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Sustainable Development as a Legal Argument for the Global South: Legal Mimicry in Indonesia's WTO Dispute Settlement

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ABSTRACT: The concept of "sustainable development" is often associated with and can be traced to the Global North. However, there is a paradigmatic change in the employment of the concept as a legal argument in the context of trade disputes. This paper especially focuses on the *Indonesia – Raw Minerals* dispute. In the WTO dispute concerning Indonesia's raw minerals export ban, the European Union (EU) challenged Indonesia over its export restrictions and Domestic Processing Requirement (DPR). Rather than invoking Article XX(g) of the GATT 1994, which addresses the conservation of exhaustible natural resources—a common approach among WTO members—Indonesia chose to rely on Article XX(d) of the GATT 1994. This article justifies trade restrictions necessary to fulfill WTO-compliant obligations, including the imperative to promote sustainable development in the minerals sector. Although Indonesia ultimately lost the dispute, its use of sustainable development as a defensive strategy merits examination. This paper analyses the narrative techniques Indonesia employed to defend its export restrictions and DPR measures in the WTO proceedings. Drawing on the "Neo" New Haven School perspective which emphasizes critical perspective on international law, the paper views the dispute through the lens of "international law as language." This approach posits that international law is intertwined with political realities and serves as a communicative tool for international actors to engage within the global community. Ultimately, this paper argues that Indonesia's invocation of "sustainable development" reflects legal mimicry, demonstrating how terminology originating from the Global North is now being appropriated as a legal argument by the Global South to empower them.

KEYWORDS: Legal Mimicry, Trade and Sustainable Development, WTO Dispute Settlement

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I. INTRODUCTION

'Sustainable development' arguably is vocabulary that originates from the Global North. Since the phrase 'sustainable development' was coined in the *Brundtlandt Report*[1] in the 1980s, the Global South has been skeptical about the interpretation and application of the concept.[2] The suspicion is particularly regarding the nexus between trade and sustainable development . The Global South contended that sustainable development is another justification for creating protectionism and limiting market access for the Global South.[3]

In the *Indonesia - Raw Minerals* WTO dispute,[4] the European Union (EU) launched a complaint against Indonesia due to Indonesia's export restriction on raw nickel ore and subsequent domestic processing requirement (DPR). Instead of using Art. XX(g)

[1] *Our Common Future: Report of the World Commission on Environment and Development*, by Gro Harlem Brundtlan, A/42/427 (United Nations, 1987).
[2] S Cummings, AA Seferiadis & L Haan, "Getting Down to Business? Critical Discourse Analysis of Perspectives on the Private Sector in Sustainable Development" (2020) 28:4 Sustainable Development 759–771.
[3] Shawkat Alam, *Sustainable Development and Free Trade: Institutional Approaches*, 1st edition ed (London New York: Routledge, 2007).
[4] Indonesia, *Measures Relating to Raw Materials, DS592* (2022).

of the General Agreement on Tariffs and Trade (GATT) 1994 regarding the conservation of exhaustible natural resources as other WTO Members typically invoke, Indonesia relied on Art. XX(d) of the GATT 1994. Art. XX(d) elaborates on the justification for implementing trade restrictions to implement WTO-compliant obligations, one of which is the mandate to implement sustainable development in the minerals sector. Despite Indonesia's loss in the dispute, the argument of sustainable development as a defence tool is worth looking at.

Since the publication of the WTO panel report, "*Indonesia — Measures Relating to Raw Materials*" (DS592) in 2022, existing literature on international trade law is already saturated with the discussion of *Indonesia – Raw Materials*. However, most research that has reported on the *Indonesia - Raw Minerals* WTO dispute has only looked at the helicopter view and broad description of the dispute.[5] Some argued about the continuing implementation of export restrictions as the panel report is unimplementable, as the mineral down streaming policy is the current national interest of Indonesia.[6] Another scholar concluded that Indonesia did not have any justification to implement export restrictions under the WTO law.[7] And some others cautiously

[5] See Dedi Sunardi, "Export of Crude Nickel (Government of Indonesia vs. European Union and WTO" (2023) 11:2 Journal of Law and Sustainable Development 1–11; Rainer Marampa Bari, Nanik Trihastuti & Pulung Widhi Hari Hananto, "Indonesia's nickel export restriction policy: alternative on environmental approach for Article XI:1 GATT justification" (2022) 22:1 Journal of International Trade Law and Policy 15–32; Dodi Sugianto, "ANALYSIS OF INTERNATIONAL TRADE LAW IN THE WORLD TRADE ORGANIZATION (CASE STUDY OF THE BAN ON THE EXPORT OF INDONESIAN NICKEL ORE TO THE EUROPEAN UNION)" (2023) 12:01 Jurnal Scientia 794–797.

