CHRISTIAN TEO & PARTNERS

(in association with Stephenson Harwood)

WTO AND NICKEL EXPORT BAN – ENDLESS MANOEUVRING AND BIGGER PICTURE CONSIDERATIONS [1][2][3][4][5]

INTRODUCTION

The long running dispute between the World Trade Organization and Indonesia over the country's ban on the export of less than fully processed and refined nickel continues to drag on. Indonesia is said to be planning to present new arguments in support of its appeal against the 2022 decision that the export ban represents a breach of the 1994 General Agreement on Tariffs & Trade.

Regardless of any new arguments that Indonesia may come up with, there is a strong possibility that Indonesia will still lose its appeal. In that event, however, it is most unlikely Indonesia will drop the nickel export ban, thereby seemingly putting Indonesia on an inevitable "collision course" with the World Trade Organization. It is questionable, though, whether any such "collision" will actually occur.

There is much potential for Indonesia to engage in almost endless procedural "manoeuvring" before any penalties can be imposed on it at all. More importantly, the World Trade Organization and its members could well be reluctant to take serious action against Indonesia because of greater geo-political considerations "playing out" in the world today. Once again, Indonesia may find that, due to good luck rather than good management, it is "on the right side of history" just as it was in 1949.

In this article, the writer will consider how and why Indonesia may avoid any serious ramifications, at least for a long time and possibly forever, if it loses the appeal but continues to insist upon enforcing the nickel export ban.

BACKGROUND

Indonesia has been a member of the World Trade Organization (**WTO**) since 1995 and has acceded to/ratified the 1994 General Agreement on Tariffs & Trade (**1994 GATT**).

1994 GATT comprises the original 1947 General Agreement on Tariffs and Trade (**1947 GATT**) together with the amendments to 1947 GATT adopted at the conclusion of the so-called "Uruguay Round" of trade negotiations in 1994 (**Uruguay Round**).

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[5] An earlier version of this article appeared in the October – November 2024 issue of Coal Metal Asia Magazine.

Article XI of 1994 GATT provides that:

> "*No prohibitions or restrictions, other than duties, taxes or other charges, whether made effective through quotas, export licenses or other measures, shall be instituted or made by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale of any product destined for the territory or any other contracting party*" (**Article XI**).

Article XI is understood as generally prohibiting member countries from imposing quantitative restrictions on the importing or exporting of any product.

Because quantitative restrictions on imports and exports are viewed as having a much more negative impact on international trade than, say, tariffs, the prohibition of such quantitative restrictions is a fundamental tenet of 1994 GATT.

Articles XII and XIII of 1994 GATT elaborate further on what is allowed and what is not allowed in terms of quantitative restrictions. In addition, Article XX of 1994 GATT provides for certain general exceptions for measures that might otherwise be prohibited by 1994 GATT including by Article XI.

As of 31 December 2019, the Government banned the export of all nickel ore (**2019 Nickel Ore Export Ban**).

Various European Union member trading partners of Indonesia responded to the 2019 Nickel Ore Export Ban by refiling an earlier complaint, made by Japan to the WTO, alleging that the 2019 Nickel Ore Export Ban represented a breach by Indonesia of Article XI (**Relevant EU Members**) (**WTO NOEB Complaint**).

As Indonesia and the Relevant EU Members were unable to resolve the WTO NOEB Complaint through bi-lateral discussions, the WTO NOEB Complaint became a formal dispute (**WTO NOEB Dispute**). The WTO's Dispute Settlement Body, which is broadly representative of the WTO membership, then formed a panel to hear and decide the WTO NOEB Dispute (**Panel**).

The procedures and timetable for settling WTO disputes, including the WTO NOEB Dispute, are set out in the WTO's Understanding on Rules and Procedures Governing the Settlement of Disputes (**SoD Understanding**). The SoD Understanding was adopted as part of the Uruguay Round.

The final Panel report or decision, ruling against Indonesia in respect of the WTO NOEB Dispute, was issued in late 2022 (**2022 WTO NOEBD Decision**).

