards identified. Moreover, the claim that there is a reduction in extraction is not substantiated.

64. Indonesia's reasoning also presupposes that such environmental effects as it has demonstrated are caused (and will continue to be caused) by the exportation of nickel ore. However, Indonesia has not demonstrated that the extraction of nickel ore for exports as opposed to the extraction of nickel ore as such is responsible for the scope of the adverse environmental effects it identified. The alleged causal link reposes on the sole basis that historically nickel ore that was extracted from predatory mining practices was for export (as was a large proportion of all nickel ore mined in Indonesia). This does not account for legal exports of ore.

65. Moreover, Indonesia has placed evidence on the record that demonstrates that environmental issues continue. This indicates precisely that limiting the ultimate destination of the ore is not apt to secure compliance with the environmental standards.

66. Indonesia relies on affidavit evidence and expert reports prepared during the course of the proceedings to affirm that enforcement of the environmental standards has improved since the introduction of the export ban and Domestic Processing Requirement. However, Indonesia's own export acknowledges that in 2020, changes to enforcement structures were introduced (centralisation), and that these changes have impacted significantly on the issuing of licences and monitoring functions. Indonesia has never suggested that these measures are necessary to secure compliance with rules that criminalise breaches of specific environmental standards, nor that they are necessary to secure compliance with a prohibition on predatory mining.

67. In any event, it is not possible to assess the contribution of the measures to the compliance objective on the basis of this evidence which does not show causality nor account for other significant changes in the regulatory system.

68. As to the domestic processing requirement, Indonesia has not substantiated its claim that compliance with the same environmental standards that were applicable previously is better secured through the alleged changes to vertical integration this measure induces. Nor has it shown that removing spot sales is a necessary means to secure compliance.

69. The long term supply contracts Indonesia refers to do not apply to the whole of the domestic market. The only enforcement issues Indonesia initially identified related to the remote geography of the regions where the mines are situated. Whilst Indonesia claims that it is now easier to check that the volumes of ore sent for domestic processing match the authorised quantities in the mining permits, it has not advanced any persuasive argument as to why this type of check could not be undertaken as regards exports and hence, why this is a necessary measure. It refers to generalised "jurisdictional" issues but has not shown why it is necessary to address these though a total export ban and the Domestic Processing Requirement.

4.3.2 There are adequate less, or non-trade restrictive alternatives to the export ban and domestic processing requirement that would achieve the alleged objective

70. Indonesia asserts that each of the two measures it identifies pursue one single objective, namely securing compliance with the rules on environmental standards and resource conservation as defined in the legal provisions it identifies as the relevant laws or regulations for these purposes (Article 96 (c) and (d) of Law No.4/2009 and Article 57 of Law No.32/2009).

71. There are adequate less or non-trade restrictive measures which could equally contribute to that alleged objective and the European Union has proposed one such alternative measure.

72. Whilst the European Union must show that its alternative would contribute equally in addressing the compliance issues that Indonesia has identified, the European Union is not required to identify two separate measures and nor is it required to identify an alternative measure that applies the same regulatory approach to that in the Indonesian measures. Moreover, for the Panel's assessment, the relevant objective is that of securing compliance with environmental standards, as opposed to other effects that the Indonesian measures may allegedly have.

73. As an alternative to the complete ban on exports and the Domestic Processing Requirement, the European Union proposes an export authorisation system, whereby exports of nickel ore would be permitted upon production by the exporter of a document attesting that the nickel ore has been mined in compliance with all the environmental requirements that Indonesia purports to enforce through these measures. This type of export authorisation system could build on the mechanisms introduced previously in Indonesia domestic law as CnC certification. However, it is different to that scheme.

74. According the legislative provisions cited by Indonesia, CnC certification was afforded at the point in time when a mining permit was issued. To the extent that it was relevant in the context of export authorisations, this was only as a check that the permit holder had been granted this status.

75. Under the alternative proposed by the European Union, the export authorisation system would require a check at the point of export that each specific consignment of ore for which export approval is sought meets the environmental standards Indonesia claims it is seeking to secure compliance with. The same system could equally entail a check that the quantities of ore correspond to those authorised in the RKAB.

76. Indonesia claims that the contribution of its domestic processing requirement is that it allows this specific level of regulatory scrutiny and that it maintains control within the jurisdiction. The European Union's alternative would be a less trade restrictive means to extend equivalent regulatory scrutiny to the point of export – whilst maintaining the checks within Indonesia's jurisdiction.

77. Indonesia claims that it can only reduce extraction rates and ensure compliance with environmental standards if it controls demand. This argument must be assessed in a context in which it has introduced no measures to control domestic demand or consumption. To the extent that this argument is then linked to alleged jurisdictional issues, these can, as explained above, be resolved by imposing a check within the territory of Indonesia prior to export.

78. Whilst, the precise substantive scope of CnC certification and in particular the environmental standards and sustainable mining requirements it encompassed, has not been fully explained or substantiated by Indonesia, given that currently Indonesia applies a complete ban on exports of nickel ore, rather than a system of prior export authorization, the proposed alternative is plainly not part of the measures already applied.

4.4 Indonesia has not demonstrated that the application of the measures is consistent with the chapeau of Article XX of the GATT 1994

4.4.1 The Legal Standard

79. The chapeau imposes an additional discipline on the exception provided by Article XX of the GATT 1994. In order to be successful in claiming that a certain measure which is inconsistent with the disciplines of the GATT 1994 is justified by application of Article XX, the Member relying on this exception must not only demonstrate that the specific conditions in the relevant

subparagraphs (a) to (j) of Article XX are fulfilled; but also that they comply with the chapeau, which contains further conditions and limitations of the defence under Article XX.

80. With regard to the interpretation of "arbitrary or unjustifiable discrimination", prior Appellate Body jurisprudence therefore underscores the importance of examining the question of whether the discrimination can be reconciled with, or is rationally related to, the stated policy objective of the measure.

81. Concerning the correct order of analysis, it will normally be appropriate for a panel to first assess whether the specific conditions of one of the specific exceptions listed in Article XX (a) to (j) of the GATT 1994 are met, before turning to the disciplines set out in the chapeau, there may be cases where the panel can properly determine whether the conditions of Article XX are fulfilled by finding that the chapeau has not been complied with. The European Union considers that the present case may be one of these instances and that the Panel could therefore start its analysis by determining that the conditions of the chapeau are not met.

4.4.2 Indonesia's measures do not comply with the chapeau of Article XX of the GATT 1994

82. Indonesia's measures clearly discriminate between foreign and domestic purchasers of nickel ore.

83. This discrimination is also arbitrary and unjustifiable. The measures at issue cannot be reconciled with, or be regarded as rationally related to, the alleged policy objective of the measures at issue. Indonesia's Export Prohibition and Domestic Processing Requirement prohibit and restrict exports, while they in no way whatsoever limit domestic consumption of nickel ore. Indeed, the European Union has demonstrated that Indonesia tries to foster a stronger domestic use of nickel ore. These measures cannot therefore be related to the alleged objective of environmental protection or the conservation of mineral resources insofar as they impose no limit on the domestic use of nickel ore.

84. Indonesia's measures therefore amount to arbitrary and unjustifiable discrimination within the meaning of the chapeau. As these measures are in reality designed to shift resources to domestic producers by resorting to means which are inconsistent with Article XI:1 of the GATT 1994, these measures can be regarded as "disguised restrictions on international trade" within the meaning of the chapeau: Indonesia alleges in the present proceedings that the measures service environmental concerns (and compliance with laws designed to safeguard such concerns), while in reality the objective pursued is to strengthen domestic industry.

85. The European Union therefore considers that Indonesia has not demonstrated that its measures comply with the chapeau of Article XX of the GATT 1994.

ANNEX B-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF INDONESIA

I. INTRODUCTION

1. At the core of this dispute is access to Indonesia's nickel resources.

2. Two decades ago, the exploitation of Indonesia's nickel was relatively manageable. However, between 2006 and 2013, Indonesia's nickel ore production increased *more than seven-fold*, with dire consequences for Indonesia's environment and the sustainability of its nickel resources. Predatory mining activities resulted in substantial environmental degradation in nickel producing areas: deforestation, land disturbance, water and soil contamination, and other environmental impacts associated with export-oriented nickel mining threatened the integrity of the Indonesian environment, and the livelihoods of indigenous people, fauna and ecosystems. Moreover, increased nickel extraction put a strain on Indonesia's nickel reserves and increased depletion rates to unsustainable levels. If left unchecked, nickel-mining activities in Indonesia would shortly result in the complete depletion of Indonesia's nickel reserves, leaving behind the curse of environmental destruction as a legacy for the Indonesian people.[1]

3. To mitigate these risks, Indonesia adopted a comprehensive policy framework to regulate mining activities. This comprehensive mining policy comprised multiple legal instruments such as a new basic mining law, environmental protection laws, water and forestry laws, a new resource conservation policy, improved resource and reserves reporting mechanisms, raw material certification, land reclamation and post-mining activities, among others. It imposes a number of requirements on regulators and private operators alike, with the objective of promoting sustainable mining practices and adequate management of Indonesia's mineral resources. Temporary export moratoria succeeded in immediately curbing nickel production to sustainable levels, and in enabling enforcement of Indonesia's comprehensive policy for mining activities. The results obtained were so significant that Indonesia gradually relaxed the export prohibition on nickel ore over time, and allowed Indonesian producers to resume export activities.

4. However, Indonesia is once again facing a second "gold rush" for its nickel resources. While global and domestic demand for nickel ore as an input into steel production remains strong, demand for nickel ore as an input to produce electric vehicle (EV) batteries is expected to explode in the next 20 years. Thus, Indonesia's nickel reserves and environment are once again at a critical juncture. The measures that have been challenged by the European Union in this dispute are crucial elements of Indonesia's comprehensive policy framework on sustainable mining and mineral resource management.[2]

5. This dispute is one of the most systemically important disputes before the WTO dispute settlement mechanism to date. Stripped to its essence, this dispute concerns whether WTO disciplines authorize developing WTO Members to use trade measures as part of a comprehensive policy framework to manage their natural resources in a sustainable manner, to the benefit of their economies and people.[3]

6. The European Union appears to consider that that the WTO Agreements have removed trade measures from the policy-makers' toolkit, and have conferred upon developed countries an unfettered right to the natural resources of developing WTO Members.[4] Indonesia disagrees. As stated in the preamble of the WTO Agreement, the covered agreements seek to expand production of and trade in goods and services, "while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment". In furtherance of this objective, the covered agreements — and in particular the GATT 1994 — provide developing WTO Members with sufficient policy space to use trade measures,

[1] Indonesia's first written submission, paras. 5-6.
[2] Indonesia's first written submission, paras. 9-10.
[3] Indonesia's opening statement at the first meeting of the Panel, para. 3.
[4] Indonesia's first written submission, para. 2.

such as those at issue in this dispute, to manage their natural resources and protect the environment in a WTO-consistent manner.[5]

7. The question before this Panel is whether the WTO will remain true to the terms of the original bargain that its Members struck in 1995; whether sustainable development is something more than an empty slogan, an aspiration; or whether, instead, WTO disciplines are sufficiently flexible to allow developing WTO Members to overcome the "resource curse" and develop themselves economically, while seeking to preserve and protect their natural resources and environment.[6]

8. The Panel must interpret the GATT 1994 in a manner that is consistent with the sustainable development objective in the first recital of the preamble to the WTO Agreement, and upholds the international law principle of Permanent Sovereignty over Natural Resources (PSNR).[7] This principle has attained the privileged status of customary international law, and the Panel is mandated to apply it pursuant to Article 31(3)(c) of the Vienna Convention and Article 3.2 of the DSU.[8] The principle of PSNR "affords Members the opportunity to use their natural resources to promote their own development while regulating the use of these resources to ensure sustainable development."[9]

9. In this dispute, the European Union invites the Panel to interpret the relevant provisions of the GATT 1994 in a manner that would empty the principle of PSNR of its normative content. The Panel must reject this invitation and, instead, interpret the relevant provisions of the GATT 1994 harmoniously with the principle of PSNR, as required by Article 31(3)(c) of the Vienna Convention.[10]

10. First, the principle of PSNR pleads against an interpretation of Article XI:1 under that effectively prohibits any non-discriminatory internal domestic regulations that have indirect impacts on competitive opportunities for exports. The corollary of such a reading is that importing countries have an *unfettered right* to the natural resources of exporting countries in the form of their raw materials. This is simply incompatible with the right of every country to exercise their permanent sovereignty over their natural wealth and resources "in the interest of their national development and the well-being *of the people of the State concerned*."[11]

11. Second, the principle of PSNR weighs against a reading of Article XI:2(a) of the GATT 1994 under which measures taken to prevent or relieve a critical shortage of natural resources are considered "incapable" of doing so simply because domestic production or consumption is not restricted. Likewise, the principle of PSNR does not support an interpretation of Article XX(d) of the GATT 1994 under which domestic production and consumption must *necessarily* be restricted in order to secure compliance with laws and regulations aimed at preserving the environment and conserving natural resources. The European Union's interpretation, predicated on the proposition that economic development and environmental and conservation efforts are somehow incompatible, does not comport with the principle that "[e]very country has the sovereign right … freely to dispose of its natural resources in the interest of the economic development and well-being of its own people."[12]

12. Third, the principle of PSNR pleads *against* a reading of Article XI:2(a) under which the relative economic importance of a product is *entirely irrelevant* for the purposes of that provision, because the reference to "foodstuffs" in Article XI:2(a) purportedly implies that only products that are "absolutely indispensable" to meet "the vital needs of the population" can be deemed "essential" under Article XI:2(a).[13] Such an interpretation would render Article XI:2(a) unavailable to prevent critical shortages of natural resources that are absolutely indispensable to the economies of WTO Members because they guarantee the livelihoods of millions of people. This is simply incongruent

[5] Indonesia's first written submission, para. 3.
[6] Indonesia's opening statement at the first meeting of the Panel, para. 8.
[7] Indonesia's opening statement at the second meeting of the Panel, para. 14.
[8] Indonesia's response to Panel question No. 80, para. 273.
[9] Panel Report, *China – Raw Materials*, para. 7.381.
[10] Indonesia's response to Panel question No. 80, para. 278.
[11] Indonesia's comments on the European Union's response to Panel question No. 80, para. 32 (quoting United Nations General Assembly Resolution 1803 (XVII), *Permanent Sovereignty Over Natural Resources,* 14 December 1962, Exhibit IDN-131 (emphasis added)).
[12] Indonesia's comments on the European Union's response to Panel question No. 80, para. 32 (quoting Proceedings of the United Nations Conference on Trade and Development, Geneva, 23 March-16 June 1964 – Vol.I: Final Act and Report by UNCTAD, Exhibit IDN-132, p. 10).
[13] European Union's second written submission, paras. 131 and 132.

with the "inalienable right of all countries to exercise permanent sovereignty over their natural resources *in the interest of their national development*."[14]

13. Fourth, the principle of PSNR is relevant to, and must be taken into account in, the interpretation of the chapeau of Article XX of the GATT 1994. In particular, it pleads against an interpretation of the chapeau under which a distinction between foreign and domestic purchasers constitutes "arbitrary or unjustifiable discrimination". The corollary of such a reading, again, is that importing countries have an *unfettered right* to the natural resources of exporting countries in the form of their raw materials, and this is simply incompatible with the right of every country to exercise sovereignty over their natural wealth and resources "in the interest of *their* national development."[15]

14. Indonesia is confident that this Panel will interpret the GATT 1994 in a manner that is consistent with the sustainable development objective in the first recital of the preamble to the WTO Agreement, and upholds the international law principle of PSNR.[16] The multilateral trading system is *ripe* for a finding that developing Members may use trade measures for sustainability and conservation purposes.[17]

II. INDONESIA'S PRELIMINARY JURISDICTIONAL CLAIM

15. In its first written submission, Indonesia raised a preliminary jurisdictional challenge under Articles 6.2 and 7.1 of the DSU in relation to MEMR Regulations 7/2012, 11/2012, 20/2013, and 1/2014. As Indonesia explained, these measures had not been subject to consultations, and their addition to the panel's terms of reference impermissibly expanded the temporal scope of the dispute and changed its essence to include measures that permitted rather than prohibited the exportation of nickel ore. Indonesia therefore requested that the Panel find that these measures are outside of its terms of reference under Articles 6.2 and 7.1 of the DSU.[18] It was not necessary for the Panel to issue a preliminary ruling to this effect, insofar as the European Union did not appear to seek findings of inconsistency in respect of the added measures. Subsequently, in its opening statement at the first meeting of the Panel, the European Union confirmed that it only sought panel findings in relation to the measures that currently implement the two measures at issue, namely, MEMR Regulations 25/2018 and 11/2019, and MOT Regulation 96/2019.[19]

16. Later in the proceedings, the European Union appeared to change its position, expressly requesting the Panel to make findings in relation to MEMR Regulation 1/2014 because this legal instrument purportedly was "still in force."[20] As Indonesia clarified, however, MEMR Regulation 1/2014 is *no longer in force* as subsequent MEMR Regulations have expressly revoked it.[21] The exclusive bases for the export prohibition on nickel ore presently in place are MEMR Regulation 11/2019 and MOT Regulation 96/2019.