[6] Edward ML Panjaitan & Putu George Matthew Simbolon, "Penyelesaian Sengketa pada World Trade Organization dan Solusi terhadap Kekalahan Indonesia pada DS 592 dalam Perspektif Kepentingan Indonesia" (2023) 9:2 Jurnal Hukum to-ra : Hukum Untuk Mengatur dan Melindungi Masyarakat 192–202.

[7] IGusti Ngurah Parikesit Widiatedja, "Indonesia's Export Ban on Nickel Ore: Does It Violate the World Trade Organization (WTO) Rules?" (2021) 55:4 Journal of World Trade 667–696.

warned the Indonesian government when designing the measure to realise sovereignty over natural resources.[8]

This paper is not interested in the WTO law compliance/non-compliance debate of the measure.[9] Rather, this paper focuses on the use of 'sustainable development' as a term that was used by Indonesia to defend the measure. In other words, this paper dissects and deconstruct the argumentative practice used by Indonesia. The semantical use of 'sustainable development' argument has not been addressed in the existing literature on this dispute, thus analysis of legal semantics is the novel aspect of this paper.

This paper posits that the term 'sustainable development' that was used by Indonesia is an expression of legal mimicry. Drawing from sociological concept of mimicry,[10] this paper defines legal mimicry as the practice of legal actors imitating or mimicking legal systems, rules, and expressions from other actors. The use of semantics of 'sustainable development' that comes from the Global North is now being used also as a legal argument for the Global South in defending their trade policy.

This paper will be divided into six sections. Following this part, this paper elaborates on the method and approach undertaken throughout the analysis. Subsequently, the first discussion explores the concept of the trade-sustainable development nexus, particularly seen from the Global South perspective. Subsequently, the paper revisits the *Indonesia - Raw Minerals* dispute, focusing on the argument

[8] Atik Krustiyati & Gita Venolita Valentina Gea, "The Paradox of Downstream Mining Industry Development in Indonesia: Analysis and Challenges" (2023) 7:2 Sriwijaya Law Review 335–349.

[9] For debates, see Mikaila Jessy Azzahra & Yetty Komalasari Dewi, "Re-examining Indonesia's Nickel Export Ban: Does it Violate the Prohibition to Quantitative Restriction?" (2022) 6:2 Padjadjaran Journal of International Law 180–200.

[10] Patrick Bourgeois & Ursula Hess, "The impact of social context on mimicry" (2008) 77:3 Biological Psychology 343–352.

of sustainable development that was put forward by Indonesia and responded by the EU, and as concluded by the WTO panel. In the fifth part, the paper explores the concept of 'legal mimicry' and how the use of 'sustainability' as a narrative by Indonesia fits perfectly to be described as 'legal mimicry'.

II. METHODS

This paper particularly highlights the narrative techniques used by Indonesia in defending the export restriction and DPR measures in the WTO dispute. Therefore, the WTO dispute settlement report of *Indonesia - Raw Minerals* will be the core legal document that is scrutinised through qualitative means. In this way, this paper extensively utilised desk research as a data collection method. This paper is indeed written from the perspective of legal discipline. However, cross-disciplinary sources and materials are also used to provide elaborations on the legal issue that is being examined here.

This paper draws perspectives from the so-called "Neo" New Haven School. "Neo" New Haven School sees international law as a *process*, thus interactions and counter-interactions among the international actors will be at the central stage. In assessing the interaction, this paper approaches the raw materials dispute from the perspective of 'international law as language'.[11] This paradigm sees international law as not distinct from political realities, and understands 'international law' as a communicative tool for international actors to communicate in the medium of the international community.[12] Thus, international law should be seen as

[11] Jared Wessel, "International Law as Language - Towards a 'Neo' New Haven School" (2010) 23:2 International Journal for the Semiotics of Law - Revue Internationale de Sémiotique Juridique 123–144.

[12] Dino Krisiotis, "The Power of International Law as Language" (1998) 34 California Western Law Review 397–404.

a *legal process* that involves actions and counter-actions of the actors.[13] International law after all, could serve as a political tool in the international sphere for international actors.[14] This perspective, which draws extensively from international politics literature, will eventually assist the analytical part of this paper.