Indonesia subsequently filed an appeal against the 2022 WTO NOEBD Decision in 2023 (**2023 WTO NOEBDD Appeal**).

It has recently been reported that Indonesia plans to present new arguments in support of the 2023 WTO NOEBDD Appeal, which arguments focus on the progress Indonesia has made in developing a viable domestic nickel processing and refining industry as a consequence of the 2019 Nickel Ore Export Ban.

The long delay in progressing the 2023 WTO NOEBDD Appeal is due to the fact that the permanent 7-member appellate body, set up by the WTO's Dispute Settlement Body (**Appellate

Body), has been effectively non-functioning for an extended period as a result of the United States' insistence upon extensive WTO reform as a pre-condition to cooperating in the appointment/re-appointment of Appellate Body members. Consequently, there is now a backlog of appeals to be heard and decided, with Indonesia's 2023 WTO NOEBDD Appeal being number 21 (or even number 23 or number 24 according to other reports) "in the queue".

Because of the backlog, the timing of an actual decision on the 2023 WTO NOEBDD Appeal is unclear but various, apparently knowledgeable, commentators have indicated that mid-2026 may be a reasonable expectation.

Former President, Joko Widodo, has previously indicated that (i) he would not be surprised if Indonesia loses the 2023 WTO NOEBDD Appeal but (ii) even if Indonesia does lose the 2023 WTO NOEBDD Appeal, it will continue with its policy of insisting upon full downstream processing and refining of all metal minerals, including nickel (**DP&R Policy**). By implication, the former President was saying that Indonesia would ignore any adverse decision in respect of the 2023 WTO NOEBDD Appeal and continue to enforce the 2019 Nickel Export Ban, at least until such time as Indonesia has a fully developed nickel processing and refining industry.

Interestingly, not withstanding its clear unhappiness with the WTO and the restrictions imposed on it by Article XI, Indonesia has made **no** move to either (i) procure an amendment of Article X1 by invoking the amendment procedures in Article XXX of 1994 GATT or (ii) withdraw/de-accede from 1994 GATT pursuant to Article XXXI of 1994 GATT.

ANALYSIS AND DISCUSSION

1. Position of New President Prabowo Subianto

Indonesia's new President, Prabowo Subianto, strongly defended the DP&R Policy and, by necessary implication, the 2019 Nickel Export Ban at the Qatar Economic Forum in May 2024 where he was quoted as saying that criticism of the DP&R Policy was misplaced and, more particularly:

> "*We're not protectionist. What we are doing is very logical*."

The new President's support of the DP&R Policy and the 2019 Nickel Export Ban is entirely consistent with the views he expresses in his October 2023 book "*Strategic Ideas – Prabowo Subianto – National Transformation Strategy towards a Golden Indonesia 2045 – Indonesia is Becoming a Developed and Prosperous Country*". That book includes (i) a lengthy "polemic" against the "evils" of allowing so much of Indonesia's national wealth, including in the form of unprocessed and unrefined metal minerals, to flow abroad and (ii) a strident defence of the DP&R Policy.

The importance of continuing and, indeed, expanding the DP&R Policy is also one of the key policies outlined by the new President and his then Vice-Presidential "running mate" in their manifesto or policy document, entitled "*Visions, Missons & Programs*", that was published prior to the February 2024 Presidential Election. More particularly, this policy document makes clear the importance of Indonesia's natural resources, metal minerals in particular, as being the primary **potential** source of improved economic prosperity for Indonesia. To this end, the policy document cites Indonesia's so-called "*Nickel Derivative Product Export Value*" of US$34.2 billion in 2023, which it claims is the "*highest in* *history*" and "up 11.7 times" from 2014's US$2.9 billion, as providing the "*Foundation of a Progressive Indonesia*".

2. Theoretical Consequences for Indonesia if it Loses 2023 WTO NOEBDD Appeal

The long delay in hearing the 2023 WTO NOEBDD Appeal is, of course, very much to Indonesia's advantage as it means that Indonesia is yet to face any real consequences for imposing the 2019 Nickel Export Ban and regardless of whether Indonesia is in breach of Article X1.