17. The European Union subsequently agreed that MEMR Regulation 1/2014 is no longer in force.[22] Given the European Union's confirmation that it only seeks findings in relation to the current bases of the export prohibition on nickel ore, it may not be necessary for the Panel to determine whether this measure falls within its terms of reference.

[14] Indonesia's comments on the European Union's response to Panel question No. 80, para. 35 (quoting United Nations General Assembly Resolution 2158 (XXI), *Permanent Sovereignty Over Natural Resources,* 25 November 1966, Exhibit IDN-133, p. 29 (emphasis added)).

[15] Indonesia's comments on the European Union's response to Panel question No. 80, para. 36 (quoting United Nations General Assembly Resolution 1803 (XVII), *Permanent Sovereignty Over Natural Resources,* 14 December 1962, Exhibit IDN-131 (emphasis added)).

[16] Indonesia's opening statement at the second meeting of the Panel, para. 14.

[17] Indonesia's closing statement at the second meeting of the Panel, para. 16.

[18] Indonesia's first written submission, paras. 63-74.

[19] European Union's opening statement, paras. 6-9.

[20] European Union's response to Panel question No. 20(b), para. 32.

[21] Specifically, Article 22 of MEMR Regulation 5/2017 (Exhibit IDN-33) expressly revoked MEMR Regulation 01/2014 and implementing regulation upon its entry into force on 11 January 2017.

[22] European Union's answers to Panel question No. 72, para. 21.

III. ARTICLE XI:1 OF THE GATT 1994 IS NOT APPLICABLE TO THE DOMESTIC PROCESSING REQUIREMENT

18. The European Union failed to establish that Article XI:1 of the GATT 1994 is even *applicable* to the domestic processing requirement, let alone that it is inconsistent with that provision.[23] Article XI:1 applies strictly to *border measures* that have a limiting effect on importation or exportation. It does not apply to *internal measures*.[24] The Appellate Body has clarified that "border measures apply 'by virtue of the event of importation' while, by contrast, internal measures apply 'because of an *internal* factor'".[25] Applying this framework, the domestic processing requirement is *not* a border measure because it does not apply *by virtue of* the exportation of nickel ore. Instead, the domestic processing requirement is an internal measure triggered by an internal factor, namely, the production, sale and use of nickel ore.[26]

19. The European Union's attempt to establish that the scope of Article XI:1 is *not* limited to border measures is unavailing.[27] *First*, the European Union argues that Article XI:1 "is couched in general terms, encompassing 'prohibitions' as well as 'restrictions'", such that "the provision is therefore a broad one and not limited to only border measures."[28] However, the fact that Article XI:1 refers to "prohibitions" and "restrictions" indicates the limiting effect of the measures in question, but says *nothing* about whether such "prohibitions" and "restrictions" can be made effective through border measures, internal measures, or both, in order to fall within the scope of Article XI:1.[29]

20. *Second*, the European Union relies on the phrase "sale for export" in Article XI:1, and argues that "the very wording of Article XI:1 … includes a business activity which would have to be considered 'internal' … [and] this in and of itself demonstrates that that provision is not limited to 'border measures'".[30] Yet, a "sale for export" cannot be characterized as an internal measure merely because it takes place behind the border.[31] Instead, the relevant question in determining whether a measure applicable to a sale for export is a border or internal measure is what is the triggering event for its application. If a measure applies *only* to sales for export, then by definition it applies by virtue, or because of, those sales being destined for the export market. Accordingly, it is a border measure. Conversely, if a measure applies to sales for export *as well as* sales for the domestic market, then by definition it cannot be characterized as a border measure because it does not apply by virtue, or because of, sales being destined for export. The reference to "sale for export" in Article XI:1 thus simply confirms that this provision covers only border measures, in this instance measures that apply by virtue, or because of, a sale for export.[32]

21. *Third*, the European Union wrongly relies on the exclusion of "taxes or other charges" from the scope of Article XI:1 in support of its contention that "the prohibition is not limited to 'border measures'".[33] The reference to "duties, taxes or other charges" in Article XI:1 excludes from the scope of that provision measures falling within the scope of Article II of the GATT 1994, namely: (i) ordinary customs duties under Article II:1(b), first sentence; (ii) other duties or charges under Article II:1(b), second sentence; and (iii) border tax adjustments under Article II:2(a). The text of Articles II:1(b) and II:2 makes clear that such measures are undoubtedly border measures, i.e. measures imposed "on importation". Thus, the reference to "duties, taxes or other charges" in

[23] Indonesia's second written submission, paras. 29-45; Indonesia's opening statement at the second meeting of the Panel, paras. 15-23.

[24] Indonesia's second written submission, paras. 29-39; Indonesia's comments on the European Union's response to Panel question No. 78, paras. 12-22.

[25] Indonesia's second written submission, para. 37 (quoting Appellate Body Report, *China - Auto Parts*, paras. 158 and 163).

[26] Indonesia's opening statement at the second meeting of the Panel, para. 19.

[27] European Union's response to Panel question No. 78, para. 36.

[28] European Union's response to Panel question No. 78, para. 38.

[29] Indonesia's comments on the European Union's response to Panel question No. 78, para. 13.

[30] European Union's response to Panel questions No.78, para. 39.

[31] Indeed, the *locus* of application of a measure applicable to exports is particularly unhelpful in determining whether it constitutes a border or internal measure, because *both* border and internal measures apply "before" products have left the exporting Member. If the *locus* of a measure's application were dispositive of its characterization as a border or internal measure, then all measures applied to products destined for exportation would be characterized as "internal measures", even if they did not apply due to an internal factor but, instead, because of, or by virtue of, exportation (See Indonesia's comments on the European Union's response to Panel question No. 78, para. 15).

[32] Indonesia's comments on the European Union's response to Panel question No. 78, paras. 14-16.

[33] European Union's response to Panel question No. 78, para. 40.

Article XI:1 *supports* Indonesia's interpretation that this provision disciplines only *border* measures limiting importation or exportation.[34]

22. This is the only reading that is consistent with the fact that Article XI:1 proscribes only "prohibitions" or "restrictions" that are "made effective through quotas, import or export licences or other measures". The illustrative reference to "quotas, import or export licences" in Article XI:1 imparts meaning to the "other measures" through which "prohibitions" or "restrictions" can be "made effective" for the purposes of Article XI:1. It is beyond dispute that "quotas, import or export licences" are all border measures, i.e., they belong to a class of measures that are triggered by, or apply by virtue of, importation or exportation, rather than an *internal factor*. Accordingly, properly construed, Article XI:1 applies strictly to *border measures* that have a direct limiting effect on importation or exportation.[35]

23. Finally, there is no basis whatsoever for the European Union's apparent contention that internal measures affecting importation *do not* fall within the scope of Article XI:1, while internal measures affecting exportation *do*.[36] Nothing in the text of Article XI:1 supports the notion that it has an *asymmetrical* scope of application in relation to, on the one hand, internal measures affecting importation and, on the other hand, internal measures affecting exportation. The existence of *Ad Article* III does not change that conclusion, but rather supports it. If the framers of the GATT 1994 intended to create disciplines governing internal measures that impacted competitive opportunities for exports, they would have done so expressly.[37] The absence of disciplines does not give the European Union an excuse to shoehorn measures that are *not* covered by Article XI:1 into it.[38]

IV. THE EUROPEAN UNION FAILED TO ESTABLISH THAT THE DOMESTIC PROCESSING REQUIREMENT IS INCONSISTENT WITH ARTICLE XI:1 OF THE GATT 1994

24. In the *alternative*, even if Article XI:1 of the GATT 1994 is applicable to the domestic processing requirement (*quod non*), the European Union failed to establish a violation of that provision. As clarified by the Appellate Body, "not every condition or burden placed on importation or exportation will be inconsistent with Article XI:1, but only those that … limit the importation or exportation of products".[39] The European Union thus bears the burden of demonstrating that the domestic processing requirement has a limiting effect on the exportation of nickel ore, such that it constitutes a "restriction" within the meaning of Article XI:1. The European Union cannot discharge this burden because the export prohibition under MEMR Regulation 11/2019 *totally prohibits* the exportation of nickel ore as of 1 January 2020. Thus, there is simply *no circumstance* in which the domestic processing requirement under MEMR Regulation 25/2018 can have *any* limiting effect on nickel ore exports.[40]

25. Faced with this fact, the European Union argues that the two measures should be assessed separately, and speculates that the domestic processing requirement *would* restrict exports *if* Indonesia lifted the export prohibition.[41] Unfortunately for the European Union, the evidence on the record entirely debunks its speculation. Uncontested, real-life export data on the panel record *conclusively* shows that nickel ore exports actually *increased substantially* during the period in which

[34] Indonesia's comments on the European Union's response to Panel question No. 78, para. 17.
[35] Indonesia's comments on the European Union's response to Panel question No. 78, para. 18.
[36] Indonesia's response to Panel question No. 79, paras. 270-272; Indonesia's closing statement at the second meeting of the Panel, para. 3.
[37] Indonesia's response to Panel question No. 78, paras. 21-22.
[38] Indonesia's response to Panel question No. 79, paras. 270-272; Indonesia's comments on the European Union's response to Panel question No. 79, para. 24.
[39] Indonesia's second written submission, para. 46 (quoting Appellate Body Report, *Argentina – Import Measures*, para. 5.217).
[40] Indonesia's second written submission, paras. 49-52.
[41] European Union's opening statement at the first meeting of the Panel, para. 18. Indonesia agrees that the domestic processing requirement and the export prohibition must be assessed separately. In particular, the European Union must demonstrate that the domestic processing requirement has a limiting effect on exportation that is *separate and apart from* the limiting effect of the export prohibition. This is consistent with the Appellate Body's guidance to the effect that there must be in every case a genuine relationship between the measure at issue and its alleged effects (Indonesia's second written submission, para. 49 (citing Appellate Body Reports, *Dominican Republic - Import and Sale of Cigarettes*, para. 96; *US - Clove Cigarettes*, footnote 372 to para. 179; *Thailand - Cigarettes (Philippines)*, para. 134).

the domestic processing requirement was in place and an export prohibition was not.[42] By contrast, there is *no* evidentiary foundation for any proposition that, during those periods, exports would have been more "but for" the domestic processing requirement.[43]

26. Faced with the evidence that exports increased when the domestic processing requirement was in effect and an export prohibition was not, the European Union then speculates that "[i]t cannot be excluded that these exports are due to the fact that Indonesia may have fail[ed] to properly implement its own laws".[44] Contrary to the European Union's speculation, exports occurred during the relevant period pursuant to specific legal provisions authorizing such exports.[45] These specific legal provisions are *lex specialis* to, and apply regardless of, the general requirement to conduct minimum processing activities in Indonesia.[46] The uncontested export data on the Panel record *corroborates* this.[47] It follows that the domestic processing requirement *cannot* have a limiting effect on the exportation of nickel ore. Instead, as the evidence on the record confirms, any limiting effect on the exportation of nickel ore is solely attributable to the export prohibition.

27. In light of the above, even if Article XI:1 of the GATT 1994 is applicable to the domestic processing requirement (*quod non*), the European Union failed to make a *prima facie* case that this measure is inconsistent with Article XI:1.

V. THE MEASURES AT ISSUE ARE JUSTIFIED UNDER ARTICLE XI:2(A) OF THE GATT 1994

28. Even if the Panel were to find that the European Union has discharged of its burden to establish a violation of Article XI:1, Indonesia has demonstrated that the measures at issue are justified under Article XI:2(a) of the GATT 1994.

29. At the outset, contrary to what the European Union suggests, Article XI:2(a) of the GATT 1994 does not contemplate a threshold inquiry into whether the export restrictions or prohibitions at issue are "capable of" preventing or relieving a critical shortage in essential products. Article XI:2(a) only applies to a limited universe of measures, namely, "export prohibitions or restrictions" within the meaning of Article XI:1 of the GATT 1994. Because Article XI:2(a) is co-extensive with Article XI:1, only measures that have a "limiting effect" on exports are potentially covered by Article XI:2(a). By definition, measures that have a "limiting effect" on exportation are in principle at least "capable of" preventing or relieving a crucial deficiency in quantities. It is thus entirely unnecessary for the Panel to separately examine, at the threshold, whether the challenged measures are "capable of" preventing or relieving critical shortages of the essential product in question.[48]

30. As explained below, Indonesia has made a *prima facie* case in relation to the three analytical elements of an affirmative defence under Article XI:2(a), namely, that: (i) the measures at issue are "temporarily applied"; (ii) a critical shortage of nickel ore is present or imminent; and (iii) nickel ore is an "essential" product for Indonesia.

A. The Measures at Issue are Temporarily Applied

31. Indonesia has demonstrated that the measures at issue are "temporarily applied" within the meaning of Article XI:2(a) of the GATT 1994. As clarified by the Appellate Body, the fact that a measure does not establish a fixed time-limit in advance is not dispositive.[49] In this respect, Article XI:2(a) covers measures "applied for a limited duration, adopted in order to bridge a passing

[42] Indonesia's response to panel question No. 13, paras. 45-57; Indonesia's second written submission, paras. 55-58; and MEMR, Excel of "Production and Sales of Nickel Ore from 2010-2020", Exhibit IDN-24.
[43] Indonesia's response to Panel question No. 73, paras. 230-237.
[44] European Union's response to Panel question No. 77, para. 33.
[45] Indonesia's comments on the European Union's response to Panel question No. 77, paras. 6-11.
[46] See e.g. Indonesia's response to Panel question No. 73, paras. 230-237.
[47] Indonesia's opening statement at the second meeting of the Panel, paras. 29-31; Indonesia's response to Panel question No. 73, paras. 230-237; Indonesia's response to Panel question No. 74, paras. 238-247.
[48] Indonesia's response to Panel question No. 87, para. 303; Indonesia's comments on the European Union's response to Panel question No. 87, para. 63.
[49] Appellate Body Report, *China - Raw Materials*, para. 331.

need, irrespective of whether or not the temporal scope of the measure is fixed in advance."[50] Record evidence demonstrates that the measures at issue are applied for a limited time, in order to bridge a passing nickel supply shortfall for the domestic processing industry.[51]

32. First, the design, structure and architecture of MEMR Regulation 11/2019 expressly links the export prohibition on nickel ore to the passing supply needs of nickel processing and refining facilities in Indonesia. In this regard, the first preambular recital of MEMR Regulation 11/2019 provides that it aims "to ensure the continuity of supply of nickel processing and refining facilities … and several domestic nickel processing and refining facilities have been built."[52] It therefore establishes, on its face, that the objective of the export prohibition on nickel ore is to bridge a passing need for nickel ore stemming from an increase in domestic processing capacity.

33. Second, this is further *corroborated* by a contemporaneous press release in which MEMR's Director General explains that the main *rationale* for MEMR Regulation 11/2019 was "limited proven reserves … which can only supply nickel ore to smelters for 7.3 years".[53] Thus, MEMR decided to "take some anticipatory steps so that the reserves lifespan can fulfil the economic life of smelters."[54] He also expresses hope that technological developments will allow low-grade nickel processing as inputs for batteries.[55] This contemporaneous evidence undoubtedly demonstrates that the export restrictions on nickel ore are temporary, and have been adopted exclusively to bridge the passing supply needs of domestic smelters given the current level of proven reserves and the state of the technology.

34. Third, Indonesia has a consistent record of applying export moratoria on nickel ore exclusively on a temporary basis.[56] In this regard, the exportation of nickel ore was prohibited temporarily, first, for a period of 15 days between 6 May 2012 and 21 May 2012, and second, for a period of about three years between 11 January 2014 and 1 February 2017. Similarly, Article 46 of MEMR Regulation 25/2018 temporarily permitted the exportation of unprocessed or unrefined nickel ore despite any minimum processing requirement imposed on domestic producers, until those exports were entirely prohibited by MEMR Regulation 11/2019 and MOT Regulation 96/2019.[57]

35. Fourth and finally, the limited time-period for which the challenged measures have been in place does not support the inference that they are somehow "permanent", as the European Union suggests.[58]

36. In sum, the totality of the evidence before this Panel conclusively establishes that the measures at issue are applied for a limited time, in order to bridge a passing need for nickel supplies stemming from increased domestic processing capacity.