III. SUSTAINABLE DEVELOPMENT AS LEGAL NARRATIVES

A. Sustainable Development' and North-South division

'Sustainable development' is orthodoxically understood as the development that "meets the needs of the present without compromising the ability of future generations to meet their own needs."[15] The G-7 countries endorsed the *Brundtland Report's* definition during the Toronto Summit in 1988,[16] and the definition has been epistemically upheld and carried forward to this day. Even the concept of 'sustainable development' has transcended into the legal sphere, subsequently translated into legal norms. As Voigt argues, sustainable development is now a legal principle that protects the "fragile equilibrium between the atmosphere, the waters, the soils, the ecosystems, and the needs of humans to live in a peaceful, just and secure world," not only in the present time but also for the tomorrow.[17] The idea of sustainability encompasses not only

[13] Regina Jefferies, "Transnational Legal Process: An Evolving Theory and Methodology" (2021) 46:2 Brooklyn Journal of International Law 311; Harold Hongju Koh, "Transnational Legal Process" in *The Nature of International Law* (Routledge, 2017) 311.

[14] Hikmahanto Juwana, "International Law as Political Instrument: Several of Indonesia's Experiences as A Case Study" (2021) 1:1 Indonesian Journal of International Law 78–100.

[15] *supra* note 3, p. 49.

[16] Barbara Stark, "Sustainable Development and Postmodern International Law: Greener Globalization?" (2002) 27:1 William & Mary Environmental Law and Policy Review 151.

[17] Christina Voigt, "Sustainable Development as a Principle of International Law: Resolving Conflicts between Climate Measures and WTO Law" in *Sustainable Development as a Principle of International Law* (Brill Nijhoff, 2008),p. 9.

environmental sustainability but also sustainability of the social dimension.

The normative content of the *Brundtland Report* has been repeated and reiterated in various international documents. *Rio Declaration 1992* sets out 27 principles and elaborates more on the concept of environmental sustainability. Principle 4, for example, is arguably the most important, which is the principle of internalisation of environmental protection in the development progress.[18] In this way, the international community expressed its desire to realign economic development with non-economic objectives, namely, environmental protection. Despite the broader goals that are set out in the various sustainable development-related international documents,[19] the core question of mainstreaming and implementing the notion of sustainable development is about the tension between the Global North and the Global South.

From its genesis, sustainable development juxtaposed the Global North and the Global South in facing global crises. During the opening of the United Nations Conference on Environment and Development (UNCED), famously known as the *Rio Earth Summit*, Maurice Strong, then Secretary-General of the UNCED, stressed that overconsumption in the Global North and the overpopulation in the Global South are the root causes for global environmental degradation.[20] This bold statement indicates that the Global North and the Global South are at odds when facing global challenges. The

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[18] *Rio Declaration on Environment and Development*, by United Nations, A/CONF.151/26 (Vol. I) (Rio de Janeiro: United Nations Conference on Environment and Development (UNCED), 1992) at Principle 4 and Principle 1.

[19] See *Johannesburg Declaration on Sustainable Development*, by United Nations, A/CONF.199/20 (Johannesburg, South Africa: United Nations, 2002); *Yangon Resolution on Sustainable Development* (Yangon, Myanmar: ASEAN, 2003).

[20] Neil Middleton & Phil O'Keefe, *Redefining Sustainable Development*, first edition ed (London Sterling, Va: Pluto Press, 2001).

two have different paradigms and views on the problem of sustainable development.

The Global North contributed and shaped largely the agenda for sustainable development.[21] Particularly, the environmentalism narrative in the Global North that is reflected into the international (legal) plane[22] is subsequently crystallised as the notion of 'sustainable development'. The concept of sustainable development reflects the cosmopolitan ideal that brought humankind as a species to face the uncertainties and crises of tomorrow. This concept is intended to be used as the integrative framework of environmental (and to a larger extent, social) policies and development strategies. Irrespective of the status of countries, whether rich or poor, integration of environmentalism and development is required in all countries.[23] Thus, the Global North concept of 'sustainable development' is being modeled as the 'development mode' in the South, irrespective of its epistemic origin of the notion.

A critique contended that "sustainable development" is a concept that links the metanarratives between "environmentalism" and "economic development".[24] Sustainable development encompasses not only an environmental dimension but also a social dimension, however, the *Brundtland Report* focused more on the integration of environmental concerns in the economic development policies.[25] In this way, the *Brundtland Report* tried its scientific legitimacy because the narratives of sustainability have been backed

[21] Shawkat Alam, *Trade and the Environment: Perspectives from the Global South* (Cambridge: Cambridge University Press, 2015).

[22]Ruth Gordon, *Unsustainable Development*, Shawkat Alam, ed (Cambridge: Cambridge University Press, 2015), p. 58.

[23] Alam, *supra* note 3, p. 38.

[24] Bourgeois & Hess, *supra* note 10.

