

sustainable mining and mineral resource management requirements.⁶⁴² In this regard, the Panel notes that the alternative presented by the European Union does not refer to a physical inspection of each consignment upon exportation, but rather a system whereby exporters produce relevant documentation, prior to exportation, to certify compliance with the relevant requirements. These documents could then be verified against the RKABs of the relevant mines. The Panel therefore considers that Indonesia has failed to explain why it is not able to implement the proposed alternative measure or why the costs or technical difficulties associated with its implementation are prohibitive or substantial. Indonesia notes that not having to deal with exports makes enforcement easier. Just because the alternative may not be as easy to implement as the challenged measures does not mean that it is not technically or economically feasible.

Conclusion on the reasonable availability of the alternative measure

7.341. The Panel has found that the proposed alternative measure makes at least the same level of contribution as the challenged measures, is less trade restrictive, and is technically and economically feasible to Indonesia even if its initial implementation might entail some costs and technical difficulty. The Panel, therefore, concludes that the European Union has presented a reasonably available alternative measure and Indonesia has failed to rebut this.

7.3.1.2.5 Conclusion on necessity

7.342. The Panel finds that the trade restrictiveness and limited contribution of the measures to the objectives of Article 96(c) weigh towards a finding that the challenged measures are not necessary. Moreover, the Panel has found that there is an alternative measure that is reasonably available to Indonesia. The Panel, therefore, concludes that the result of the weighing and balancing exercise is that the challenged measures are not necessary within the meaning of subparagraph d of Article XX of the GATT 1994.

7.3.2 Conclusion on Article XX(d) of the GATT 1994

7.343. The Panel recalls that Article XX of the GATT 1994 sets out a two-tier test that involves, first, an assessment of whether the measure falls under at least one of its subparagraphs and, second, an assessment of whether the measure satisfies the requirements of the *chapeau* of that provision.

7.344. The Panel has found that Indonesia has failed to demonstrate that the export ban and the DPR fall within the scope of subparagraph (d) of Article XX of the GATT 1994.

7.345. Based on the foregoing, the Panel does not find it necessary to proceed with an analysis of the export ban and the DPR under the *chapeau* of Article XX of the GATT 1994.

8 CONCLUSIONS AND RECOMMENDATION

8.1. For the reasons set out in this Report, the Panel concludes as follows:

8.2. The prohibition on the export of nickel ore that began in January 2014 and is currently implemented through Law No. 4/2009 (as amended by Law No. 3/2020), MOT Regulation 96/2019 and MEMR Regulation 11/2019 is not excluded from the applicability of Article XI:1 because it is not a prohibition or restriction temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to Indonesia within the meaning of Article XI:2(a) of the GATT 1994. The export prohibition is inconsistent with Article XI:1 of the GATT 1994. The Panel has also concluded that the export prohibition is not justified under Article XX(d) of the GATT 1994 because it is not necessary to secure compliance with laws or regulations that are themselves not inconsistent with the GATT 1994.

8.3. The domestic processing requirement (DPR) that began in 2012 and is currently implemented through Law No. 4/2009 (as amended by Law No. 3/2020), MEMR Regulation Nos. 25/2018 and 7/2020 is not excluded from the applicability of Article XI:1 because it is not a prohibition or restriction temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to Indonesia within the meaning of Article XI:2(a) of the GATT 1994. The DPR is

⁶⁴² Indonesia's comments on the European Union's response to Panel question No. 111.

inconsistent with Article XI:1 of the GATT 1994. The Panel has also concluded that the DPR is not justified under Article XX(d) of the GATT 1994 because it is not necessary to secure compliance with laws or regulations that are themselves not inconsistent with the GATT 1994.

8.4. Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. The Panel concludes that the measures at issue are not excluded from the obligations in Article XI:1 of the GATT 1994 by Article XI:2(a) of the GATT 1994, are inconsistent with Article XI:1 of the GATT 1994, and are not justified under Article XX(d) of the GATT 1994. As such, they have nullified or impaired benefits accruing to the European Union under that agreement.

8.5. Pursuant to Article 19.1 of the DSU, the Panel recommends that Indonesia bring its measures into conformity with its obligations under the GATT 1994.