B. A Critical Shortage of Nickel Ore is Imminent and Grave

37. Turning to the critical shortage element under Article XI:2(a), Indonesia has demonstrated that its nickel reserves are presently *insufficient* to meet the total production capacity of Indonesia's existing smelters beyond 2026. Indonesia has demonstrated further that the grave imbalance between available nickel quantities and the needs of the domestic industry is going to be exacerbated in the next 4 to 6 years.[59]

38. To put this in concrete terms, Indonesia's nickel ore consumption is projected to increase exponentially between 2020 and 2026. This suggests that Indonesia's Competent Persons-verified nickel ore reserves of about 1 billion wmt will *only* be sufficient to meet the needs of Indonesia's

[50] Appellate Body Report, *China - Raw Materials*, para. 331.
[51] Indonesia's second written submission, paras. 71-84.
[52] MEMR Regulation 11/2019, Exhibit IDN-29, p. 2. Similarly, the first recital of the preamble of MOT Regulation 96/2019 expressly links that measure with supporting "the effectiveness of the implementation of the export of mining commodities as processing and refining products." MOT Regulation 96/2019, Exhibit IDN-30, p. 2.
[53] Press Release from the MEMR, 2 September 2019, Exhibit IDN-92, p. 2.
[54] Press Release from the MEMR, 2 September 2019, Exhibit IDN-92, p. 2.
[55] Press Release from the MEMR, 2 September 2019, Exhibit IDN-92, p. 2.
[56] Indonesia's second written submission, para. 78.
[57] Indonesia's first written submission, para. 102.
[58] Indonesia's second written submission, paras. 80-82.
[59] Indonesia's opening statement at the second meeting of the Panel, paras. 48-49.

domestic industry until 2026.[60] If one includes non-Competent Persons verified reserves into available supply inventory, quantities of nickel ore (of 2 billion wmt) will only be sufficient to meet the needs of the domestic industry until 2030.[61] In other words, based on Indonesia's current estimate of nickel ore quantities presently available, Indonesia's domestic nickel ore market will move into a structural deficit in 4 to 8 years' time; a period that the European Union itself appears to recognize as inadequate to justify the large-scale investment in the construction of new processing plants.[62]

39. The European Union's rebuttal of Indonesia's *prima facie* showing of a "critical shortage" within the meaning of Article XI:2(a) hinges on its assertion that the Maryono report underestimates Indonesia's nickel reserves. That assertion is simply not credible.[63] Among other things, it is belied by the fact that the total reserves that the Maryono report estimates is actually *higher* than the USGS estimate of 21 million tons. In addition, the methodology that the European Union would conveniently have Indonesia apply to estimate its nickel reserves must be rejected if only because it entails a substantial deviation from international standards, including the reserve reporting standards that EU Member States themselves are *required* to apply in calculating mineral reserves.[64]

40. Contrary to the European Union's assertions, the hard data on the panel record demonstrates a grave imbalance between Indonesia's existing nickel reserves and domestic demand, such that there is undoubtedly a "crucial deficiency in quantities" giving rise to a "passing need" that export restrictions seek to "bridge".[65]

C. Nickel Ore is Essential for Indonesia

41. Finally, Indonesia has established that nickel is a product that is "essential" for Indonesia within the meaning of Article XI:2(a) of the GATT 1994.[66] In Sulawesi and Maluku, nickel mining alone accounts for between 23 and 41% of the regional GDP and represents close to 20% of all paying jobs.[67] Nationally, mining is a priority industry in its own right, accounting for 6.4% of the GDP.[68] Nickel is one of the most important mining products of Indonesia, with exports of nickel ore and nickel-based products accounting for wholly 62% of Indonesia's exports of mining products.[69] Globally, Indonesia is the largest nickel supplier worldwide, accounting for one-third of global production.[70]

42. In addition, nickel ore is a critical input for key sectors of the Indonesian economy, enabling steel-making production, which accounts for close to 4% of the industrial GDP, [71]and supporting the construction, automotive and auto-parts sectors downstream. These sectors combined account for 20% of the Indonesian industrial GDP.[72] Moreover, nickel is a critical input into Indonesia's emerging EV battery production industry, and is indispensable for Indonesia's transition away from fossil fuels into renewable energy, carbon emissions reduction, and economic development.[73]

43. The European Union does not appear to challenge the relative importance of nickel as an input into a critical industry in Indonesia. It argues, instead, that the relative importance of nickel as an input is legally *irrelevant*, because only foodstuffs and other products "indispensable to meet the

[60] Indonesia's second written submission, para. 99.
[61] Indonesia's second written submission, para. 98.
[62] See e.g. European Union's second written submission, paras. 124-127.
[63] Indonesia's response to Panel question No. 102, para. 339.
[64] Indonesia's opening statement at the second meeting of the Panel, paras. 52-55.
[65] Appellate Body Report, *China – Raw Materials*, para. 323.
[66] Indonesia's opening statement at the second meeting of the Panel, paras. 41-47.
[67] MEMR, Impact of Smelter Development in the Special Economic zone in Sulawesi (2015), Exhibit IDN-61.
[68] Bank Indonesia, "Gross Domestic Product by Industrial Origin at Current Prices", *Indonesian Economic and Financial Statistics* (2021), 226-227, Exhibit IDN-50.
[69] Indonesia's second written submission, para. 110.
[70] USGS, Excel of "Nickel Reserves", Exhibit IDN-20.
[71] Bank Indonesia, "Gross Domestic Product by Industrial Origin at Current Prices", *Indonesian Economic and Financial Statistics* (2021), 226-227, Exhibit IDN-50.
[72] Bank Indonesia, "Gross Domestic Product by Industrial Origin at Current Prices", *Indonesian Economic and Financial Statistics* (2021), 226-227, Exhibit IDN-50.
[73] Reuters, "Europe's EV battery strategy threatened by supply chain gaps, Eramet says" (29 October 2021), available at https://www.reuters.com/technology/europes-ev-battery-strategy-threatened-by-supply-chain-gaps-eramet-says-2021-10-29/ (last accessed 19 March 2022), Exhibit IDN-79.

essential needs of the population" can be "essential" within the meaning of Article XI:2(a). [74]The distinction the EU seeks to draw between the "vital" and the "economic" needs of the population is totally artificial. Products that serve as inputs into particularly important economic sectors are obviously necessary or indispensable to meet the "vital needs" of the population, because they create the direct and indirect jobs that provide a livelihood to millions of individuals and their families.[75]

44. If the panel in *China - Raw Materials* was prepared to find that refractory bauxite, a mere intermediary product in the production of iron and steel, was "essential" to China under Article XI:2(a)[76], this Panel should have no difficulty in concluding that nickel is "essential" to Indonesia.

45. For all of the foregoing reasons, the Panel should therefore conclude that the measures at issue are temporarily applied to prevent or relieve a critical shortage of nickel, a product that is essential for Indonesia within the meaning of Article XI:2(a). Indonesia has demonstrated that the measures at issue are fully justified under Article XI:2(a) of the GATT 1994.

VI. The Measures At Issue Are Justified Under Article Xx(D) of the GATT 1994

46. In the unlikely event the Panel were to conclude that the measures at issue are *not* justified under Article XI:2(a) of the GATT 1994, Indonesia has demonstrated that they are, nevertheless, justified under Article XX(d) of the GATT 1994 as measures "necessary to secure compliance with" WTO-consistent laws or regulations. More specifically, consistent with the legal standard under Article XX(d), Indonesia has demonstrated that: (i) the "laws or regulations" that the challenged measure seek to secure compliance with are consistent with the GATT 1994; (ii) the measures at issue are "necessary" to secure such compliance; and, (iii) the challenged measures are applied in a manner consistent with the chapeau of Article XX.[77]

A. Indonesia's Laws or Regulations are Consistent with the GATT 1994

47. The relevant laws and regulations that the challenged measures seek to secure compliance with are expressed in Articles 96(c) and (d) of Law No. 4/2009, and Article 57 of Law No. 32/2009.[78] These measures essentially provide that mining permit holders must implement mining environment management and monitoring, including reclamation and post mining activities, as well as mineral conservation efforts. These sustainable mining and mineral resource management requirements are part of Indonesia's comprehensive policy framework on mining activities. The effectiveness of this comprehensive policy depends on the interplay among its various elements, including the challenged measures. This factor must therefore be taken into account in an assessment under Article XX(d) of the GATT 1994, in line with the Appellate Body's recognition that "complex … environmental problems may be tackled only with a comprehensive policy comprising a multiplicity of interacting measures."[79]

48. The European Union does not dispute the WTO-consistency of the laws identified by Indonesia for the purposes of its affirmative defence under Article XX(d). Therefore, they must be presumed as a matter of law to be WTO-consistent.[80]

[74] European Union's response to Panel question No. 29, para. 35.
[75] Indonesia's opening statement at the second meeting of the Panel, para. 44.
[76] Panel Report, *China – Raw Materials*, paras. 7.277 and 7.340.
[77] Indonesia's first written submission, para. 147 (citing Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 177).
[78] Indonesia's second written submission, para. 146; Indonesia's opening statement at the second meeting of the Panel, para. 66; Indonesia's response to Panel question No. 105, para. 352.
[79] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151. See also Indonesia's response to Panel question No. 119, paras. 408-410; Indonesia's comments on the European Union's response to Panel question No. 119, paras. 108-110.
[80] Panel Reports, *India – Solar Cells*, para. 7.321 (referring to Panel Reports, *US – Gambling*, para. 6.549; *US – Customs Bond Directive*, para. 7.301; *Colombia – Ports of Entry*, para. 7.531 (citing Appellate Body Report, *US – Carbon Steel*, para. 157)).

B. The Challenged Measures are Designed to Secure Compliance with Indonesia's Laws and Regulations

49. At the threshold, Article XX(d) requires the Panel to ascertain whether the measures at issue are "designed to" secure compliance with the underlying laws or regulations. This is a relatively "undemanding" inquiry where the Panel must simply check whether the challenged measures are "not incapable" of securing compliance with the relevant laws or regulations.[81] The measures at issue in this dispute are manifestly *capable* of securing compliance with Indonesia's sustainable mining and mineral resource management requirements.

50. *First*, the export prohibition removes from the market the opportunity to sell to purchasers that are outside of Indonesia's jurisdiction, and it also reduces the overall amount of nickel extracted. Any measure that reduces the total production and extraction of nickel ore cannot logically be considered as *incapable* of securing compliance with laws and regulations mandating the protection of the environment and conservation of exhaustible natural resources.[82]

51. *Second*, the domestic processing requirement, in turn, promotes vertical integration in the supply chain, induces long-term changes in the behaviour of market players, and enables regulatory conformity to be assessed both at the supply and demand ends of the supply chain. This discourages spot sales of nickel ore, curbs predatory mining practices, and ensures that all mining activities are properly regulated both on the supply and demand side. Any measure operating in this way is evidently *capable* of securing compliance with laws and regulations mandating the protection of the environment and conservation of exhaustible natural resources. [83]

52. The Panel should thus have little difficulty in concluding that the measures at issue are "designed" to secure compliance with Indonesia's sustainable mining and mineral resource management requirements.

C. The Challenged Measures are Necessary to Secure Compliance with Indonesia's Laws and Regulations

53. Following the well-established analytical framework under Article XX(d) of the GATT 1994, Indonesia has demonstrated that the challenged measures are "necessary" to secure compliance with its sustainable mining and mineral resource management requirements.

54. *First*, Indonesia demonstrated that the relevant laws further interests or values of the highest importance.[84] *Second*, Indonesia acknowledged that while the export prohibition on nickel ore is trade-restrictive, the domestic processing requirement does not entail any limiting effect on exportation, or is *at most* potentially trade-restrictive.[85] *Third*, Indonesia established that both the export prohibition and domestic processing requirement are apt to make a material contribution to securing compliance with Indonesia's sustainable mining and mineral resource management requirements.[86] *Fourth*, Indonesia established that the alternative measure put forward by the European Union is not reasonably available, and would not make an equivalent contribution to Indonesia's enforcement objective at Indonesia's chosen level of protection.[87]

55. The element of contribution within the necessity test under Article XX(d) appears to be the sole issue disputed between the parties.

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[81] Indonesia's opening statement at the second meeting of the Panel (quoting Appellate Body Report, *India - Solar Cells,* para. 5.58).

[82] Indonesia' second written submission, para. 128; Indonesia's opening statement at the second meeting of the Panel, paras. 68-71.

[83] Indonesia's first written submission, para. 178; Indonesia's second written submission, paras. 129-130.

[84] Indonesia's first written submission, paras. 183-187.

[85] Indonesia's first written submission, paras. 188-190.

[86] Indonesia's first written submission, paras. 191-217; Indonesia's second written submission, paras. 158-182; Indonesia's opening statement at the second meeting of the Panel, paras. 72-87.

[87] Indonesia's first written submission, paras. 218-220; Indonesia's comments on the European Union's response to Panel question No. 111, paras. 87-95

1. The Export Prohibition is Apt to Make a Material Contribution to Indonesia's Enforcement Objective

56. The crux of the European Union's contention is that the measures at issue are not apt to make a material contribution to the enforcement of Indonesia's sustainable mining and mineral resource management requirements because Indonesia does not maintain any restrictions on the domestic production or consumption of nickel ore. This contention rests on an unsubstantiated assertion that *all* nickel mining — whether for export or domestic consumption — presents the same compliance risk profile, such that any improvement in environmental or conservation efforts after the adoption of the challenged measures would stem from a reduction in production, rather than improvements in enforcing regulatory conformity.[88] The evidence on the panel record debunks this assertion.

57. Indeed, the panel record is replete with evidence demonstrating that export-oriented nickel mining presented a *higher* risk profile than mining for domestic consumption, and that the challenged measures have resulted in *higher* regulatory conformity in Indonesia. Such evidence consists of *inter alia*:

- Exhibits IDN-59 through IDN-70, which demonstrate that predatory export-oriented mining practices have resulted in substantial regulatory non-conformity and ensuing environmental damage in nickel producing areas such as Sulawesi and Maluku.

- Exhibit IDN-106, which demonstrates that in 2020 Indonesia was the second largest supplier of nickel ore to China while an export prohibition was in place.

- Exhibit IDN-52, which demonstrates that domestic smelters are subject to criminal sanctions and fines pursuant to Article 161 of Law No. 4/2009, when foreign purchasers are obviously not subject to any sanctions as they fall outside of Indonesia's enforcement jurisdiction.

- Exhibits IDN-15 and IDN-105, which demonstrate that subsequent to the challenged measures there was a reduction of nickel mining permit holders from 717 to 220.

- Exhibits IDN-15 and IDN -109, where Professor Rudy Sayoga explains, based on empirical data from MEMR, that the rate of deforestation in Southeast Sulawesi decreased subsequent to the introduction of the measures at issue. Professor Sayoga explains that, for an equivalent increase in nickel ore production (11M wmt), the rate of deforestation after the imposition of the challenged measures was about one third of what it was prior to the enactment of those measures. Professor Sayoga also demonstrates that land reclamation activities increased more than 2.5 times after the introduction of the measures, which is direct evidence of increased compliance with Article 96(c) of Law No. 4/2009.

- Exhibits IDN-110 to IDN-112, and respective annexes, which demonstrate increased criminal and administrative enforcement subsequent to the introduction of the measures at issue.

- Exhibit IDN-113, which demonstrates why domestic smelters subject to Indonesia's regulatory powers make every effort to conform with relevant regulatory requirements and act to combat illegal, export-oriented mining activities.[89]

58. The European Union's attempt to discredit this evidence on the record is unavailing and must be rejected.[90] The European Union has itself argued that data on the number of enforcement proceedings initiated "before the measures and subsequently" is "*an obvious means of substantiating*" Indonesia's claims regarding the contribution of the challenged measures to their enforcement objective.[91] Indonesia has placed such data on the record. The European Union cannot simply walk away from the standard that the European Union *itself* articulated in these proceedings.[92]

[88] European Union's second written submission, para. 268.
[89] Indonesia's response to panel question No. 64, para. 199.
[90] Indonesia's comments on the European Union's response to panel question No. 128, paras. 118-137.
[91] European Union's second written submission, para. 272 (emphasis added).
[92] Indonesia's comments on the European Union's response to Panel question No. 115, para. 101.