[25] Alam, *supra* note 3, p. 38.

up with scientific arguments.[26] Stark stressed that the term itself is an oxymoronic juxtaposition of the two contrasting terms. It is conceived that (environmental) sustainability cannot be ensured unless the development of the Global South is expensed.[27] This is because global environmental degradation is borne by people who are not able to escape from the degradation. The most impacted victims are from the Global South.

Amartya Sen argued that the Global South and the Global North have different degrees of responsibility in achieving future sustainability.[28] Thus, it is unfair to impose Global South a mechanical limitation to constrain the environmental behaviour of the Global South without considering their development process. Moreover, today's problem of unequal sharing of the global common resources that resulted from past historical exploitation needs to be taken into account by the international community to determine the proportion of shared responsibility to achieve sustainability.[29]

As explained by Judge Weeramantry's separate opinion in the International Court of Justice *Gabčikovo-Nagymaros*[30] judgment, the principle of protection of nature and its harmonious relationship has been apparent throughout the many civilisations in the ancient past, both in the Global North and the Global South.[31] However, late

[26] See "We are not forecasting a future; we are serving a notice - an urgent notice based on the latest and best scientific evidence - that the time has come to take the decisions needed to secure the resources to sustain this and coming generations." See Alam, *supra* note 3.,

[27] Bourgeois & Hess, *supra* note 10.

[28] Amartya Sen, "Sustainable Development And Our Responsibilities" (2010) 26 Notizie di Politeia 129.

[29] *Ibid*.

[30] Gabčikovo-Nagymaros dispute is a dispute between Hungary and Slovakia concerning the construction of a dam project over the Danube River. Hungary argued the halt over the construction is due to the sustainability concern, particularly regarding environmental protection. When the construction halted Hungary is claimed by Slovakia have breached the treaty between the Slovakia and Hungary.

[31] *Gabčikovo-Nagymaros Project (Hungary v Slovakia) Separate Opinion Vice-President Weeramantry*, [1997] 1997] ICJ Rep 7 [1997] ICJ Rep 88 (1998) 37 ILM 162 ICGJ 66 (ICJ 1997), p. 98.

capitalism set aside a harmonious balance between humans and nature, in favour of economic gain, which necessitates overproduction and overconsumption.

Indeed, the language of 'sustainable development' has been deliberated for more than three decades. It seems that the debate has already been settled. As reflected in the UN General Assembly Resolution,[32] the 2030 Agenda for Sustainable Development, UN Members collectively agreed on the adoption of the UN SDGs 2030 as the global policy framework to implement the concept of 'sustainable development'. This common acceptance of the idea implicates the collective objective that is being pursued by the international community as a whole. However, the question of sustainable development is about its implementation. There are inherently different applications of 'sustainable development' as a concept between the Global North and the Global South. On the other hand, wider acceptance of this concept also entails the internalisation of the vocabulary of sustainability that is expressed throughout many international documents. For instance, since the 1990s, the concept of sustainability has been expressed in the Marrakesh Agreement establishing the WTO,[33] UN Convention on Biological Diversity,[34] UN Framework Convention on Climate Change,[35] and many others.

As an illustration, in the dispute about the *Gabčikovo-Nagymaros* dam construction project. Both Hungary and Slovakia agreed about the principal existence of 'sustainable development' as a concept.

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[32] *A/RES/70/1, "Transforming Our World: The 2030 Agenda for Sustainable Development"*, by United Nations General Assembly, Official Records of the General Assembly, 70th session, Supplement No 49 A/70/49 (New York: United Nations, 2015).

[33] World Trade Organization (WTO), *Marrakesh Agreement Establishing the World Trade Organization* (World Trade Organization, 1994). (emphasis added).

[34] United Nations, *United Nations Convention on Biological Diversity* (United Nations, 1992) 1760 UNTS 79.(emphasis added).

[35] United Nations, *United Nations Framework Convention on Climate Change* (United Nations, 1992) 1771 UNTS 107.(emphasis added).

Before the International Court of Justice (ICJ), however, disagreement was not about the recognition or non-recognition of the concept of sustainable development. Instead, the legal issue at hand was about the interpretation and application of such concept. In this way, practical legal implementation of 'sustainable development' as a concept is about the *legal narrative.* The language of sustainable development has developed into an impeccable device to argue through the international domain.

Commenting on international law, politics, and sustainable development, Koskenniemi highlights that the deliberation of sustainable development in the international community shows the shift within 'cosmopolitan space'. The space was previously the exclusive domain of sovereign states; presently, it is no longer exclusive for the states to argue. Sustainable development, as a contemporary subtopic of globalisation discourse, deliberated through the coupling between political and legal as a postmodern process; in this way, legal and political activities were taken not only exclusively by states but also by other actors through fragmented and uncoordinated forms of 'normative specification'.[36] Thus, the language of sustainability in the current context does not only appear in the formal declaration of state or binding agreements, but also in many forms of further operationalisation of international law, including the documents of dispute settlement.