Readers may be surprised to know that, even if Indonesia eventually loses the 2023 WTO NOEBDD Appeal but continues to enforce the 2019 Nickel Export Ban, the potential consequences for Indonesia are relatively limited, **except (of course) in terms of damage to its international reputation as a country that respects the rule of law**. More particularly, there is **no** specific provision in 1994 GATT dealing with either the suspension or termination of WTO membership in the case of WTO member countries which simply refuse to comply with their 1994 GATT obligations or for any other reason.

The possibility of suspending or terminating Russia's membership of the WTO, as punishment for its invasion of Ukraine, has been proposed by various parties including by Ukraine itself. However, trade law scholars have, by and large, come to the conclusion that 1994 GATT does **not** provide any obvious legal basis for suspending or terminating WTO membership. It would seem that this is equally the case whether a member country has become an international "pariah" because of its invasion of another member's sovereign territory or because a member country has continuously refused to comply with its 1994 GATT obligations.

The perhaps surprising position outlined in the previous paragraph is probably due to the implicit assumption of the drafters of and the signatories to 1994 GATT that any member country, which decides that the obligations imposed on it by 1994 GATT are too onerous and otherwise not in its national best interests to comply with, will quickly exercise its unconditional right to withdraw/de-accede from 1994 GATT in reliance upon Article XXXI of 1994 GATT. It is reasonable to assume that this is why the withdrawal/de-accession procedure is so easy and straightforward. This explanation is also entirely consistent with the wholly voluntary nature of WTO membership. Clearly, the drafters of and the signatories to 1994 GATT never contemplated that there would be a WTO member like Indonesia which **both** refuses to comply with its 1994 GATT obligations **and**, at the same time, refuses to withdraw/de-accede from 1994 GATT.

The only penalty for non-compliance with 1994 GATT is, in fact, the risk of having to pay compensation or suffer the suspension of agreements/concessions providing trade benefits to the non-compliant party. Even these relatively modest penalties are still a long way off for Indonesia.

The SoD Understanding provides that, if Indonesia loses the 2023 WTO NOEBDD Appeal, it must follow the recommendations and rulings of the Appellate Body appeal report, stating its intention to do so at a Dispute Settlement Body meeting held within 30 days of the appeal report's adoption. If complying with the recommendation immediately proves "*impractical*", Indonesia will be given a "*reasonable period of time*" to do so. This "*reasonable period of time*" is to be proposed by Indonesia and approved by the Dispute Settlement Body or, in the absence of such approval, such "*reasonable period of time*" is to be (i) agreed between Indonesia and the Relevant EU Members within 45 days of the issuance of the Appellate Body's report or (ii) failing such agreement, as determined by binding arbitration conducted within 90 days of the issuance of the Appellate Body's report. In any event, the *"reasonable period of time*" should not exceed 15 months from the issuance of the Appellate Body's report, except in the case of "*exceptional circumstances*", the existence of which "*exceptional circumstances*" may result in a maximum compliance period, not exceeding 18 months, being allowed (Article 21 of SoD Understanding).

It should be anticipated that Indonesia will seek to take every procedural advantage allowed by Article 21 of the SoD Understanding should it lose the 2023 WTO NOEBDD Appeal. More particularly, it is not hard to envisage Indonesia (i) maintaining it is "*impractical*" for it to immediately comply with the appeal report by dropping the 2019 Nickel Export Ban, (ii) initially proposing a wholly unacceptable compliance period, (iii) then refusing to reach agreement with the Relevant EU Members, within 45 days, on a more "*reasonable period of time*", (iv) subsequently prolonging the resulting arbitration of what is a "*reasonable period of time*" for the full 90 days and (v) finally, contending that "*exceptional circumstances*" exist in the case of the 2019 Nickel Export Ban which warrant the maximum 18 months "*reasonable period of time*" being applied.