59. The Panel must also reject the European Union's erroneous assertion that Indonesia is required to show, as part of its affirmative defence under Article XX(d), that the "changes in enforcement activity" demonstrated by the evidence on the record "are *attributable exclusively* to the measures at issue."[93] There is no such requirement under Article XX(d), particularly where the challenged measures are a component of a comprehensive framework with multiple elements interacting synergistically to achieve a policy objective. Indonesia need only show a "genuine relationship of ends and means between the objective pursued" and the challenged measures.[94]

60. Based on an objective assessment of the totality of evidence on the record, the Panel should have little difficulty in finding that the export prohibition at issue is apt to make a material contribution to securing compliance with Indonesia's sustainable mining and mineral resource management requirements.

2. The Domestic Processing Requirement is Apt to Make a Material Contribution to Indonesia's Enforcement Objective

61. The domestic processing requirement is also apt to make a material contribution to securing compliance with Indonesia's sustainable mining and mineral resource management requirements. This is because it promotes vertical integration in the supply chain, induces long-term changes in the behaviour of market players, and enables regulatory conformity to be assessed at both the supply and demand ends of the supply chain.

62. Since the adoption of the measures at issue, IUP holders are required to submit RKABs pursuant to which they receive authorization to mine specific quantities of nickel ore per year. Domestic smelters are *required* by law to purchase, utilize, process, refine or sell only nickel ore from conforming IUP holders, and only to the extent of their maximum production capacity. For this reason, domestic smelters are increasingly undertaking long-term supply contracts with mining companies or vertically integrating with them.[95] Indonesian regulators can now cross-check production volumes with consumption data in order to verify regulatory conformity. Any active IUP holders which are *not* selling the production volumes approved in their RKABs to domestic smelters become the object of increased regulatory scrutiny, because this is a strong indication of non-conforming mining activities, illegal exports, or both. Conversely, any domestic smelters that purchase inputs that do not correspond to RKAB volumes of their suppliers are similarly targeted for criminal and administrative enforcement.[96]

63. Such an enhanced enforcement mechanism is simply *not* available in respect of sales between domestic mining companies and foreign purchasers, as Indonesia has *no access* to consumption data of foreign smelters. Therefore, Indonesian regulators simply cannot cross-check production volumes with consumption data of foreign purchasers in order to verify regulatory conformity.[97]

64. The evidence on the record confirms that proper regulation of *both* the supply and demand ends of the supply chain has resulted in increased enforcement. Indeed, it is not by coincidence that the number of nickel IUP holders has decreased sharply subsequent to the adoption of the measures at issue. Deprived of the opportunity to sell their non-conforming nickel ore to foreign suppliers that are outside of the purview of Indonesia's authorities, rogue mining companies have decided to simply stop production and have exited the market.[98]

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[93] European Union's response to Panel question No. 115, para. 170.

[94] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 145. See Indonesia's comments on the European Union's response to Panel question No. 115, paras. 96-103.

[95] See Sample of Nickel Ore Sales Contract 2, Exhibit IDN-58; Sample of Nickel Ore Sales Contract 3, Exhibit IDN-71. In addition to these contracts that were already on the record, Indonesia is also providing the underlying contract requested by the European Union in its second written submission (See European Union's second written submission, para. 274, and Sample of Nickel Ore Sales Contract 4, Exhibit IDN-114). Indonesia is also providing two further contracts demonstrating how the domestic processing requirement has fostered vertical integration and long-terms supply arrangements in the nickel supply chain (See Sample of Nickel Ore Sales Contract 5, Exhibit IDN-115, and Sample of Nickel Ore Sales Contract 6, Exhibit IDN-116).

[96] Indonesia's opening statement at the second meeting of the Panel, para. 84. See also Indonesia's response to Panel question No. 70, paras. 220-228; Indonesia's comments on the European Union's response to Panel question No. 108, paras. 81-86.

[97] Indonesia's comments on the European Union's response to Panel question No. 108, para. 85.

[98] Indonesia's opening statement at the second meeting of the Panel, paras. 84-87.

65. In light of the above, the domestic processing requirement is manifestly apt to make a material contribution to Indonesia's sustainable mining and mineral resource management requirements.

3. The Alternative Measure Put Forward by the European Union is Not Reasonably Available and Does not Make an Equivalent Contribution to Indonesia's Enforcement Objective

66. It was incumbent on the European Union to propose reasonably available alternative measures that are less trade restrictive than the measures at issue, while, at the same time, "preserving for [Indonesia] its right to achieve its desired level of protection with respect to the objective pursued."[99] Yet, the European Union has simply attempted to differentiate its purported alternative measure from Indonesia's existing "clear and clean" certification process, but has failed to do so.[100]

67. In any event, to the extent that the European Union's alternative measure can be distinguished from Indonesia's clear and clean certification process, it is only on the basis that, under the European Union's proposed alternative, border officials would need to determine for *each* and *every* consignment of nickel ore whether such ore *has been mined* in compliance with Indonesia's sustainable mining and mineral resource management requirements.[101] This actually reveals, however, that the European Union's proposed alternative is *not* reasonably available to Indonesia, and would not make an equivalent contribution to the enforcement objectives of the challenged measures.[102]

68. Indonesian border officials simply cannot determine by examining a consignment of nickel ore whether such ore has been *mined* in conformity with sustainable mining and mineral resource management requirements. Sustainably mined nickel and unsustainably mined nickel look exactly the same. The European Union's proposed alternative measure would entail significant technical, financial and resource obstacles for Indonesia, if it were even possible at all. It is simply theoretical in nature, far removed from the regulatory reality in Indonesia, and thus not a reasonably available alternative measure.[103]

69. Indeed, any measure that is remedial in character is not a reasonably available alternative measure that would make an equivalent contribution to the enforcement of Indonesia's sustainable mining and mineral resource management requirements at Indonesia's chosen level of protection. This is because, unlike the export prohibition at issue, such measures do not remove *ex ante* all of the foreign demand for Indonesia's nickel ore from the market, thus rendering *any* export activity illegal preventively, and alleviating the burden of verifying conformity *ex post*. Moreover, any measure that seeks to secure compliance *exclusively* at the point of exportation would not allow Indonesia to regulate both the supply and demand ends of the nickel ore production chain.

70. The Panel should thus find that the European Union has failed to identify a reasonably available alternative measure that would make an equivalent contribution to Indonesia's enforcement objective at Indonesia's chosen level of protection. As the Appellate Body has held, governments "may adopt preventive measures" in pursuit of legitimate policy objectives, and are not required to adopt, instead, remedial measures that involve "prohibitive costs or substantial technical difficulties".[104]

D. The Challenged Measures are Applied Consistently with the Chapeau of Article XX of the GATT 1994

71. Finally, the measures at issue are applied consistently with the chapeau of Article XX of the GATT 1994. In particular, they are not applied in a manner that would constitute a means of arbitrary

[99] Appellate Body Report, *Brazil - Retreaded Tyres*, para. 156.

[100] Indonesia's response to Panel question No. 107, paras. 357-359; Indonesia's response to Panel question No. 110, paras. 375-377; Indonesia's comments on the European Union's response to Panel question No. 111, paras. 87-95.

[101] European Union's response to Panel question No. 111, para. 151.

[102] Indonesia's comments on the European Union's response to Panel question No. 111, paras. 87-95.

[103] As the Appellate Body has held, "an alternative measure may be found not to be 'reasonably available' … where it is merely theoretical in nature" (Appellate Body Report, *US – Gambling*, para. 308).

[104] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 171.

or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.

72. Indeed, there is *no* differential treatment entailed by the application of challenged measures, let alone differential treatment that can be characterized as arbitrary or unjustifiable discrimination under the *chapeau* of Article XX. Far from reflecting *any* discrimination, the measures at issue do not distinguish *at all* between Indonesia's trading partners. Both measures apply with equal force regardless of the importing country concerned. Put another way, the challenged measures are applied even-handedly because *all* importing countries receive the same treatment. The European Union's arguments to the contrary proceed from a faulty legal premise, namely, that the discrimination proscribed under the *chapeau* refers to discrimination between "purchasers" of nickel ore in Indonesia and "all other purchasers".[105] This argument is unpersuasive.[106]

73. First, there is no legal basis for the proposition that the chapeau covers discrimination between "purchasers". Instead, the chapeau, like other provisions of the GATT 1994, covers discrimination between and among "products" and hence producers of the product at issue. Second, the discrimination proscribed by the chapeau is, by its own terms, limited to discrimination between "countries where the same conditions prevail". This is clearly a reference to discrimination between and among the trading partners of the country applying the measure at issue. In this way, the chapeau ensures even-handed application of measures otherwise inconsistent with the GATT 1994 to all similarly situated Members. Third, and finally, the Panel's analysis under the chapeau of Article XX must focus on the element of the measures found to be inconsistent with the GATT 1994 disciplines. In the present case, if the Panel were to reach the chapeau of Article XX, it is because it has concluded that the measures are prohibited export restrictions. Hence, it is discrimination in the treatment of exports that is the relevant inquiry, not any distinction between exports and domestic sales. Put differently, a domestic sale cannot be magically converted into an export sale under the chapeau of Article XX.[107]

74. In any event, even if the interpretation advanced by the European Union was correct, *quod non*, any alleged discrimination resulting from the application of the measures at issue is rationally related to their policy objective. This is because, as confirmed by evidence on the record, foreign and domestic purchasers are not similarly placed in respect of their compliance risk profile. As such, there is undoubtedly a rational relationship between the discrimination alleged by the European Union and the enforcement objectives of the challenged measures.[108]

VII. CONCLUSION AND REQUEST FOR FINDINGS

75. For all of the foregoing reasons, Indonesia respectfully requests that the Panel find that the European Union has failed to establish that the domestic processing requirement is inconsistent with Article XI:1 of the GATT 1994.

76. Alternatively, Indonesia requests that the Panel find that the challenged measures are justified under Article XI:2(a) of the GATT 1994 as measures temporarily applied to prevent or relieve a critical shortage of nickel, a product that is essential to Indonesia.

77. If the Panel were to conclude otherwise, then Indonesia respectfully requests that the Panel find that the challenged measures are justified under Article XX(d) of the GATT 1994 as measures necessary to secure compliance with Indonesia's WTO-consistent laws or regulations.

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[105] European Union's second written submission, para. 293.
[106] Indonesia's response to Panel question No. 109, paras. 360-361.
[107] Indonesia's response to Panel question No. 109, paras. 362-364.
[108] Indonesia's response to Panel question No. 109, paras. 370-374.

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

ANNEX C-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF BRAZIL*

1. Brazil appreciates the opportunity to present this Oral Statement as a third party in the current proceedings.

2. In this statement, Brazil will briefly address five issues. First, whether both challenged measures are under the scope of Article XI:1 of the GATT 1994. Second, whether the challenged measures can be considered "temporary" within the meaning of Article XI:2(a) of the GATT 1994. Third, whether Indonesia has sufficiently specified the laws or regulations with which the challenged measures allegedly seek to secure compliance. Fourth, whether there are alternative, less-trade restrictive measures that could achieve equivalent results. And, finally, whether the challenged measures constitute "arbitrary or unjustifiable discrimination" within the meaning of the chapeau of Article XX of the GATT.

Article XI of the GATT 1994

3. At the outset, Brazil deems it important that the Panel determine whether both challenged measures – namely Indonesia's (i) export prohibition of nickel ore and its (ii) domestic processing requirements for nickel ore – are within the scope of Article XI:1 of the GATT 1994.

4. In its first written submission, Indonesia claims that the EU has failed to make a *prima facie* case that the challenged domestic processing requirements introduced by Regulation 25/2018 of Indonesia's Ministry of Energy and Mineral Resources (MEMR) are inconsistent with Article XI:1[1], because they did not demonstrate that those measures have a limiting effect on the exportation of nickel ore.[2]

5. The crux of Indonesia's argument is that, due to MEMR Regulation 11/2019, which introduced an outright ban on exports of nickel ore as from 1st of January 2020, the domestic processing requirements imposed by MEMR Regulation 25/2018 ceased to be a limitation on the exportation of nickel ore, and became a regulation affecting the internal sale of this mineral, subject to Article III:4 of the GATT 1994.

6. As Brazil argued in its first written submission, the entry into force of MEMR Resolution 11/2019 is not a relevant factor in determining whether the domestic processing requirements imposed by Indonesia entail a limitation on exports of nickel ore.[3] In Brazil's view, all challenged measures should be examined in and of themselves in light of Article XI:1 of the GATT 1994. This approach is reasonable because the domestic processing requirements and the export prohibition impose separate export restrictions in and of themselves, thus creating superposed limitations on the exports of nickel ore.

7. Moreover, accepting Indonesia's argument could lead to a situation in which the complainant could be denied a positive solution to the dispute. In fact, if the only factor preventing MEMR Regulation 25/2018 from being considered as imposing a limitation on exports is the existence of MEMR Regulation 11/2019, a finding limited to the latter measure, and its subsequent withdrawal on implementation, would simply trigger the limiting effects of the former measure.

8. As a second issue, Brazil would like to address Indonesia's claim that its measures are covered by the exemption in Article XI:2(a) of the GATT 1994, because they are "temporarily applied to prevent or relieve critical shortages of […] products essential to" Indonesia.

9. In its first written submission, Indonesia refers to the Appellate Body's jurisprudence in *China – Raw Materials*,[4] according to which a measure may be considered temporary when it is "applied

* Brazil requested that its oral statement serves as its executive summary.
[1] First Written Submission of Indonesia, para. 80.
[2] Ibid.
[3] Brazil's First Written Submission, paras. 7-10.
[4] Indonesia's First Written Submission, para. 93.

for a limited duration, adopted in order to bridge a passing need, irrespective of whether or not the temporal scope of the measure is fixed in advance."[5]

10. Brazil agrees that the jurisprudence in *China – Raw Materials* could provide guidance in resolving this dispute. It is true that, in that case, the Appellate Body disagreed with the Panel regarding the necessity of a temporal scope fixed in advance for a measure to be considered temporary within the meaning of Article XI:2(a) of the GATT 1994. However, this did not prevent the Appellate Body from upholding the Panel's conclusion that China had not demonstrated that the measure in question was "temporarily applied" to prevent or relieve a "critical shortage".[6]

11. In fact, the Appellate Body did not disagree with the Panel's findings that, "if there is no possibility for an existing shortage ever to cease to exist, it will not be possible to 'relieve or prevent' it through an export restriction applied on a temporary basis."[7] With that in mind, Brazil believes that the Panel in this dispute should examine whether the critical shortage of nickel ore indicated by Indonesia can be considered a "passing need", or whether, instead, it is unlikely that this shortage will ever cease to exist. This analysis could aid the Panel in determining the applicability of Article XI:2(a) of the GATT 1994 to the challenged measures.

Article XX(d) of the GATT 1994

12. As a third issue, Brazil would like to discuss whether Indonesia has sufficiently specified the laws or regulations whose compliance is secured by the challenged measures, pursuant to Article XX(d) of the GATT 1994.

13. We recall that, in *India – Solar Cells*, the Appellate Body decided that, in assessing "whether an instrument constitutes a 'law or regulation' within the meaning of Article XX(d), a panel should also consider the degree of specificity or precision with which the relevant instrument lays down a particular rule of conduct or course of action within the domestic legal system of a Member, as opposed to simply providing a legal basis for action that may be consistent with certain objectives."[8]

14. In this context, Brazil considers that the Panel should examine whether the instruments pointed out by Indonesia as "laws or regulations" within the meaning of Article XX(d) can be read to set out specific rules, obligations or requirements to ensure the protection of the environment and the conservation of natural resources. In Brazil's view, the specific rules, obligations, or requirements with respect to which the challenged measures seek to secure compliance are still not entirely clear from Indonesia's first written submission.[9]

15. In continuing its examination under Article XX(d), the Panel will likely conduct an analysis of the "necessity" of the measures Indonesia seeks to justify. Such analysis entails a consideration of whether there are alternative, less-trade restrictive measures that could achieve equivalent results to the challenged measures. It is incumbent on the complaining party to demonstrate the existence of such alternative measures.

16. Up to this point, the EU is yet to present alternative measures for the Panel's appreciation. However, in the event that such measures are presented in the next stages of this dispute, Brazil encourages the Panel to consider them in light of the fact that the government of Indonesia has specifically chosen to target exports rather than production. In our view, measures limiting domestic sales and exports of nickel ore to that which has been produced according to sustainable mining practices, without entailing a prohibition on exports, could be a less trade-restrictive alternative to the measures challenged in this dispute.