In international legal discourse, the interaction between actors is not always about the validity of sources. Certain actors may be established as 'semantic authority' of the language of sustainable development,making them the 'source' of the international legal argument through their communicative action. According to Venzke, semantic authority is understood as the "actors' capacity to find

[36] Martti Koskenniemi, *The Politics of International Law* (Oxford: Hart publishing, 2011).

recognition for their claims about international law and to establish reference points for legal discourse that other actors can hardly escape."[37] The EU for instance, has been promoting sustainable development in their relationship with external trading partners, as reflected in the EU policy documents.[38] EU asserted the concept of sustainable development as its core value that needs to be promoted through trade and investment agreements with their partners.[39] Manner argued that 'sustainable development' is the normative power of the EU[40] that can be asserted externally. Cui even further stressed that the EU has established hegemony over the discourse of sustainable development.[41] In this way, we can observe how the EU is establishing itself as the semantic authority of the phrase 'sustainable development' precisely because of the assertion of sustainability language in their trade policy implementation. The language of sustainable development is hegemonic, used by the EU as part of the Global North to project its values and interests towards the international community. Sustainable development, as its core, is therefore epistemically resulted and operated predominantly from the paradigm of the Global North.

B. Sustainable Development - International Trade Nexus

Sustainable development cannot be separated from the international trade dimension. The *Brundtland Report* perfectly

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[37] Ingo Venzke, "Semantic Authority, Legal Change and the Dynamics of International Law" in Henrik Palmer Olsen & Patrick Capps, eds, *Legal Authority beyond the State* (Cambridge: Cambridge University Press, 2018) 102.

[38] *Trade for All: Towards a More Responsible Trade and Investment Policy*, by European Union (Luxembourg: Publications Office of the European Union, 2014).

[39] *Ibid., p 20*.

[40] Manner Ian, "The EU's Normative Power in Changing World Politics" in Gerrits Andre, ed, *Normative Power Europe in a Changing World: A Discussion* (The Hague: Netherlands Institute of International Relations Clingendael, 2009) 9-24.

[41] Hongwei Cui, "'Guanxing xingqian' Oumeng yu zhongguo guanxi de hexie fazhan ['Normative Power' EU and the Harmonious Development of China-EU Relations]" (2007) 11 Shehui Kexue [Social Science] 54–61.

highlights the movement of goods in the globaliastion context as humanity's achievement:

"We can move information and goods faster around the globe than ever before; we can produce more food and more goods with less investment of resources [...]"

However, this ability of humankind, as a species, that thrived through international trade is now at odds with the resources that need to be sustained for the upcoming generation.[42] The *Brundtland Report* also acknowledges the asymmetrical trade and trade protectionism implemented by states. The Global North depended on the raw commodities of the Global South, potentially putting the Global South at the dilemma of conservation and exploitation.[43] When the Global North implements trade barriers, it could eventually harm the Global South by denying market access to them and subsequent chances to economically develop.[44] Unsustainable development, as stressed in the *Brundtland Report*, is not only from the overexploitation of commodities but also potentially polluting manufacturing practices.[45] Thus, the nexus between trade and sustainable development is about the balance between trade policy liberalisation and social and environmental protections on the other hand. The *Brundtland Report* also finds that sustainable development in the context of mineral trade needs to accommodate the exporters a higher participation shares in value-added minerals and improve market access of developing countries.[46] In this way, sustainable development is not only entailing the protection of the environment *per se*, but also the overall balance between the three dimensions of economy, environment, and society.

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[42] Alam, *supra* note 3, p. 11.
[43] *Ibid*., p. 78.
[44] *Ibid*., p. 15
[45] *Ibid*., p. 78.
[46] *Ibid*., p. 53.

The Global South's skeptical view on the trade-sustainability nexus has been expressed since the GATT Council meeting that deliberated trade and environment issues in preparation for the UN Conference on Environment and Development in 1991. In that forum, the Global South's position was skeptical about the talks on environmental matters within the GATT, as it was not an appropriate forum for standard-setting. The common concern is regarding the reduced market access due to high environmental protection standards, and lack of capacity (e.g., financial and technological) for the Global South to implement sound environmental protections for trade.[47]

India strongly contended that the degradation of the global environment is caused by the overconsumption of the Global North. Moreover, India also stressed that the GATT is not the appropriate forum to discuss environmental matters and suggested discussing trade in the relevant international foral. Malaysia, on behalf of ASEAN, expressed the Contracting Parties' sovereignty to use and manage resources in the respective territories. Malaysia and ASEAN desired that market access, and value-added products from developing countries were necessary to support sustainable development and sound environmental protection.[48]