If Indonesia fails to act, within the ultimately determined "*reasonable period of time*", to drop the 2019 Nickel Export Ban (something that seems entirely likely given the new President's unqualified defence of the 2019 Nickel Export Ban), the Relevant EU Members' only recourse is to (i) seek to agree with Indonesia "*satisfactory*" compensation or (ii) failing any agreement being reached with Indonesia on "*satisfactory*" compensation within 20 days of the end of the "*reasonable period of time*", request authorisation from the Dispute Settlement Body to suspend various trade concessions and trade related agreements benefiting Indonesia (**Trade Sanctions**). This Trade Sanctions authorization request is to be granted within 30 days unless the Dispute Settlement Body "*decides by consensus to reject the request*". The economic effect on Indonesia of the authorized Trade Sanctions is meant to be equivalent to the "*level of nullification or impairment*" suffered by the Relevant EU Members (**i.e.**, by their stainless-steel producers) as a result of the 2019 Nickel Export Ban. If Indonesia objects to any Trade Sanctions authorized by the Dispute Settlement Body, it has a further right of arbitration (Article 22 of SoD Understanding).

Again, it is not hard to see a situation arising where Indonesia refuses to engage with the Relevant EU Members in good faith negotiations over "*satisfactory compensation*", thereby leaving the Relevant EU Members with the unenviable choice of either (i) allowing Indonesia to avoid any financial consequences of its continued refusal to drop the 2019 Nickel Export Ban or (ii) seeking approval to impose Trade Sanctions on Indonesia. It can also be confidently expected that Indonesia would, most likely, object to whatever Trade Sanctions is authorized by the Dispute Settlement Body and then seek to delay the implementation of the authorized Trade Sanctions by exercising its further right of arbitration.

The WTO has certainly done itself and the promotion of its free trade objectives no favours at all in allowing the extraordinarily extended process, for implementing decisions of the Appellate Body, to exist in the first place or at least to continue for so long without extensive amendment.

Why the Relevant EU Members (and certain other WTO members which would normally be expected to automatically support the Relevant EU Members) may be very reluctant, in practice, to seek approval (or to see the Relevant EU Members seek approval) to impose Trade Sanctions on Indonesia is the subject of the next part of this article.

3. <u>Bigger Picture Considerations Likely to Hinder Resolute Relevant EU Member Action</u>

3.1 **Preliminary Remarks:** The 2023 WTO NOEBDD Appeal is taking place in the midst of unprecedented levels of economic and industrial rivalry between the United States and China. China is seeking to challenge the United States's long held position as the world's pre-eminent economic and industrial power. At the same time, the United States is, of course, seeking to do everything possible to prevent that challenge from being successful.

The economic and industrial rivalry between the United States and China is only likely to increase exponentially if Donald Trump becomes President again and given his expressed intention to use high tariffs to help protect United States industry against what he says is "unfair" competition from cheaper Chinese imports, something which, needless to say, China strenuously denies. There is never likely to be any global consensus on this issue and the writer would not purport to express any view on the same.

China and the United States are both WTO members, something that might suggest a common interest in making sure that 1994 GATT is complied with, and the WTO otherwise operates efficiently. However, the economic and industrial rivalry between China and the United States surely transcends any nominal commitment that each of them may otherwise have to 1994 GATT and the WTO. 1994 GATT and the WTO are almost certainly viewed by the United States and China as just another dimension of and channel for their economic and industrial rivalry.

As part of their economic and industry rivalry, each of China and the United States are actively pursuing alternative channels to the WTO in an endeavour to ensure their eventual dominance. Witness (i) the BRICS intergovernmental organization (comprising Brazil, Russia, India, China, South Africa, Iran, Egypt, Ethiopia and the United Arab Emirates) and the "Belt and Road Global Infrastructure Development Initiative" in the case of China and (ii) the United States' pursuit of a wide-ranging Strategic Minerals Partnership with multiple, mineral rich countries including Indonesia.