17. As a final issue, Brazil would like to refer to an argument raised by Japan in its third party submission regarding the consistency of the challenged measures with the chapeau of Article XX of the GATT 1994.[10] According to the chapeau, the measures a Member seeks to justify under Article

[5] Appellate Body Report, *China - Raw Materials*, para. 331.
[6] *China – Raw Materials*, Report of the Appellate Body, para. 344.
[7] *China – Raw Materials*, Report of the Appellate Body, para. 336.
[8] Appellate Body Report, *India – Solar Cells*, para. 5.110 (footnotes omitted).
[9] Third Party Submission of Brazil, paras. 22-25.
[10] Japan's Third Party Submission, par. 44.

XX of the GATT 1994 must not constitute "arbitrary or unjustifiable discrimination between countries where the same conditions prevail" nor a "disguised restriction on international trade."

18. Therefore, in order to determine whether a measure satisfies the requirements of the chapeau of Article XX of the GATT 1994, panels are expected to delve into the rationale presented to explain the measures' objectives. If there is no logical connection between the reasons given for the challenged measures and their stated objective, one could conclude that such measures constitute an "arbitrary or unjustifiable discrimination" or a "disguised restriction on international trade."

19. With regard to the specific facts of this case, Japan rightly points out that, in the absence of limitations on domestic demand, an export prohibition alone bears no rational relationship with the goal of conserving an exhaustible resource.[11] In such a scenario, domestic demand would continue to further the depletion of exhaustible reserves, i.e. of nickel ore, and would thus undermine the achievement of the stated objective of the measure.

20. This concludes Brazil's statement. Thank you.

[11] *Ibid*.

ANNEX C-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CANADA*

I. INTRODUCTION

1. Madam Chairperson, distinguished members of the Panel, Canada would like first to express its appreciation to the Panel and the Secretariat for their work in thisdispute, and for the opportunity we have been given to express our views today.

2. This dispute concerns Indonesia's export restrictions, specifically the export prohibition of nickel ore and domestic processing requirements with regard to certainraw materials, notably nickel ore and iron ore, prior to them being exported.

3. Canada is an exporter of significant amount of raw materials and its companies are engaged in raw material extraction throughout the world. In this role, Canada has a systemic interest in the interpretation of the disciplines governing export restrictions and their justification.

4. Several policy objectives motivate restrictions on the export of strategic raw materials. Conservation of natural resources and protection of the environment are two of them. In contrast, policy objectives such as the protection of domestic downstream industries can also motivate export restrictions. The balance between employing export restrictions for legitimate public policy objectives as opposed to protectionism is reflected in the scope of Article XI:1 of the GATT 1994, which is qualified by Article XI:2 and in the enumerated exceptions in Article XX of the GATT 1994.

5. Canada's oral statement will focus on the order of analysis and burden of proof between Article XI:I, Article XI:2(a) and Article XX of the GATT 1994, the legal standard under Article XI:2(a) and the determination of necessity under Article XX(d) of the GATT 1994.

II. THE ORDER OF ANALYSIS THAT IS REQUIRED BY THE CORRECT INTERPRETATION OR APPLICATION OF THE LEGAL PROVISIONS AT ISSUE

6. Article XI:2 and Article XX of the GATT 1994 are in the nature of affirmative defences.[1] Therefore, the Panel should first assess whether the measures at issue fall within the scope of, and are inconsistent with, Article XI:1 of the GATT 1994. If so, then the Panel should determine whether the measures meet the requirements of Article XI:2(a). If the Panel finds they do not, then the Panel should consider whether the measures are justifiable under Article XX(d) of the GATT 1994.

7. The burden of proof rests upon the party, whether complaining or defending, that asserts a fact or the affirmative of a particular or defence. This means that in this case the European Union must assert and prove its claim of a violation under Article XI:1. In turn, Indonesia, as the party invoking provisions that are exceptions to the allegedly violated obligation bears the burden to prove that the conditions set out in the exceptions are met.[2]

A. Whether the measures at issue fall within the scope of ArticleXI:2(a)

8. Canada agrees with Indonesia that Article XI:2(a) applies to measures that fall within the scope of Article XI:1, that is, measures that ban or have a limiting effect on exports.[3]

9. In Canada's view, the issue is whether the requirements of Article XI:2(a) are met.

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* Canada requested that its oral statement serves as its executive summary.

[1] Panel Reports, *China – Raw Materials*, para. 7.211, referring to Appellate Body Report, *US –Wool Shirts and Blouses*, p. 16.

[2] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 16.

[3] Indonesia's first written submission, para. 90.

10. The Appellate Body examined the meaning of the following concepts in Article XI:2(a) – "temporarily applied," "to prevent or relieve critical shortages," and "foodstuffs or other products essential to the exporting Member."[4]

11. First, examining the meaning of "temporary," and its use with the word "applied," the Appellate Body considered that "the definitional element of 'supply[ing] a passing need' suggests that Article XI:2(a) refers to measures that are applied in the interim."[5] Further, the Appellate Body noted the differences in scope of Article XI:2(a) and Article XX(g). Specifically, regarding Article XI:2(a), the Appellate Body noted that the Panel had reasoned that "if there is no possibility for an existing shortage ever to cease to exist, it will not be possible to 'relieve or prevent' it through an export restriction applied on a temporary basis."[6] Thus, the requirement for the measure to be of a temporary nature as opposed to a long-term conservation measure is an important consideration to keep in mind when dealing with exhaustible natural resources such as minerals.

12. Next, the Appellate Body considered that "[t]aken together, 'critical shortage' [...] 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."[7] Further, the Appellate Body noted that inherent in the notion of criticality is the expectation of reaching a point in time when conditions are no longer "critical," such that measures will no longer fulfil the requirement of addressing a critical shortage.[8] This can be contrasted with a provision such as Article XX(g), which addresses measures relating to conservation of exhaustible natural resources[9] without necessarily responding to a critical shortage or threat of a critical shortage.

13. The Appellate Body also considered the phrase "general or local short supply" in Article XX(j) as providing relevant context for interpretation of the term "critical shortage" in Article XI:2(a). The Appellate Body found that the reference to "short supply" in Article XX(j) had a very similar meaning to "shortage" in Article XI:2(a). However, Article XI:2(a) includes the adjective "critical" which suggests that the types of shortages that fall within the scope of Article XI:2(a) are more narrowly circumscribed that those within the scope of Article XX(j).[10] Therefore, the Panel in this case will need to consider whether the shortage or potential shortage is of a "critical" nature.

14. Finally, the shortage must relate to "foodstuffs or other products essential to the exporting member," i.e. it must relate to food "or otherwise absolutely indispensable or necessary products."[11]

15. In addition, the Appellate Body explained that Article XI:2(a) "allows Members to apply prohibitions or restrictions temporarily in order to 'prevent or relieve' such critical shortages." Therefore, the Appellate Body understood Article XI:2(a) "as providing a basis for measures adopted to alleviate or reduce an existing critical shortage, as well as for preventive or anticipatory measures adopted to pre-empt an imminent critical shortage."

16. The Appellate Body also stated that Article XI:2(a) "must be interpreted so as to give meaning to each of the concepts in that provision," and, at the same time, it should be taken into account that "these different concepts impart meaning to each other, and thus define the scope of Article XI:2(a)." For example, it explained, "whether a shortage is 'critical' may be informed by how 'essential' a particular product is." Moreover, "the characteristics of the product as well as factors pertaining to a critical situation, may inform the duration for which a measure can be maintained in order to bridge a passing need in conformity with Article XI:2(a)." In short, it requires a "case-by-case analysis taking into consideration the nexus between the different elements contained in Article XI:2(a)."[12]

[4] Appellate Body Reports, *China – Raw Materials*, para. 322.
[5] Ibid, para. 323.
[6] Appellate Body Reports, *China – Raw Materials*, para. 336, referring to Panel Reports, *China –Raw Materials*, para. 7.297.
[7] Appellate Body Reports, *China – Raw Materials*, para. 324.
[8] Ibid, para. 328.
[9] Ibid, para. 337.
[10] Ibid, para. 325.
[11] Ibid, para. 326.
[12] Appellate Body Reports, *China – Raw Materials*, paras. 327-328.

17. Therefore, the Panel must consider whether Indonesia has demonstrated that its measures meet the requirements of each element.

18. If, after examining the facts and arguments put forward by the disputing Members, the Panel determines that these three elements are met, then the export ban would be justifiable pursuant to Article XI:2(a).

19. If one or more of the three requirements under Article XI:2(a) are not met, then the Panel should consider whether the export ban is justifiable under Article XX(d) of the GATT 1994.

B. Whether the measures are justifiable under Article XX(d) of theGATT 1994

1. Indonesia submits that the measures are necessary to secure compliance with Indonesia's laws and regulationsunder Article XX(d) of the GATT 1994

20. Turning to Indonesia's defence under Article XX(d) of the GATT 1994, Indonesia submits that the measures are "necessary" because their contribution to securing compliance with those requirements outweighs their trade-restrictiveness, in the light of the importance of the interests or values they address.[13]

21. In Canada's view, Indonesia correctly explains that in order to determine whether a measure is "necessary" under Article XX(d) of the GATT 1994, a panel must "assess all the relevant factors, particularly the extent of the contribution to the achievement of a measure's objective and its trade restrictiveness, in the light of the importance of the interests or values at stake." If this analysis yields a preliminary conclusion that the measure is necessary, this result must be confirmed by comparing the measure with its possible alternatives, which may be less trade restrictive while providing an equivalent contribution to the achievement of the objective pursued.[14]

22. Indonesia refers to *US – Gambling* regarding reasonably available alternatives and argues that it is incumbent upon the European Union to put forward alternative measures to rebut Indonesia's prima facie demonstration that the export prohibition on nickel ore and the domestic processing requirement is "necessary" within the meaning of Article XX(d) of the GATT 1994.

23. Canada agrees that the first step is to determine if Indonesia has prima facie demonstrated that the measures are necessary and if so, Canada agrees that it is incumbent on the European Union, to put forward reasonably available alternative measures to rebut the presumption.

2. The "necessary" standard of the exception of Article XX(d) of the GATT 1994 and whether there is a reasonably alternative measure that leads to a lesser degree of inconsistency with the rules of the GATT 1994

24. For a measure, otherwise inconsistent with GATT 1994, to be justified provisionally under paragraph (d) of Article XX, two elements must be shown. First, the measure must be one designed to "secure compliance" with laws or regulations that are not themselves inconsistent with some provision of the GATT 1994. Second, the measure must be "necessary" to secure such compliance.[15]

25. We will focus on the "necessary" standard and the availability of alternative measures.

26. With respect to the "necessary" requirement, in US – Gambling, the Appellate Body referred to its finding in Korea – Various Measures on Beef and said that determining whether a measure is necessary involves the weighing and balancing process set out in that dispute and "begins with an assessment of the 'relative importance' of the interests or values furthered by the challenged measure." As for the two other factors, which, it noted, are not "exhaustive" as to the possible factors to be considered, one is "the contribution of the measure to the realization of the ends pursued by it," and the other is "the restrictive impact of the measure on international commerce." In addition to examining these factors, it said, "[a] comparison between the challenged measure

[13] Indonesia's first written submission, para. 14.
[14] Ibid, paras. 218-220
[15] Appellate Body Report, *Korea – Various Measures on Beef*, para. 157.

and possible alternatives should then be undertaken, and the results of such comparison should be considered in the light of the interests at issue." The Appellate Body then stated:

> *It is on the basis of this "weighing and balancing" and comparison of measures, taking into account the interests or values at stake, that a panel determines whether a measure is "necessary" or, alternatively, whether another, WTO-consistent measure is "reasonably available."*[16]

27. Canada submits that the "necessary" standard that the Appellate Body has laid out requires a panel to look at the weighing and balancing of the specific factors and the element of reasonably available alternative measures.

28. It is for the complaining Member, in this case the European Union, to make arguments regarding any reasonably available alternative measures. However, should it do so, then Indonesia, as the responding Member, would need to explain why the alternative measure or measures put forward by the complainant were not reasonably available or did not make the same contribution as the challenged measure.

29. On this point, Canada refers to the dispute *China – Rare Earths* where the Panel examined on an arguendo basis China's argument that its export duties were justified under Article XX(b) of the GATT 1994 because they were "necessary to protect human, animal or plant life or health."

30. Regarding the existence of alternative measures, China argued that the complainants had to identify reasonably available alternative measures that would make the same contribution to the protection of human, animal and plant life or health. In this regard, the Panel noted that all three complainants did in fact identify alternative measures that China could or was already using at the time, including requirements for strict compliance with environmental requirements as a condition for access to the products, requirements for mines to make deposits for ecological recovery, an increase in resource taxes, imposition of a pollution tax, and an increase in volume restrictions on mining and production. China responded that measures already imposed by China were not in fact alternatives.

31. In response, the Panel accepted that China already imposed the measures identified, but the Panel considered that China "ha[d] not explained why it could not, as an alternative to the export duties, increase volume restrictions and pollution controls and the resource tax, and/or the pollution tax." In this regard, the Panel agreed with Japan that "China could increase the resource tax on ores significantly enough to deter domestic production," but China failed to respond to this WTO-consistent alternative. On this basis, the Panel concluded that China did not meet its burden of demonstrating that the alternative measures put forward by the complainants were not reasonably available to China, or did not make the same contribution as the challenged measure.[17]

32. The Panel should keep in mind that export restrictions are used by policymakers to respond to a number of social, economic and political objectives. These include objectives such as environmental protection and preservation of reserves of strategic raw materials for future use.

33. The effectiveness and the potential social benefits of export restrictions should be carefully weighed against the distorting effects on trade that they cause and any alternative tools identified that are reasonably available to policy makers.

III. CONCLUSION

34. Canada thanks the Members of the Panel for their attention. Should the Panel have any questions, we would be pleased to respond either orally or in writing.

[16] Appellate Body Report, *US – Gambling*, paras. 304-309.
[17] Panel Reports, *China – Rare Earths*, paras. 7.180-187.

ANNEX C-3

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF INDIA*

Introductory Statements

1. Good Afternoon to the Meeting. India appreciates this opportunity to present its views on the issues raised in this panel proceeding. India has a systemic interest in ensuring the correct legal interpretation and application of all WTO covered agreements, including the GATT 1994.

2. India understands the EU to have challenged the MEMR Regulation 11/2019 and 96/2019 as export prohibition measures and the MEMR Regulation 25/2018 as containing certain domestic processing requirements that constitute an export restriction inconsistent with Article XI:1 of the GATT 1994.

3. India does not take a position on the factual issues raised in this dispute. However, India wishes to present some views on: (i) the legal standard applicable to export restriction under Article XI:1 of the GATT 1994; and (ii) the scope of the term "restriction".

I. Export Restriction under Article XI:1 of the GATT 1994

4. The EU appears to have claimed that the domestic processing requirement under MEMR Regulation 25/2018 poses a restriction on export of low concentration nickel ore because it imposes a mandatory legal obligation to purify and/or process the raw mining products in Indonesia before exporting the relevant goods.[1] Further, the EU is understood to have claimed that the measure restricts the possibility to export unpurified or unprocessed raw material.[2]

5. Indonesia has responded that the MEMR Regulation 25/2018 does not have any "limiting effect" on the exportation of nickel ore.[3] Indonesia highlights that with the enactment of MEMR Regulation 11/2019, a complete prohibition on the export of nickel has been imposed as of 1 January 2020, irrespective of its concentration. As a result, the domestic processing requirement in MEMR Regulation 25/2018 neither operates as a pre-condition for the exportation of nickel ore, nor restricts said exports because the exportation of nickel ore is legally prohibited in the first place.[4]

6. India notes that the EU has challenged the domestic processing requirements in MEMR Regulation 25/2018 as a standalone measure operating independently. Accordingly, if the Panel finds that the two MEMR Regulations operate independently, it should evaluate the consistency of the measures with Article XI:1 of the GATT independently.

7. Turning to the applicable legal standard, India notes that for a measure to be inconsistent with Article XI:1 of the GATT 1994, it must be demonstrated that the measure falls within the scope of the phrase 'quotas, import or export licenses or other measures', and, that the measure constitutes a prohibition or restriction on the importation or on the exportation or sale for export of any product[5] destined for the territory of any other contracting party.