On the other hand, European Communities (EC), now the EU, stressed that refusal to deliberate the relationship between trade and environment within the GATT would be an 'enormous error'. The EC continued to stress that it is unacceptable for the GATT dispute settlement system to become the testbed to test environmental protection policies with GATT.[49] According to the EC, trade measures

[47] *GATT Council Minutes of Meeting, 29-30 May 1991*, by General Agreement on Tariffs and Trade (GATT), C/M/250 (1991).
[48] *Ibid*., p. 12.
[49] *Ibid*., p. 19.

to enforce environmental policies should be the last resort and not as the primary recourse. This debate shows that the North-South debate on sustainable development has been extended and repeated over again. Yet, the debate that we have today still indicates that no clear consensus can be made regarding the incorporation of sustainable development within the trade rules.

As elaborated above, sustainable development as a concept is widely recognised and acknowledged by the international community. However, there are a multitude of approaches regarding the means, methods, and forms on how legal operationalisation of the concept takes place.

1. Trade agreements

   The language of sustainability paved its way into the text of trade agreements in the 1990s. After the buildup of discussions of the trade-sustainablility nexus in the late 80s, states began to incorporate the language of sustainable development within the texts of the Regional Trade Agreements (RTAs). The North American Free Trade Agreement (NAFTA) was the first RTA to incorporate the language of sustainability within the text. It even predated the 1994 Marrakesh Agreement. The preamble of NAFTA explicitly refers to the acknowledgment of sustainable development.[50] Even though the preamble is not legally binding, it does not lack normative character. Under the logic rules of interpreting treaties, the preamble can determine the

[50]"UNDERTAKE [their NAFTA obligations] in a manner consistent with environmental protection and conservation;…[to] STRENGTHEN the development and enforcement of environmental laws and regulations; and [to] PROMOTE sustainable development." See Canada, Mexico, & United States, *North American Free Trade Agreement (NAFTA)* (Government of Canada / United States / Mexico, 1994) Can TS 1994 No 2, 32 ILM 289, 605 US 605 (1992), 1867 UNTS 14.

object and purpose of the trade agreement.[51] This suggests that the body of the agreement needs to be read with the sustainable development logic in mind. Moreover, NAFTA also featured some operationalising provisions with reference to other Multilateral Environmental Agreements (MEAs),[52] as well as non-regression of environmental protection standards.[53]

The Marrakesh Agreement, which established the WTO_, also featured the language of sustainability in its preambular text.[54] However, unlike NAFTA, the architecture of the WTO legal agreements feature a minimalist approach to trade and sustainable development. WTO Members have been using the General Exception to defend the trade measure using the argument of sustainability. Through this logic in the WTO and GATT systems, sustainable development is an exception rather than a rule.

Under Art. XX of the GATT 1994, there are at least three subparagraphs that could be linked into the argument of sustainability. Subparagraphs (b) and (g) in particular are devised to tackle trade policy that genuinely concernsenvironmental matters.[55] However, in recent years, there have also been justifications of other subparagraphs that invoke the concept of sustainable development. Thus, under the

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[51] United Nations, *Art. 31 & 32, Vienna Convention on the Law of Treaties* (United Nations, 1969) 1155 UNTS 331.

[52] Canada, Mexico, & United States, *North American Free Trade Agreement (NAFTA)* (Government of Canada, Mexico, and the United States, 1994) Article 104..

[53] Canada, Mexico, & United States, *North American Free Trade Agreement (NAFTA)* (Government of Canada, Mexico, and the United States, 1994) Article 1114(2).

[54] "[o]ptimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development" [World Trade Organization, *Marrakesh Agreement Establishing the World Trade Organization* (United Nations, 1994) 1867 UNTS 154, 33 ILM 1144.

[55] Alam, *supra* note 3 at 304.

context of General Exception, the concept is now related to Art. XX (a), (b), (g) of GATT, as follows:

Article XX: General Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

(a) necessary to protect public morals;

(b) necessary to protect human, animal or plant life or health;

[...]

(d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade-marks and copyrights, and the prevention of deceptive practices;

[...]

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption; [...]