There are also, of course, important national security and defence dimensions to the growing economic and industrial rivalry between the United States and China, which dimensions we see "playing out" in the form of China's claim to most of the South China Sea and the emergence of new defence/military/security groupings such as the AUKUS trilateral security partnership (comprising Australia, the United Kingdom and the United States) and the Five Eyes Anglosphere intelligence alliance (comprising Australia, Canada, the United Kingdom and the United States).

It would be naïve to imagine that the European Union and Indonesia are not, inadvertently, "bit players" ("pawns" if you like) in the economic and industrial rivalry between the United States and China. Indonesia's great mineral endowment, especially of so-called critical minerals such as copper, **<u>nickel</u>** and tin, makes this inevitable in the case of Indonesia. At the same time, the Relevant EU Members' challenge to the 2019 Nickel Export Ban and their attempt to ensure that unrefined nickel ore is readily available on the international market arguably has a similar consequence for the European Union.

Given the above, it is probable that the eventual outcome of the WTO NOEB Dispute and what happens if Indonesia loses the 2023 WTO NOEBDD Appeal will be greatly influenced by the ongoing economic and industrial rivalry between the United States and China as well as by the associated defence and security issues. The wording of Article XI of 1994 GATT and the SoD Understanding may end up having very little at all to do with the end result.

3.2 **CEPA between Indonesia and European Union:** What action, if any, the Relevant EU Members decide to take against Indonesia, if Indonesia loses the 2023 WTO NOEBDD Appeal, can hardly avoid being influenced by the European Union's long running negotiation of and attempt to conclude a Comprehensive Economic Partnership Agreement with Indonesia (**IEU-CEPA**).

The European Union tried very hard to have the IEU-CEPA negotiations concluded and IEU-CEPA signed before President Joko Widodo's term of office came to an end. This did **<u>not</u>** happen, however. Following an internal meeting at the Presidential Palace on 25 June 2024, for the stated purpose of "*accelerating completion of the IEU-CEPA negotiations*", Indonesia's Minister of Trade was quoted as saying that:

> "*The progress of IEU-CEPA [negotiations] has reached 90 percent*"

While this claimed "*90 percent progress*" might seem like a very significant landmark, it nevertheless means that (i) important issues still remain unresolved and (ii) more importantly, it will now be the new Government, led by President Prabowo Subianto, which decides how Indonesia approaches the resolution of the outstanding issues in respect of the IEU-CEPA negotiations and what sort of priority, if any, this receives. That "last 10 percent" of required progress could prove very difficult to achieve should there be a subsequent deterioration in the overall diplomatic relationship between Indonesia and the European Union. In this regard, Indonesia is **<u>not</u>** likely to be willing to acknowledge the existence of any material difference between, on the one hand, the Relevant EU Members pursuing it over the 2019 Nickel Export Ban and, on the other hand, the European Union seeking to conclude the IEU-CEPA negotiations with it.

IEU-CEPA, of course, offers significant **<u>potential</u>** economic benefits for both Indonesia and the European Union. A study by the Centre for Strategic and International Studies indicates that IUE-CEPA could result in (i) additional, annual Indonesian GDP growth of 0.10 percent, (ii) a 57.76% increase in Indonesian exports to the European Union and (iii) increased export revenue earnings of US$2.8 billion per year for Indonesia. Given Indonesia is currently only the European Union's 33rd largest trading partner, with bilateral trade between the European Union and Indonesia amounting to just US$32.04 billion annually, the European Union and its members clearly also have, potentially, a lot to gain economically from a much-expanded trade and investment relationship with Indonesia. As such, it might be thought that Indonesia, like the European Union, has every incentive to conclude the IEU-CEPA negotiations as quickly as possible. That, though, has not proved to be the case so far as evidenced by the many years and nearly 20 rounds of negotiations to date. Further, given President Prabowo Subianto's strong defence of the 2019 Nickel Export Ban and his reputation for being a "tough-minded" politician, the new Government might see a significant strategic advantage in delaying the conclusion of the IEU-CEPA negotiations until the outcome of the 2023 WTO NOEBDD Appeal is finally known and it becomes clear what action, if any, the Relevant EU Members will take against Indonesia if it loses the 2023 WTO NOEBDD Appeal. The writer cannot help but wonder if leaving the "last 10 percent" of required progress, in the IEU-CEPA negotiations, outstanding as at the end of the old Government's term was, in fact, a deliberate and clever move on the part of Indonesia.