1. Scope of the term 'restriction' in Article XI:1 of GATT 1994

8. India recalls that whether a measure is a quota, import or export license or other measure restricting import or export of products constitutes the first component in assessing the consistency of a purported quantitative restriction.

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* India requested that its oral statement serves as its executive summary.
[1] EU's first written submission, para. 50.
[2] *Ibid.*
[3] Indonesia's first written submission, para. 80.
[4] Indonesia's first written submission, paras. 82-83.
[5] Appellate Body Report, *Argentina – Import Measures*, paras. 5.216-5.218.

9. The Oxford Dictionary of English defines 'restriction' as a noun meaning '*a limiting condition or measure*, *especially a legal one*', and a mass noun meaning '*the limitation or control of someone or something, or the state of being restricted*'. 'Limiting' means '*setting or serving as a limit to something*', and in this context, a 'limit' is defined as 'a *point or level beyond which something does not or may not extend or pass*' and '*a restriction on the size or amount of something permissible or possible*'. Black's Law Dictionary defines restriction as a '*limitation or qualification*'. The ordinary meaning of the term 'restriction' therefore implies that the measure at issue must be one that:

   (i) sets a point or level beyond which exports or sales for export of a product cannot extend; or

   (ii) restricts the amount of exports or sales for export of a product that is permissible or possible.[6]

   Therefore, for the measure at issue in this dispute to fall within the meaning of 'restriction', it must quantitatively limit the exports or sales for exports of nickel ore destined for the territory of another Member that is possible or permitted.

10. Panels have also previously found that the ordinary meaning of the term restriction to be "a limiting condition or measure, especially a legal one."[7] It has been interpreted under Article XI:1 to mean 'a limitation on action, a limiting condition or regulation'.[8]

11. The scope of the term 'restriction' under Article XI:1 of the GATT 1994 is not unlimited. India recalls in the context of importation that "not every measure affecting the opportunities for entering the market would be covered by Article XI, but only those measures that constitute a prohibition or restriction on the importation of products, i.e. those measures which affect the opportunities for importation itself".[9]

12. Moreover, every formality, or charge, does not amount to a restriction on imports that is inconsistent with Article XI:1, GATT 1994.[10] In *Indonesia – Chicken (Article 21.5 – Brazil)*, the panel found Brazil to not have demonstrated that the burden or cost on importers of certain charges and formalities was of such nature and extent as to preclude or dissuade them from requesting changes to the import documents.[11]

13. In order words, Article XI:1 does not cover simply any restriction or prohibition. It covers only those conditions that are demonstrated to limit the importation or exportation of products through the design, architecture, and structure of the measure itself, considered in its relevant context.[12] Therefore, in circumstances of *de facto* restriction, greater evidentiary weight would be attached to the actual trade impact of the measure.[13]

14. For these reasons, India views that a wide interpretation of 'restriction' in Article XI:1 that makes the provision applicable to any condition that may have an indirect or remote limiting effect on trade would not be reasonable or legally sound. Furthermore, it would curtail Members' policy space to formulate policies concerning the goods produced, manufactured or extracted within their territories. Such an interpretation would blur the distinction between the notions of 'restriction' and other incidental barriers to trade.[14] Therefore, in this case, the Panel would have to evaluate whether the measure presented by the EU affects export opportunities, by

[6] Black's Law Dictionary, 8th edition, 1341.
[7] Restriction, Oxford Dictionary, available at<https://en.oxforddictionaries.com/definition/restriction> accessed on 17 November 2021.
[8] Panel Report, *India – Quantitative Restrictions*, para. 5.128. Also see, Appellate Body Reports, *China – Raw Materials*, paras. 319-320.
[9] Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 7.261.
[10] Panel Report, *Indonesia – Chicken (Article 21.5 – Brazil)*, para. 7.232.
[11] *Ibid*.
[12] Appellate Body Report, *Argentina – Import Measures*, para. 5.217
[13] Panel Report, *Argentina – Hides and Leather*, paras. 11.20-11.21.
[14] Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 7.262.

way of a quantitative limitation on exports or sale for exports, in order for the measure to fall within the scope of the term 'restriction' under Article XI:1 of the GATT.

2. The restriction must be linked to the importation or exportation of any product

15. India also wishes to address the second element of the legal standard under Article XI:1, i.e., the prohibition or restriction on the *importation or on the exportation* of any product. Article XI:1 provides that no prohibitions or restrictions (other than duties, taxes, or other charges) shall be instituted or maintained by any Member, on the importation or exportation of any product. From the ordinary meaning of this provision, India notes that it is clear that the measure must, at the very least: (i) be in the nature of a restriction on (ii) the *importation* or *exportation* of a product.

16. In this context, India recalls that the Appellate Body, in *China – Raw Materials*, concluded that Article XI covers those prohibitions and restrictions that have a limiting effect on the quantity or amount of a product being imported or exported.[15] In other words, the measure in question must be a condition for the importation or exportation itself.[16]

17. In *India – Autos*, the Panel found that as the measure required acceptance of a so-called 'trade balancing condition' it imposed a restriction on imports and therefore was inconsistent with Article XI:1 of the GATT 1994. The trade balancing condition effectively limited the quantity of imports that a manufacturer was able to undertake, as the measure provided that the import licenses would be granted to those manufacturers who undertook to comply with export balancing requirements, i.e., a requirement to undertake a certain quantity of exports. In this case, an importer was not free to import as many kits or components as he otherwise could have in the absence of the limitation, because there is a *finite limit to the amount of possible exports*.[17] Further, *Dominican Republic – Import and Sale of Cigarettes* illustrates another factor that was evaluated to establish that the measure at issue was not a restriction or prohibition on import or export restriction: the bond requirement in question was not enforced either at the time or at the point of importation, and was not administered by the customs authority, but the internal tax authorities.[18]

III. Conclusion

18. India adds that whether Article XI, GATT 1994 applies to the measure at issue could also be relevant to the Panel's analysis in this dispute[19] – this could be discussed as the proceedings progress. In sum, evaluating the consistency of the domestic processing requirement in MEMR Regulation 25/2018 vis-à-vis Article XI:1 of GATT 1994 would require establishing that there is a requirement in the measure at issue that has a limiting effect on the quantity of exports or sale for exports of nickel ore, and is a condition or restriction on the exportation of nickel ore from Indonesia.

19. India appreciates the opportunity to comment on these issues in these proceedings and hopes that the viewpoints presented in this submission would assist the Panel in its consideration of the issues raised in this dispute.

[15] Appellate Body Reports, *China – Raw Materials*, paras. 319-320.
[16] Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 7.265.
[17] Panel Report, *India – Autos*, paras 7.318 – 7.322.
[18] Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, paras. 7.257 – 7.258.
[19] Panel Report, *India – Autos*, para. 7.220, *citing* GATT Panel Report, *Canada – FIRA*, para 5.14 adopted 07 February 1984, BISD 30S/140.

ANNEX C-4

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

I. ARTICLE XI:1 OF THE GATT 1994

Prima Facie Case

1. Indonesia does not dispute that its regulations legally prohibit the exportation of nickel ore.[1] Rather, Indonesia argues that the European Union failed to make a *prima facie* case that the domestic processing requirement, as applied to nickel ore, is inconsistent with Article XI:1 of the GATT 1994.[2] Specifically, Indonesia argues that the domestic processing requirement:

> neither operates as a pre-condition 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.[3]

In other words, Indonesia asserts that the domestic processing requirement does not restrict exportation of nickel ore because, with the enactment of MEMR Regulation 11/2019, exportation of that ore is entirely prohibited.

2. Article XI:1 of the GATT 1994 provides:

> General Elimination of Quantitative Restrictions
>
> No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on […] the exportation or sale for export of any product destined for the territory of any other contracting party.

3. In *Argentina – Import Measures*, the Appellate Body explained that, in the context of Article XI:1 of the GATT 1994, the limitation on the importation or exportation "need not be demonstrated by quantifying the effects of the measure at issue; rather, such limiting effects can be demonstrated through the design, architecture, and revealing structure of the measure at issue considered in its relevant context."[4]

4. As Japan understands it, Indonesia is not arguing that the domestic processing requirement was repealed by MEMR Regulation 11/2019. Indeed, MEMR Regulation 11/2019 makes no mention of repealing the legal instruments underlying the domestic processing requirement. The domestic processing requirement appears, therefore, to remain in force.

5. Rather, Indonesia's argument is that the domestic processing requirement has no effect on international trade because of a separate measure – i.e., the export ban on nickel ore, regardless of concentration. Indonesia's argument thus requires the Panel to assess the domestic processing requirement in light of its actual trade effect. However, as explained, the assessment under Article XI:1 should consider the "design, architecture, and revealing structure of the measure".

6. In this case, the design, structure and architecture of the domestic processing requirement is such that all nickel ore mined in Indonesia must be processed in Indonesia. As a result of the domestic processing requirement, unprocessed nickel ore cannot lawfully be exported from Indonesia. Therefore, under Article XI:1, the design, structure and architecture of the domestic processing requirement reveal that the measure serves to restrict the quantities of unprocessed nickel ore that may be exported. Hence, the evidence on the design, architecture, and revealing structure of the measure is sufficient to make a *prima facie* case that the domestic processing requirement is an export prohibition of unprocessed ores under Article XI:1 of the GATT 1994.

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[1] Indonesia's first written submission, para. 64.
[2] Ibid. para. 80.
[3] Ibid. para. 82.
[4] Appellate Body Report, *Argentina – Import Measures*, para. 5.217.

7. Moreover, because both measures exist independently, it is possible that the domestic processing requirement would remain in effect if the export prohibition were to be revoked. The fact that two measures may simultaneously restrict or prohibit exportation of the same set of goods should not prevent the Panel from reviewing the WTO-consistency of each measure to secure a positive solution to the dispute.

A. Application of Article III:4

8. Indonesia further argues that, to the extent that domestic producers are subject to the domestic processing requirement, the measure would be "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 thereof."[5]

9. Japan notes that Article XI:1 applies to restrictions maintained "on … the exportation" of goods. In contrast, Article III:4 of the GATT 1994 provides that "[t]he products of the territory of any [Member] imported into the territory of any other [Member] shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all [measures] affecting their internal sale …". Because the European Union does not allege differential treatment between products imported into Indonesia and those of national origin, Article III:4 of the GATT 1994 is not relevant for purposes of this dispute.

10. In any case, the domestic processing requirement is a measure that applies on the exportation of unprocessed nickel ore, as opposed to a measure affecting the internal sale of the product. This is evident from the text of the underlying measures. For example, Article 17(1) of Regulation 25/2018 expressly makes the right to "conduct[] export activities" conditional on operators undertaking certain processing or refining activities in Indonesia, and Article 17(2) makes the right to sell "overseas" (i.e., for exportation) conditional on the Minister stipulating certain minimum processing or refining thresholds. Further, Article 66 of Regulation 7/2020 conditions the sale "abroad" (i.e., for exportation) to "carrying out processing and/or refineries domestically". Therefore, the plain language of the legal instruments underlying the domestic processing requirement makes it clear that the requirement applies to the exportation or sale for export of a product and thus it falls within the scope of Article XI:1 of the GATT 1994.

I. ARTICLE XI:2(a) OF THE GATT 1994

11. Indonesia argues that its prohibition on the exportation of nickel ore and its domestic processing requirement, as applied to unprocessed nickel ore, are justified under Article XI:2(a) of the GATT 1994.

12. Article XI:2(a) of the GATT 1994 provides that Article XI:1 of the GATT 1994 "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 contracting party.

13. Article XI:2(a) of the GATT 1994 provides an exclusion from the obligation under Article XI:1 of the GATT 1994, and the burden of proof is on the respondent to demonstrate that the conditions of Article XI:2(a) are met.[6]

A. "Temporarily Applied"

14. Article XI:2(a) of the GATT 1994 requires that the export prohibition or restriction be "temporarily applied". In *China – Raw Materials*, the Appellate Body determined that "temporarily" in this context means that the measure must be "applied for a limited duration, adopted in order to bridge a passing need, irrespective of whether or not the temporal scope of the measure is fixed in

[5] Indonesia's first written submission, para. 83.
[6] Panel Reports, *China – Raw Materials*, para. 7.213.

advance."[7] As the Appellate Body further noted, "Article XI:2(a) refers to measures that are applied in the interim".[8]

15. To determine whether Indonesia's measures are "temporarily applied", the Panel may consider, *inter alia*, whether (i) the relevant laws and regulations implementing the measure indicate that the measure is temporary and (ii) whether the measure is designed to "bridge a passing need."

16. Although a time limit need not be fixed in advance for a measure to be considered temporarily applied[9], language in the laws and regulations implementing a measure that indicates an intended termination of the measure can help clarify whether or not a measure is temporary. At the same time, where a measure is frequently paused and reinitiated, this may indicate that the measure is really intended to be permanent, subject to periodic exceptions.

17. Indonesia argues that the measures were designed to "bridge a passing need". However, Indonesia also contends that: "[t]he measures at issue in this dispute were adopted to prevent crucial deficiencies in nickel quantities from arising in a near future"[10]; in the early 2000s, the "expansion of Chinese industry, and in particular stainless steel manufacturing, led to an exponential increase in global nickel demand"[11]; "electric vehicles and battery storage are set to take over from stainless steel as the largest end user of nickel by 2040"; and, "demand for nickel will grow between 20-25 times by 2040."[12] Furthermore, Indonesia specifically argues under Article XX(d) of the GATT 1994 that the challenged measures are designed to secure compliance with its "sustainable mining and mineral resources management" requirements.[13]

18. These statements and arguments suggest that Indonesia is concerned about managing the risk of *long-term depletion* of nickel, which may not be reasonably characterized as a "passing need".

19. Japan further notes that the risk of depletion of exhaustible natural resources is specifically addressed in Article XX(g) of the GATT 1994, by providing a justification for a measure with the objective of "conservation of exhaustible natural resources". The reach, function, and requirements of Article XX(g) of the GATT 1994 differ from those of Article XI:2(a) of the GATT 1994.[14] If Article XI:2(a) were improperly construed to address the same risk of depletion of exhaustible natural resources, Article XX(g), with its additional requirement that a measure be "made effective in conjunction with restrictions on domestic production or consumption", would be rendered inutile. Such an outcome would be contrary to the principle of effectiveness in treaty interpretation.[15]

20. Japan does not argue that the risk of a shortage of an exhaustible natural resources can never be covered by Article XI:2(a) of the GATT 1994. Rather, a measure addressing such risk may be covered under Article XI:2(a) when the shortage is not of a permanent nature, but rather is one that can be eventually relieved. In this regard, the Appellate Body in *China – Raw Materials* gave an example where the shortage of exhaustible resource may be covered under Article XI:2(a), which is when "a natural disaster caused a 'critical shortage' of an exhaustible natural resource, which, at the same time, constituted a foodstuff or other essential product."[16]

A. "To Prevent … Critical Shortages"

21. In addition, measures excluded under Article XI:2(a) of the GATT 1994 must be "applied to prevent or relieve critical shortages" of essential products. The Appellate Body in *China – Raw Materials* found that the term "critical shortage" 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."[17]

[7] Appellate Body Reports, *China – Raw Materials*, para. 331.
[8] Ibid. para. 323.
[9] Ibid. para. 331.
[10] Indonesia's first written submission, para. 107.
[11] Ibid. para. 28.
[12] Ibid. para. 53 (footnotes omitted).
[13] See, for example, Indonesia's first written submission, paras. 10, 14, 144, and 152.
[14] See Appellate Body Reports, *China – Raw Materials*, para. 337.
[15] Appellate Body Report, *US – Gasoline*, p. 23, DSR 1996:I, p. 3 at 21.
[16] Appellate Body Reports, *China – Raw Materials*, para. 337.
[17] Ibid. para. 324.

22. The Appellate Body also agreed with the panel in that case on the following points:

> …if there is no possibility for an existing shortage ever to cease to exist, it will not be possible to "relieve or prevent" it through an export restriction applied on a temporary basis. … [i]f a measure were imposed to address a limited reserve of an exhaustible natural resource, such measure would be imposed until the point when the resource is fully depleted. … [t]his temporal focus seems consistent with the notion of "critical", defined as "of the nature of, or constituting, a crisis".[18]

23. Thus, to determine whether an export prohibition or restriction is applied to "prevent …critical shortages",[19] a panel should take into account whether the measure is capable of preventing the shortage of the relevant products. If the shortage is permanent, the export prohibition or restriction, which is supposed to be temporary, cannot be applied to "prevent" a "critical shortage" under Article XI:2(a).