Subparagraph (a) deals with sustainable development issues that could be construed as the concern of public morals. Subparagraph (b) is about measures to protect the life or health of living organisms. Subparagraph (g) covers the measure that is related to conserving exhaustible natural resources. The original text is intended to cover only non-renewable resources such as minerals,but the WTO Appellate Body's evolutionary interpretation has broadened it to cover renewable resources that could perish due to overconsumption and

overexploitation.[56] The use of subparagraph (d) to defend sustainable development-related trade measures is rather peculiar. This is because subparagraph (d) is applicable broadly to justify a *prima facie* WTO non-compliant measure *because of* the necessity to respect the non-WTO obligation laws and regulations, including its internal law. However, non-WTO obligations themselves must be consistent with the GATT/WTO commitment. Furthermore, subparagraph (d) includes intellectual property rights regulations, anti-monopoly enforcement regulations, and others. Subparagraph (d) is one of the main arguments of defence that was used by Indonesia.

Whenever a subparagraph of Art. XX uses the word 'necessary', then the respondent must demonstrate the necessity and cost-benefit of the measure.[57] This is done by analysing relative importance of the value protected, the less restrictive policy options available, and the degree of attainment of the public policy objective that is desired. However, when Art. XX(g) uses the word 'relating to', then the threshold of necessity test is not required. The respondent needs only to prove the relationship between the measure and the policy goals that are intended.

Art. XX has a two-step analysis method that needs to be followed. First, when any subparagraph fits with the scope of the measure in question, subsequently, the measure needs to be analysed further using the *chapeau* test. This is to determine whether the measure has the element of 'arbitrary or

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[56] *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, by World Trade Organization (WTO), 37 ILM 1 (1998) DSR 1998:I (World Trade Organization, 1998), p. 130.

[57] See *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, 2005, 41 ILM 1192 (2005) DSR 241; *European Communities — Measures Affecting Asbestos and Products Containing Asbestos*, 2001, 40 ILM 1049 (2001)DSR 2000:VI.

unjustifiable discrimination' or is a 'disguised restriction on trade'.

Using this General Exception as a catch-all defence device, the argument of sustainability therefore needs to be channeled through the WTO dispute settlement system. Thus, sustainable development from the point-of-view of GATT is about the *exception* rather than a *rule*. As sustainable development-related trade policy measures may contradict with the core obligations of the WTO/GATT agreements, it is the burden of the respondent in the dispute to defend the measure using the persuasive language of sustainability.

2. Dispute Settlement

As mentioned above, the WTO/GATT system lacked concrete operationalisation of sustainable development. However, the traces of how sustainable development implemented in the context of trade, can be found within the disputes submitted to the WTO dispute settlement mechanism (DSM). There are at least two modes of how the logic of sustainability operates in the dispute settlement context. *First*, the language of sustainability is used as a guiding interpretative tool for the dispute settlement panel and Appellate Body as mandated by Art. 3.2 of Dispute Settlement Understanding.[58] *Second*, the panel and the Appellate Body must analyse the justifiability of the measure using the General Exception defence and read the article with the context of sustainable development in mind. This is why the responding party needs to reiterate 'sustainable development' as a supporting device to enable seemingly

[58] Which refers to 'customary rules of interpretation of public international law', meaning the Art. 31 and 32 of the Vienna Convention on the Law of Treaties applicable as customary international law.

impeccable defence tools. Cases in the WTO dispute settlement mechanism have developed plenty of 'jurisprudence' that could give us some idea of how sustainable development is implemented through General Exceptions.

In the *European Community (EC) - Seals* dispute, the EC,now the EU, put a ban on seal products obtained through the clubbing practice. The EU argues that the ban was put to enforce animal welfare due to the concerns of EU citizens over the welfare of seals, and because clubbing is considered an inhumane method to kill seals. However, the EU made an exception where only seal products originating from the by-products of hunting by the Inuit indigenous community and for the sole purpose of "sustainable management of marine resources" were allowed.[59] The panel and Appellate Body agreed that the ban is necessary to protect the welfare of seals as reflected in the EU public concern. However, the measure is unjustifiable because it discriminated against seal products of the Canadian Inuit community, which used a similar method to kill seals.

In *EC - Asbestos,* France prohibited the importation of asbestos on the grounds of the health risks.[60] Even though the EC did not explicitly refer to the argument of sustainability, health and well-being are also part of sustainable development. Canada complained about this measure and brought it to the WTO dispute settlement mechanism.[61] Both the panel and Appellate Body held that the measure is *necessary* to protect human health

[59] *Measures Prohibiting the Importation and Marketing of Seal Products, Panel Report*, by World Trade Organization (WTO), WT/DS400/AB/R (2014) L/9099 Paragraph: 7.14.

[60] *European Communities – Measures Relating to Imports of Asbestos and Asbestos-containing Products, WTO Panel Report*, by World Trade Organization (WTO), WT/DS135/R (2000) Paragraphs: 2.1 – 2.7.