The European Union will need to think very carefully about what is more important to its members – a signed IEU-CEPA and greater economic co-operation between Indonesia and the European Union or allowing the Relevant EU Members to take a "hard line" against Indonesia by seeking authorization to impose significant Trade Sanctions on Indonesia if it continues to enforce the 2019 Nickel Export Ban despite losing the 2023 WTO NOEBDD Appeal. Of course, neither the new Government of President Prabowo Subianto nor the European Union is ever likely to acknowledge the existence of these strategic considerations but who could seriously doubt the reality of the same.

3.3 **Encouraging Indonesia to Reduce Economic Cooperation with China:** There has been growing economic cooperation between China and Indonesia for many years. During the Joko Widodo Presidency, the Government actively courted Chinese financing and technical support for Indonesia's numerous large scale infrastructure projects, including the Jakarta-Bandung fast train line, even to the extent of seemingly "sidelining" traditional infrastructure "partners" such as Japan. At the same time, Chinese companies have become increasingly important investors in the Indonesian resources sector, especially metal minerals (most notably, nickel) mining and the downstream processing and refining of metal minerals (again, most notably, nickel). Finally, Chinese companies have provided Indonesia with access to much needed "cutting edge" technology for emerging industries such as electric battery manufacturing. The "high profile" presence of large numbers of "imported" Chinese workers has even become a social problem in certain parts of Indonesia.

Concern has been expressed, both publicly and privately, by Indonesia's traditional trading partners and sources of investment funds that, as evidenced by the various developments described in the previous paragraph, Indonesia is in danger of becoming, perhaps unwittingly, an economic "satellite" of China. This possibility was and continues to be seen, at least by some parties and whether justified or not, as posing a serious potential economic and security risk for the United States, the European Union and other OECD countries such as Australia, Japan and South Korea. These countries, rightly or wrongly, would be likely to maintain, in private at least, that Indonesia's strategic geographic location and its rich natural resources endowment, particularly of critical minerals, makes it a source of great concern for them if Indonesia becomes too "close", economically and otherwise, to China. Indonesia, of course, has always denied the China economic "satellite claim, maintaining that its wide-ranging engagement with China is just another manifestation of its long standing "non-aligned" foreign policy.

The last 12 months, however, has seen a number of important developments that indicate the Government possibly understands, only too well, the potential longer-term risks for Indonesia (never mind the rest of the world!!) if it becomes too closely aligned with China. In comparatively short order, (i) Indonesia and Australia signed, in November 2023, a Memorandum of Understanding on Electric Vehicle Cooperation (**EV MoU**) which, among other things, is intended to ensure Indonesia is able to obtain, from Australia, the lithium it needs for domestic electric battery manufacturing, (ii) the Government announced its intention, in February 2024, to shortly begin discussions with the OECD as a precursor to Indonesia becoming a member of the OECD (which China is not a member of although it is a country that the OECD "partners" with on reform related matters) (**OECD Membership Initiative**), (iii) the United States disclosed in July 2024 that it was actively engaged in discussions with the Government concerning a proposed Mineral Security Partnership among 14 countries (including Indonesia along with India, Australia, Japan, the United States and others) as well the European Union (but not China of course!!!) aimed at promoting "*responsible investment in critical minerals*" (**Critical Minerals Partnership Discussions**) and (iv) Indonesia signed what is being described as an "historic" Defence Cooperation Agreement with Australia in August 2024 (**IA-DC Agreement**).