24. In this case, the Panel may wish to examine the following two issues specifically in assessing the alleged "critical shortage". First, Indonesia's measures only prohibit the *exportation* of nickel ore.[20] Indonesia's measures do not limit the *extraction* of nickel ore, nor do they limit the *consumption* of nickel ore by domestic processors or refiners. Indeed, Indonesia itself has noted that its "domestic capacity will continue to expand, placing increased strain on Indonesia's nickel reserves",[21] and that "Indonesia is implementing a strategic plan to expand EV battery production in the short term and needs to secure nickel as an input into processed products (nickel sulphate) that is used in the production of EV batteries."[22] Thus, the Panel should consider whether Indonesia has demonstrated that, in the absence of limits on extraction or domestic consumption, the challenged measures are capable of preventing or relieving the alleged shortage.

25. Second and relatedly, the Panel should consider whether Indonesia has provided sufficient evidence that its nickel reserves have reached a turning point necessitating the export restriction. If so, the Panel should assess whether the "shortage" is the result of limited reserves or the anticipated expansion of Indonesia's installed capacity.[23] If it is the latter or such anticipated expansion of domestic production capacity constitutes a substantial cause of the shortage, it would be doubtful whether the measures at issue can prevent a critical shortage as long as such expansion of domestic production capacity continues to be anticipated.

I. ARTICLE XX(d) OF THE GATT 1994

A. Subparagraph (d)

26. For a defense to succeed under Article XX(d) of the GATT 1994, it must be established that: (i) the measure at issue secures compliance with "laws or regulations" that are themselves consistent with the GATT 1994; (ii) the measure at issue is "necessary" to secure such compliance; and (iii) the measure at issue meets the requirements set out in the chapeau of Article XX.[24]

27. With regard to the "laws or regulations" under Article XX(d), the Appellate Body has stated that a "measure can be said 'to secure compliance' with laws or regulations when its design reveals that it secures compliance with *specific rules, obligations, or requirements* under such laws or regulations" and that "[i]t is important, in this regard, to distinguish between the specific rules, obligations, or requirements with respect to which a measure seeks to secure compliance, on the one hand, and the objectives of the relevant 'laws or regulations', which may assist in 'elucidating

[18] Ibid. para. 324 (citing Panel Reports, *China – Raw Materials*, para. 7.297).

[19] Indonesia does not argue that the measures at issue are to "relieve" the critical shortage (See Indonesia's first written submission, title of Section IV.D, paras. 13, 85, 107 and 140 etc.).

[20] Indonesia's export prohibition applies to the export of nickel ore, regardless of concentration, while its domestic production requirement effectively bans the export of unprocessed nickel ore.

[21] Indonesia's first written submission, para. 126.

[22] Ibid. para. 138.

[23] See Indonesia's first written submission, paras. 126-127.

[24] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 177.

the content of specific rules, obligations, or requirements' of the 'laws or regulations', on the other hand."[25]

28. In this regard, Japan notes that the examples of such laws or regulations that are listed in Article XX(d), namely, laws and regulations relating to "customs enforcement, the enforcement of monopolies…, the protection of patents, trademarks and copyrights, and the prevention of deceptive practices", require specific actions or provide specific obligations, and the "compliance" therewith can be specifically examined. These examples in Article XX(d) suggest that, in principle, the provision is contemplating a measure that is necessary to secure compliance with specific obligations.

29. Indonesia in this case alleges that the challenged measures are designed to secure compliance with its sustainable mining and mineral resources management requirements. Japan notes that Indonesia's first written submission does not clearly identify the *specific* law or regulation whose compliance is being secured through the export restriction and domestic processing requirement. Instead, the arguments seem to be directed at showing that the challenged measures are necessary to comply with WTO-consistent resource-management *objectives*. As the Appellate Body underscored in *India – Solar Cells,* the "'more precisely' a respondent is able to identify specific rules, obligations, or requirements contained in the relevant 'laws or regulations', the 'more likely' it will be able to elucidate how and why the inconsistent measure secures compliance with such 'laws or regulations'". Thus, the Appellate Body explained that:

> in assessing whether an instrument constitutes a "law or regulation" within the meaning of Article XX(d), a panel should also consider the degree of specificity or precision with which the relevant instrument lays down a particular rule of conduct or course of action within the domestic legal system of a Member, as opposed to simply providing a legal basis for action that may be consistent with certain objectives.[26]

30. Japan recognizes that a respondent is not precluded from referring to multiple instruments. However, "insofar as a respondent seeks to rely on a rule deriving from several instruments or parts thereof, it would still bear the burden of establishing that the instruments or the parts that it identifies actually set out the alleged rule".[27]

31. Indonesia describes "two … main pillars" of its comprehensive mining policy implicated by this dispute: "the protection of Indonesia's environment through the imposition of sustainable mining requirements, and the conservation of natural resources through the imposition of mineral resource management requirements."[28] These "pillars" are not "particular rule[s] of conduct or course[s] of action," but are rather general objectives, and therefore are not precise laws or regulations for assessment under Article XX(d) of the GATT 1994.

32. Moreover, when the identified laws and regulations are not precise and thus there is insufficient linkage between the measure at issue and such laws and regulations, it may be difficult to establish that the measure is implemented *to secure the compliance with* the referred laws and regulations. In the current case, to the extent that Indonesia identifies particular rules of conduct or courses of action, it is not clear that such rules or courses of action are actually mandated by the laws and regulations it references. For example, Indonesia argues that the export prohibition is capable of "securing compliance with Indonesia's sustainable mining and mineral resource management insofar as it reduces total Indonesian production and extraction of nickel ore."[29] Even if the reduction of nickel ore production and extraction could, in theory, constitute a particular rule of conduct or course of action, Indonesia does not provide a specific law or regulation that requires the reduction of nickel ore production and extraction in Indonesia. Similarly, Indonesia argues that

[25] Appellate Body Report, *India – Solar Cells*, para. 5.110 (citing Appellate Body Report, *Argentina – Financial Services*, para. 6.203.) (emphasis original).
[26] Appellate Body Report, *India – Solar Cells*, para. 5.110.
[27] Ibid. para. 5.111.
[28] Indonesia's first written submission, para. 143.
[29] Ibid. para. 177.

the domestic processing requirement "curbs predatory mining practices."[30] However, Indonesia does not provide a specific law or regulation that defines and regulates "predatory mining practices."

33. Turning to "necessity", it is well-established that the assessment of this element of Article XX(d) involves a process of weighing and balancing a series of factors, including: the extent to which the measure sought to be justified contributes to the realization of the end pursued (i.e., securing compliance with specific rules, obligations, or requirements under the relevant provisions of "laws or regulations" that are not GATT-inconsistent); the relative importance of the societal interest or value that the "law or regulation" is intended to protect; and the trade-restrictiveness of the challenged measure.[31] Also, in most cases, a comparison between the challenged measure and reasonably available alternative measures should then be undertaken.[32]

34. With respect to the first factor, i.e., the measure's contribution, when the laws and regulations to be complied with are less specific, it will generally be more difficult to establish the linkage between the measure sought to be justified and the laws and regulations. In such cases, a panel must carefully scrutinize the existence and the degree of contribution. To the extent it finds that the contribution is vague or that the degree of contribution is low, it should not find that the measure is necessary, particularly when the trade restrictiveness is high, such as in the case of an export prohibition.

35. In regards to the third factor, i.e., the trade-restrictiveness of the measure, an export restriction, and in particular an export prohibition, is highly trade-restrictive, as it directly prevents the subject domestic goods from being traded to foreign markets and prevents foreign consumers from accessing the subject goods produced in the territory of the Member imposing the measure. Furthermore, with regard to reasonably available alternative measures, the Panel may consider whether Indonesia's concerns – about the depletion of ore reserves or predatory mining – can be addressed more directly and effectively through non-discriminatory measures, rather than export restrictions that are highly trade-restrictive.

36. Lastly, Japan notes with regard to the second factor, i.e., the importance of the protected societal value, that the United States and Ukraine discuss a Member's right to determine the level of protection with respect to the objective pursued in the context of Article XX(d) of the GATT 1994.[33] However, even if a Member considers an objective to be of high societal interest and therefore to require a high level of protection, the measure at issue still must be "necessary to secure compliance" with the laws or regulations. Thus, even in such a case of high importance, if the identified laws and regulations are not specific, it may be difficult to establish that the measure is implemented to secure compliance with them or to establish the existence and the degree of contribution. Similarly, there may also be reasonably available alternative measures, especially if the measures at issue are export restrictions that are highly trade-restrictive. Indeed, there have been prior cases in which panels and the Appellate Body have found that a measure pursues interests of the highest importance, but is not "necessary" under Article XX(d). For example, the Appellate Body in *Colombia - Textiles* found that, even though the parties did not dispute that the fight against money laundering was a societal interest that could be characterized as "vital and important in the highest degree", the challenged measure was not "necessary" to secure compliance with the identified provision of Colombia's criminal code as there was a lack of sufficient clarity regarding the degree of contribution and the degree of trade-restrictiveness of the measure.[34]

A. Chapeau

37. A measure justified under Article XX(d) of the GATT 1994 must meet the requirements of the chapeau of Article XX. The chapeau provides that measures must not constitute "arbitrary or unjustifiable discrimination between countries where the same conditions prevail" or a "disguised restriction on international trade." The analysis of whether discrimination is arbitrary or unjustifiable focuses on the cause of the discrimination, or the rationale put forward to explain its existence.

[30] Ibid. para. 178.
[31] Appellate Body Report, *India – Solar Cells*, para. 5.59.
[32] Ibid.
[33] United States' third party submission, para. 40 and Ukraine's third party submission, para. 27.
[34] Appellate Body Report, *Colombia – Textiles*, paras. 5.144-150.

Discrimination is arbitrary or unjustifiable "when the reasons given for the discrimination 'bear no rational connection to the objective' or 'would go against that objective'".[35]

38. An export prohibition imposes the regulatory burden entirely on foreign demand, and places no regulatory burden on domestic demand. In the absence of other limitations on domestic demand, this differential treatment has no rational relationship with the objective of conserving an exhaustible resource, particularly when domestic demand accounts, or will account, for a major part of overall demand for the exhaustible resource. This is because domestic demand will continue to drive extraction of the resources. Thus, it would seem difficult to justify under the chapeau an export prohibition if it is not paired with appropriate limitations on domestic demand. In this regard, Japan agrees with the United States that "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", and the impact of the measure to be examined should include the impact on "the consumers and purchasers" (i.e. the demand) of the subject product.[36]

[35] Appellate Body Report, *US – Tuna II (Mexico) (Article. 21.5 - Mexico)*, para. 7.316.
[36] United States' third party submission, para. 31.

ANNEX C-5

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE REPUBLIC OF KOREA

I. Introduction

1. The Republic of Korea ("Korea") welcomes this opportunity to present an executive summary of its views as a third party in this dispute between the Republic of Indonesia ("Indonesia") and the European Union ("EU") over Indonesia's measures relating to raw materials.

II. Article XI:1 of the GATT 1994

2. In relation to Indonesia's domestic processing requirement, the EU challenges that Indonesia's measure constitutes a restriction of exports of the raw materials as the obligations imposed through the measure are designed to restrict the possibility to export the unpurified and unprocessed raw mineral products. Therefore, the EU argues that Indonesia's measure is inconsistent with Article XI:1 of the GATT 1994.[1]

3. Indonesia maintains that the EU has failed to make a *prima facie* case that the domestic processing requirement is inconsistent with Article XI:1 of the GATT 1994. Indonesia points out that the exportation of nickel ore is legally prohibited in the first place under a separate measure. For Indonesia, therefore, the domestic processing requirement only affects the internal sale of nickel ore, rather than restricting the export of nickel ore within the meaning of Article XI:1 of the GATT 1994. Accordingly, Indonesia argues that the EU has failed to demonstrate that the domestic processing requirement places any "limiting effect" on the export of nickel ore.[2]

4. Several panels and the Appellate Body have interpreted the term "prohibitions or restrictions" under Article XI:1 of the GATT 1994. In *China – Raw Materials*, the Appellate Body defined "prohibition" as a "legal ban on the trade or importation of a specified commodity" and "restriction" as "a thing which restricts someone or something, a limitation on action, a limiting condition or regulation, and thus refers generally to something that has a limiting effect". The Appellate Body further observed that Article XI of the GATT 1994 covers those prohibitions and restrictions that have a limiting effect on the quantity or amount of a product being imported or exported.[3]

5. In determining "limiting effect" set forth in *China – Raw Materials*, the Appellate Body held in *Argentina – Import Measures* that "not every condition or burden placed on importation or exportation will be inconsistent with Article XI, but only those that are limiting, that is, those that limit the importation or exportation of products. Moreover, *this limitation need not be demonstrated by quantifying the effects of the measure at issue; rather, such limiting effect can be demonstrated through the design, architecture, and revealing structure of the measure at issue considered in its relevant context*".[4]

6. The panel in *Colombia – Ports of Entry* also considered that an analysis under Article XI:1 of the GATT 1994 must be "based on the design of the measure and its potential to adversely affect importation, *as opposed to a standalone analysis of the actual impact of the measure on trade flows*" and "to the extent Panama 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*".[5]

7. Korea agrees that in order for a measure to be inconsistent with Article XI:1 of the GATT 1994, there need not be a proof that the measure at issue *de facto* exerts any quantified or even quantifiable limiting impact on exportation or importation. Instead, it is sufficient for a complaining

[1] EU's First Written Submission, paras. 50-52.
[2] Indonesia's First Written Submission, paras. 77-84.
[3] Appellate Body Report, *China – Raw Materials*, paras. 319-320.
[4] Appellate Body Report, *Argentina – Import Measures*, para. 5.217.
[5] Panel Report, *Colombia – Ports of Entry*, paras. 7.240 and 7.252.

party to demonstrate that "limiting effect" exists by virtue of the design, structure, architecture, or other relevant construct of the measure at issue.

8. As such, while the Panel may base its assessment on a wide-range of relevant evidences such as the express language of the legal instrument at issue or the intended effect of the measure as manifested by the measure's design, structure, architecture, etc., among others, it need not consider whether or to what extent the measure *is* adversely affecting trade flows.

III. Article XI:2(a) of the GATT 1994

9. In order for export prohibitions or restrictions to be justified under Article XI:2(a) of the GATT 1994, such measures must be proven to meet three requirements, namely (i) to be temporarily applied, (ii) to prevent or relieve critical shortage, and (iii) foodstuffs or other products essential to the exporting Member.

10. Regarding "critical shortage" of Article XI:2(a), Indonesia argues in its First Written Submission that a surge in demand for Indonesian nickel ore has caused a dramatic expansion of extraction and production levels in Indonesia reaching unsustainable levels. Indonesia explains that its reserves of high-grade saprolite ore, the only type of nickel ore with economic value, are expected to be depleted in the coming future creating concerns of crucial deficiencies.[6]

11. First, Korea notes that the Appellate Body in *China – Raw Materials* interpreted the term "critical shortage" as "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".[7]

12. The Appellate Body elaborated that "critical shortage" under Article XI:2(a) is more narrowly circumscribed than those falling within the scope of "short supply" of Article XX(j),[8] implying that a much higher standard is applied in determining "critical shortage" under Article XI:2(a). In this vein, Korea submits that the meaning of "short supply" under Article XX(j) may also offer a threshold guidance for the Panel's examination as to whether the circumstances at issue fall within the scope of "critical shortage".

13. Second, Korea recalls the finding of the panel in *China – Raw Materials*, with which the Appellate Body did not disagree, that "if there is no possibility for an existing shortage ever to cease to exist, it will not be possible to relieve or prevent it through an export restriction applied on a temporary basis".[9] Relevantly, the Appellate Body in *China – Raw Materials* proposed an example that "Article XI:2(a) measures could be imposed if a natural disaster caused a "critical shortage" of an exhaustible natural resource, which, at the same time, constituted a foodstuff or other essential product".[10] This is understood to mean that a measure could be justified under Article XI:2(a) in case of an extrinsic and transitory event that affects the supply of a certain product, rather than in structural and permanent circumstances.

14. Indonesia stresses that its reserves of high-grade saprolite ore are expected to be depleted in the coming future. It is worth noting that nickel ore is not a regenerating natural resource that recovers over time if left unmined. Therefore, should the reserves of nickel ore be depleted in the coming future, this entails that there may be little possibility for the shortage of nickel ore to cease to exist. It appears that the circumstance at hand is not the one that is extrinsic or transitory, but is rather a structural and permanent one.

IV. Article XX(d) of the GATT 1994

15. Indonesia claims in its First Written Submission that the measures are necessary to secure compliance with WTO-consistent laws or regulations, namely Indonesia's sustainable mining and

[6] Indonesia's First Written Submission, paras. 104–131.
[7] Appellate Body Report, *China – Raw Materials*, para. 324.
[8] Appellate Body Report, *China – Raw Materials*, para. 325.
[9] Panel Report, *China – Raw Materials*, para. 7.297.
[10] Appellate Body Report, *China – Raw Materials*, para. 337.

mineral resource management requirements. To that end, Indonesia demonstrates the wide-reaching adverse impact nickel ore mining has on the environment.[11]

16. Indonesia concludes that the measures at issue are necessary in light of the 'weighing and balancing' exercise as held by the Appellate Body in *India – Solar Cells,*[12] as the interests or values concerned are of the highest importance, and the measures make a material contribution to securing compliance with Indonesia's laws and regulations.[13]

17. Certainly, Indonesia's arguments must be duly considered by the Panel. At the same time, the Panel should also give full consideration to the degree of trade-restrictiveness of the measures at issue in the context of conducting 'weighing and balancing' exercise under Article XX(d) of the GATT 1994.

18. In this regard, the Appellate Body in *Korea – Various Measures on Beef* considered that "a measure with a relatively slight impact upon imported products might more easily be considered as 'necessary' than a measure with intense or broader restrictive effects".[14] The Appellate Body also affirmed that "a determination of whether a measure, which is not indispensable, may nevertheless be 'necessary' within the contemplation of Article XX(d), involves in every case a process of weighing and balancing a series of factors which prominently include … the accompanying impact of the law or regulation on imports or exports".[15]

19. In Korea's view, a comparative analysis needs to be undertaken between the measure at issue and its reasonably available alternatives in order to satisfy the Appellate Body's standard. A relevant consideration for the Panel, therefore, should be whether *less restrictive* alternatives that could achieve the same or similar goal were reasonably available for Indonesia.

20. Next, in relation to the chapeau of Article XX, which stipulates that "measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail", Indonesia claims that the measures at issue are consistent with the requirements of the provision as they do not distinguish between Indonesia's trading partners and apply with equal force regardless of the country at issue.[16]

21. It is relevant to recall the finding of the Appellate Body in *US – Shrimp* that "discrimination could occur not only between different exporting Members, but also between exporting Members and the importing Member concerned".[17] That is, the principle of even-handedness applies not only to and among Indonesia's trading partners, but also between Indonesia and its trading partners.

22. In this regard, Korea respectfully requests the Panel to consider whether the measures at issue have any discriminating effect between all the Members concerned.

V. Conclusion

23. Korea thanks the Panel for providing an opportunity to comment on the issues raised in this proceeding.

[11] Indonesia's First Written Submission, paras. 195-205.
[12] Appellate Body Report, *India – Solar Cells*, para. 5.59.
[13] Indonesia's First Written Submission, paras. 174-187.
[14] Appellate Body Report, *Korea – Various Measures on Beef*, para. 163.
[15] Appellate Body Report, *Korea – Various Measures on Beef*, para. 164.
[16] Indonesia's First Written Submission, paras. 224-228.
[17] Appellate Body Report, *US - Shrimp*, para. 150.

ANNEX C-6

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF UKRAINE*

1. Dear Chair, distinguished Members of the Panel, Ukraine welcomes this opportunity to shortly express its views on certain legal aspects in the present dispute.

2. In its Third Party Written Submission Ukraine has already provided some views and will not repeat them today.

3. In the ongoing dispute the European Union challenges introduced by the Indonesian authorities prohibition on export of nickel as well as domestic processing requirements in Indonesia and argues that they are inconsistent with Article XI:1 of the GATT 1994.[1]

4. Indonesia in its turn justifies its actions and appeals to Article XI:2(a) and Article XX(d) of the GATT 1994.

5. Indonesia stated that the measures at issue legally prohibits the exportation of nickel ore and the European Union has failed to make a *prima facie* case that the domestic processing requirement is inconsistent with Article XI:1 of the GATT 1994 because it has not demonstrated that measures have a limiting effect on nickel ore trade.[2]

6. In *Argentina – Import Measures*, the Appellate Body explained that, in the context of Article XI:1 of the GATT 1994, the limitation on the importation or exportation "need not be demonstrated by quantifying the effects of the measure at issue; rather, such limiting effects can be demonstrated through the design, architecture, and revealing structure of the measure at issue considered in its relevant context."[3]

7. At the same time in another case *China - Raw Materials*, the Appellate Body held that Article XI:1 covers "those prohibitions and restrictions that have a *limiting effect* on the quantity or amount of a product being imported or exported."[4]

8. Therefore, in this dispute Panel should consider whether the complainant proved any of its claims in relation to the alleged violation of Article XI:1 of the GATT and presented a *prima facie case* that the measures are not justified in terms of limiting effect on the quantity or amount of a product being imported or exported or the complainant clearly demonstrated limiting effect through the design, architecture, and revealing structure of the measure at issue.

9. Another issue the Panel faced is whether Indonesia has demonstrated that the export prohibition on nickel ore and domestic processing requirement are temporarily applied to prevent critical shortage of nickel, a product that is essential to Indonesia.

10. Alternatively, in case the Panel were to conclude that the measures at issue are not justified under Article XI:2(a) of the GATT 1994, Indonesia then argues that such measures are justified under Article XX(d) of the GATT 1994, as measures necessary to secure compliance with WTO-consistent laws or regulations.

11. Ukraine won't repeat its Third Party Written Submission but would like to provide comments regarding the issue of specific rules, obligations, or requirements with respect to which the measures at issue seek to secure compliance.

12. In order to conclude whether measures at issue are necessary to secure compliance with WTO-consistent laws or regulations the Panel should examine whether Indonesia has

* Ukraine requested that its oral statement serves as its executive summary.
[1] EU's First Written Submission, para 2.
[2] Indonesia's First Written Submission, para. 12.
[3] Appellate Body Reports, *Argentina – Import Measures*, para. 5.217.
[4] Appellate Body Report, *China - Raw Materials*, para. 320.

explained the relevant specific rules, obligations, or requirements with respect to which the measures at issue seek to secure compliance.

13. Indonesia asserts that it "has adopted a comprehensive policy framework to regulate mining activities. Such comprehensive policy imposes a number of obligations on both regulators and economic operators, in order to ensure that the exploitation of Indonesia's mineral resources are conducted on the basis of good mining practices" and provided a brief description of the relevant elements of the above policy.

14. As Indonesia stated its comprehensive policy comprises a multiplicity of laws and regulations dealing with the protection of the environment, conservation of natural resources, worker health and safety, mining operations safety, waste management, among others.

15. In this regard Ukraine reiterates that each country has its right to establish and regulate its own levels of domestic environmental protection with respect to objectives pursued and it can be reflected not in one separate regulation but as a complex policy. Therefore, while examining specific rules, obligations, or requirements with respect to which the measures at issue seek to secure compliance it is also important to take into account the comprehensive policy as a whole.

16. Ukraine hopes its considerations set out above will help the Panel when evaluating the claims set forth in this dispute.

ANNEX C-7

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED KINGDOM

1. An integrated executive summary of the United Kingdom's third party submission, statement and responses to certain Panel questions is provided below.

I. Article XI:1 GATT

2. Article XI:1 has been interpreted to cover "those prohibitions and restrictions that have a limiting effect on the quantity or amount of a product being imported or exported". Previous case law has found that this limiting effect "need not be demonstrated by quantifying the effects of the measure at issue; rather, such limiting effects can be demonstrated through the design, architecture, and revealing structure of the measure at issue considered in its relevant context".[1]

3. As to the relationship between the two challenged measures, the United Kingdom submits that the Panel should assess the WTO-consistency of each of the measures individually. The fact that one measure prevented the application of the second measure should not preclude the Panel from assessing the compatibility of the latter with the GATT.

II. Article XI:2(a) GATT

4. Article XI:2(a) exempts "export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting Member" from the general prohibition on quantitative restrictions contained in Article XI:1.

5. **"Temporarily Applied".** The Appellate Body has interpreted "temporarily applied" to mean a "measure applied in the interim, to provide relief in extraordinary conditions in order to bridge a passing need. It must be finite, that is, applied for a limited time. [It] must be of a limited duration and not indefinite".[2]

6. The United Kingdom submits that an export restriction applied to an exhaustible resource that is intended to be maintained until the reserves of that resource have been depleted cannot be said to be "temporarily applied", nor can it be said to be applied to "prevent or relieve a critical shortage".

7. **"Critical Shortage".** The Appellate Body has interpreted "critical shortage" to mean "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 turning point". The term "shortage" "is qualified by the adjective 'critical', which, in turn, is defined as '[o]f, pertaining to, or constituting a crisis; of decisive importance, crucial; involving risk or suspense'".[3] The United Kingdom observes that a proposal to remove the term "critical" from the original draft of the GATT was rejected by the drafters.

8. In response to Panel Question 3, the United Kingdom notes that Article XI:2 does not prescribe the cause of the "critical shortage" and therefore, it is not necessary to demonstrate, for example, that the critical shortage was caused by an exceptional and temporary exogenous event. However, the meaning of each element of Article XI:2(a) is informed by each of the other elements of the provision. The cause of the critical shortage may therefore be relevant when assessing whether the measure is being applied to "prevent or relieve" that shortage. The United Kingdom submits that it may be difficult to demonstrate that a measure is applied to "prevent or relieve" a critical shortage if the shortage is in fact caused or exacerbated by expanding extraction and production capacity within the Member's domestic market.

9. **"Essential".** The Appellate Body has interpreted the term "essential" to mean products that are "absolutely indispensable or necessary" to the exporting Member. Furthermore, in *China - Raw*

[1] Appellate Body Reports, *Argentina – Import Measures*, para. 5.217.
[2] Appellate Body Report, *China - Raw Materials*, para. 330.
[3] Appellate Body Report, *China - Raw Materials*, para. 324.

Materials, the Panel found that "essential" products "*may* include a product that is an 'input' to an important product or industry". However, it reiterated that this assessment "must take into consideration the particular circumstances faced by that Member at the time that a Member applied the restriction."[4] The United Kingdom submits that access to domestic supplies of input products is not, in and of itself, "essential" to the development of a domestic industry.

III. Article XX(d) GATT

10. **Meaning of "laws or regulations".** The United Kingdom notes that text of Article XX(d) refers to "laws or regulations" in respect of which "compliance" can be "secure[d]". As to the term "secure", in *India – Solar Cells* the Appellate Body found that a measure can be said to secure compliance "with 'laws or regulations' when it seeks to secure observance of *specific rules*, even if the measure cannot be guaranteed to achieve such result with absolute certainty": the "'more precisely' a respondent is able to identify specific rules, obligations, or requirements contained in the relevant 'laws or regulations', the 'more likely it will be able to elucidate how and why the inconsistent measure secures compliance with such 'laws or regulations'".[5]

11. The Appellate Body also held that the "laws or regulations" must be ones with which "compliance" is possible and consequently, a panel should consider the degree to which an instrument containing the alleged rule is normative in nature, including its enforceability and the existence of any penalties and sanctions.

12. It follows that a measure can be said "to secure compliance" with "laws or regulations" when its design reveals that it secures compliance with *specific rules, obligations, or requirements* under such laws or regulations. The Appellate Body distinguished between the "specific rules, obligations or requirements" contained within the "laws or regulations" and the objectives of the "laws or regulations", and held that panels should consider the degree of specificity or precision with which the relevant instrument lays down a particular rule of conduct or course of action within the domestic legal system of a Member, as opposed to simply providing a legal basis for action that may be consistent with certain objectives.

13. The Appellate Body concluded by setting out a non-exhaustive list of criteria that panels may consider when considering whether the respondent has identified a rule, or rules, that fall within the scope of "laws or regulations", including but not limited to, the degree of normativity of the instrument and the degree of specificity of the relevant rule.

14. Finally, the United Kingdom submits that there are systemic reasons for avoiding an expansive interpretation of "laws or regulations". If otherwise GATT-inconsistent measures could be justified by reference to aspirational objectives or broad policy goals, it would disturb the balance between trade liberalisation and the right to regulate enshrined in Article XX.

[4] Panel Report, *China - Raw Materials*, para. 7.282 (emphasis added).
[5] Appellate Body Report, *India – Solar Cells*, para. 5.108.

ANNEX C-8

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES

EXECUTIVE SUMMARY OF THE U.S. THIRD PARTY SUBMISSION

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

1. The European Union claims that the export prohibition of nickel ore (implemented by MEMR Regulation 11/2019 and MOT Regulation 96/2019), and the domestic processing requirement on nickel ore and iron ore (implemented by MEMR Regulation 25/2018) are inconsistent with Article XI:1 of the GATT 1994. 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 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".

2. 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 pertinent definition of "restriction" in relation to the acts of importation or exportation is "a limitation on action, a limiting condition or regulation".

3. Further, Article XI:1 applies to *any* "restriction", including those "made effective through quotas, import or export licenses *or other measures*", other than "duties, taxes, or other charges". 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.

4. Indonesia argues, with respect to the domestic processing requirement, that the European Union has not made a *prima facie* case because the measure does not have any "limiting effect" on the exportation of nickel ore since the exportation "is legally prohibited in the first place" by the export ban also at issue.

5. The text of Article XI:1, however, does not require a showing of actual trade effects of a measure at issue. 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.

6. Moreover, the European Union 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 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

7. 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.

II. INTERPRETATION OF ARTICLE XI:2(a) of the GATT 1994

8. 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."

9. 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.

10. 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". Accordingly, the requirement means that the measures at issue should have defined and limited time parameters, at the very least. The United States notes that 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.

11. 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". The United States notes 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. 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." 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 Indonesia's own territory. 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 an export restriction would be applied for a limited time. Expanded capacity and resulting demand would rather suggest the measures would be applied for an unlimited time.

12. 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". 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. Therefore, 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.

13. 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.

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

14. 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" – namely Indonesia's "comprehensive policy framework for mining activities, in particular sustainable mining and mineral resource management requirements."

15. 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 measure must be "necessary" to the achievement of that objective, *i.e.*, to secure such compliance.

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

16. 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 international trade".

17. 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"; and because the measures do not "confer[] any direct or indirect protection to Indonesian nickel producers", but instead "*disadvantage* domestic mining companies by restricting their ability to compete in foreign markets." However, 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.

18. 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 processing, but also affect the consumers and purchasers of nickel that may operate in other industries. The Panel's examination of whether the measures constitute a disguised restriction on international 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. For instance, 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.

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

19. 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.

20. 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 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 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.

21. 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". This review would include whether any alternative measures exist "that achieve an equivalent level of protection while being less trade restrictive" than the challenged measure.

22. Indonesia, while acknowledging that the measures at issue are trade-restrictive, 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"; and the measures, "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." 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.'" 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."

23. The United States agrees that responding Members maintain the right to determine their own level of protection with respect to objectives pursued, and that it rests on the European Union to propose reasonably available, less trade-restrictive alternatives for achieving an equivalent 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 its identified laws or regulations.

EXECUTIVE SUMMARY OF THE U.S. RESPONSES TO PANEL QUESTIONS TO THIRD PARTIES

24. Response to Question 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. Furthermore, 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.

25. Response to Question 2: Based on the dictionary definition of "temporarily," which is "for a time (only); during a limited time", 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. Moreover, 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 shortage" is the result of the creation of increased processing capacity within the respondent Member's territory. 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

26. Response to Question 3: 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" or exclude "a definitive and unavoidable outcome." 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, 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 challenged measures could be seen as applying for a limited time.

27. Response to Question 4: 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. 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. The term "essential" should only cover those products that are "essential" within the meaning of Article XI:2(a). The inclusion of "foodstuffs" in Article XI:2(a) conveys the level of importance of the product that is contemplated by the provision.

28. Response to Question 5: 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.

29. Response to Question 6: Nothing in the text of Article XX suggests that an Article XX analysis must begin with an examination under one or more Article 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.

30. Response to Question 7: 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. 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.

31. Response to Question 8: An argument that the challenged measure is "apt to produce a material contribution" toward securing compliance with the underlying laws or regulations may not, on its own, establish that the measure is in fact "necessary" within the meaning of Article XX(d). The dictionary definition of "necessary" is "indispensable, vital, essential; requisite". 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. If the Panel finds that 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.

32. Response to Question 9(a): 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.

33. Response to Question 9(b): Under Article XX(d), 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 aspirational or general objectives 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 under Article XX(d).