Indonesia's OECD Membership Initiative is of particular interest because, although the process of Indonesia becoming an OECD member will take at least 3 years to complete, it involves a commitment by Indonesia to adopt and implement OECD standards on a wide range of matters, including structural reform, trade and investment, inclusive growth, governance, the environment, digitalization and infrastructure. These are all matters that are perceived to be of great importance by Indonesia's traditional North American, European, and South-East Asian partners as well by Australia and Japan.

The IA-DC Agreement is also interesting because it represents an upgrading and expansion of the existing defence and military cooperation relationship between Indonesia and Australia which, of course, is one of the United States' AUKUS and Five Eyes partners. This, self-evidently, is <u>**not**</u> likely to be seen as a positive development by China.

The EV MoU, the OECD Membership Initiative, the Critical Minerals Partnership Discussions and the IA-DC Agreement (together, **Recent Economic Cooperation & Security Developments**) can all be seen as (although they <u>**not**</u> necessarily are in fact) evidence of the Government's realization that it might be prudent for Indonesia to, at least, broaden its economic and security relationships, thereby reducing its dependence upon China. Other explanations of the significance or otherwise of the Recent Economic Cooperation & Security Developments are also plausible. Indonesian officials have, needless to say, been careful to publicly deny any suggestion that the Recent Economic Cooperation & Security Developments indicate any lessening of Indonesia's enthusiasm for economic and other forms of cooperation with China.

It is inevitable that the United States will view the Recent Economic Cooperation & Security Developments through the "prism" of its intensifying economic and industrial rivalry with China and, therefore, see the Recent Economic Cooperation & Security Developments as being very positive indeed. Accordingly, the United States is likely to be determined to ensure that nothing happens to reduce Indonesia's commitment to and interest in realizing the full potential of the Recent Economic Cooperation & Security Developments. As a consequence, the United States may well increasingly come to regard the outcome of the 2023 WTO NOEBDD Appeal and the potential for the Relevant EU Members to seek authorization to impose punitive Trade Sanctions on Indonesia, if it loses the 2023 WTO NOEBDD Appeal but nevertheless continues to enforce the 2019 Nickel Export Ban, as an important and worrying possibility that is <u>**not**</u> consistent with the United States' greater economic, industrial and strategic interests. In these circumstances, the United States could decide that its interests are actually best served by "working behind the scenes" to ensure that Indonesia is treated very leniently by the WTO and does not otherwise feel "unwelcome" in the WTO. The last thing the United States will want to happen is for the new Government of Prabowo Subianto to have any reason to rethink the merits of Indonesia broadening its economic and security co-operation relationships, far less anything that might encourage Indonesia to move closer to, rather than further away from, China.

3.4 **Possible Parallel with 1949 and Holland's Loss of United States Support:** Although Indonesia declared its independence on 17 August 1945, it was not until the signing of the Roem – Van Royen Agreement on 7 May 1949 that the remaining issues between Indonesia and Holland, in respect of the country's independence, were finally resolved at least temporarily. This made possible Holland's formal recognition of Indonesian independence at the so-called "Round Table Conference" in The Hague later in 1949.

During the period 1945 to 1949, the support Holland enjoyed from the United States, in respect of its endeavour to maintain at least de facto control of Indonesia, shifted dramatically. Initially, the United States was quite supportive of Holland's plan for Indonesia as clearly evidenced by the very favourable terms (at least as far as Holland was concerned) of the Renville Agreement signed on 17 January 1948, under the auspices of the United States and, indeed, onboard a US warship (the USS Renville) in Jakarta Bay. However, United States support of Holland declined dramatically and starting soon after the signing of the Renville Agreement, thereby leaving Holland with no real choice but to sign the much less favourable (at least as far as Holland was concerned) Roem – Van Royen Agreement less than 12 months later.

Inevitably, historians do not agree on precisely why the United States changed its mind about supporting Holland and its ambitions for Indonesia. The reasons for the fundamental change in the United States' position were undoubtedly complex and multi-faceted but, most probably, had almost nothing to do with any re-evaluation of the underlying merits (legal or moral) of the competing claims of Holland and Indonesia's republican government. Many historians believe that this change in position was, in fact, due to growing concern in Washington D.C about the impending takeover of China by the communists and the threat this posed to the long term stability of South East Asia, a threat which the State Department decided would be exacerbated if Indonesia was still engaged in a bitter struggle with Holland over its claim to independence. In other words, greater geo-political considerations and the United States' changing perception of what would best serve its interests led to a very different outcome for Holland, in terms of continuing Untied States support, to that which it had been confidently expecting.

There would seem to be an obvious, **potential** parallel with how and why the United States ultimately determined its position on Indonesian independence with how and why the United States and other traditional supporters of the Relevant EU Members may ultimately determine their collective position on the WTO NOEB Dispute and what, if anything, should happen to Indonesia if it loses the 2023 WTO NOEBDD Appeal. The ongoing intense economic and industrial rivalry between the United States and China, together with its associated defence/military/security implications, is likely to be seen (by the United States at least) as being just as serious as the impending takeover of China by the communists was in the late 1940s.

SUMMARY & CONCLUSIONS

The hearing of Indonesia's 2023 WTO NOEBDD Appeal is still to take place and what the Relevant EU Members will do, if Indonesia loses the 2023 WTO NOEBDD Appeal but continues to enforce the 2019 Nickel Export Ban, remains an unknown quantity. As such, the WTO NOEB Dispute has a long way to go, with many interesting "twists and turns" along the way being almost guaranteed.

It could be a serious mistake to believe, however, that the final resolution of the WTO NOEB Dispute will necessarily have a lot to do with the wording of Article XI of 1994 GATT and the SoD Understanding. A detailed knowledge of the wording of Article XI and the SoD Understanding is undeniably important in terms of understanding the various options for procedural "manoeuvring" available to Indonesia in the aftermath of the 2023 WTO NOEBDD Appeal and if Indonesia loses the same but continues to enforce the 2019 Nickel Export Ban. However, bigger considerations, of a geopolitical nature, are likely to be the ultimate determinants of what "price", if any, Indonesia has to ultimately "pay" for its continued non-compliance with Article XI.

The European Union's interest in concluding the IEU-CEPA negotiations and the interest of the United States, as well as of many other countries, in ensuring that Indonesia continues to see benefit in broadening its economic and security relationships may well prove to be decisive in terms of how the WTO NOEB Dispute is finally resolved.

Although just a "bit player" (like the European Union) in the intensifying economic and industrial rivalry between the United States and China, Indonesia could end up being a major beneficiary of that rivalry, at least in terms of whether significant Trade Sanctions are ever imposed on it. Geopolitics may well, once again, favour Indonesia just as it did when political sentiment in the United States and other western countries moved decisively in Indonesia's favour and against Holland during the long struggle for independence from 1945 to 1949. Like Holland in 1949, the Relevant EU Members may end up lamenting that they were "*on the wrong side of history*" in pursuing Indonesia over the 2019 Nickel Export Ban.

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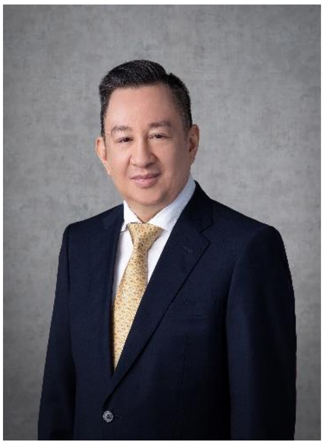

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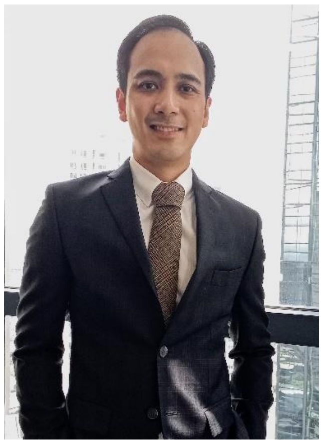

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