[61] *Ibid*.

because of the risk posed by the use of asbestos products, and there are no alternatives available to reduce the risk to the intended level. Also, French measures survived the Art. XX *chapeau* test. Despite the measure being discriminatory, it is justified under Art. XX(b) GATT 1994.

In *US - Shrimp,* the US banned the importation of shrimp that did not use Turtle Excluder Devices (TED) to protect sea turtles under Section 609, which implements the Endangered Species Act of 1973. The Appellate Body determined that the US implemented the measure that is "relating to" the conservation of exhaustible natural resources within the meaning of Art. XX(g) GATT 1994.[62] However, the Appellate Body found that the measure is arbitrary and deemed to be unjustifiable discrimination.[63] According to the report on *US – Gasoline*, the Appellate Bodydetermined that in invoking the subparagraph (g), respondent must demonstrate the 'even-handedness' requirement. Meaning that trade restriction as conservation efforts also must be accompanied by relevant domestic measure, such as reduction of domestic consumption.[64]

So far, Art. XX GATT 1994 could accommodate many policies that implement the concept of sustainable development. However, the penultimate determination on whether trade measures as the implementation of sustainable development as defence depends upon the *chapeau* test. The *chapeau* of Art. XX questions whether the measures are not discriminatory or disguised restrictions in international trade. In this sense, there

[62] *United States - Import Prohibition of Certain Shrimp and Shrimp Products, AB-1998-4, Report of the Appellate Body*, by World Trade Organization (WTO), AB-1998-4 (1998) 37 ILM 1 (1998)DSR 1998:IParagraph: 142.
[63] *Ibid*, p. 186.
[64] *Ibid*, p. 19–20.

are strong incentives for the respondent in the dispute to maintain a strong position and defend the measure using the sustainability narratives. This is how the 'disguised restriction' and 'discrimination' elements could be blurred using sustainability.

IV. REVISITING THE NARRATIVES OF SUSTAINABLE DEVELOPMENT IN *INDONESIA - RAW MINERALS*

A. Background and Context

The *Indonesia - Raw Minerals* dispute is about export prohibition and the domestic processing requirement that is enforced by the Indonesian government. Among the dispute settlement cases at the WTO DSM, export restriction measures are rarely challenged. Even in the WTO/GATT legal framework itself, export restriction is underregulated.[65] Export restriction policy is not only implemented in the mineral sector but also commonly implemented in the food and agriculture sectors.[66]

Previously it was not only Indonesia that had implemented export restrictions on raw minerals. Export restrictions for strategic natural resources have been implemented by China to further downstream its industry, particularly related to rare earth minerals to support its manufacturing industry.[67] Different from the original Uruguay Round WTO Members, China has committed itself to removing taxes and charges applied to exports under the China Accession Protocol. This means that China is under a stricter export

[65] Some dispute settlement cases are among others, *United States — Measures Treating Export Restraints as Subsidies, Panel Report*, by World Trade Organization (WTO), DS194 Panel Report.

[66] Baris Karapinar, "Export Restrictions and the WTO Law: How to Reform the Regulatory Deficiency" (2011) 45:6 Journal of World Trade 1139–1155.

[67] Mark Wu, "China's Export Restrictions and the Limits of WTO Law" (2017) 16:4 World Trade Review 690, p. 690.

prohibition discipline put by the Accession Protocol, different from the rest of the WTO Members. Chinese export restrictions which started in 2009 resulted in dispute settlement cases channeled by the WTO DSM that challenged the measure.[68]

The *Indonesia – Raw Minerals* dispute is centred around the export ban that was legally grounded on Law No. 4/2009 on Coal and Mining (*Undang-Undang Mineral dan Batubara*, subsequently referred to as "Coal and Mining Law").[69] For the context, the Coal and Mining Law is the rebirth of the 1967 Mining Law that significantly changed the legal paradigm of mining governance in Indonesia. Some scholars argue that the 2009 Coal and Mining Law reflects resource nationalism that was adhered by Indonesia in the past decade after *reformasi*.[70] Article 5 of the Coal and Mining Law allows domestic use priority to be set by government regulations.[71] This provision was also enhanced in 2020 by the amendment of the Coal and Mining Law.[72]

Under the umbrella of the 2009 Coal and Mining Law and its subsequent amendment, including The Law on Job Creation (*Undang-Undang Cipta Kerja*), the Indonesian government introduced a series of ministerial-level regulations that controled exportation and the domestic processing requirement.[73] For instance, the Ministry of

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[68] *Ibid*, p. 680.

[69] *Undang-undang tentang Mineral dan Batubara (Law on Mineral and Coal), Indonesia, Law No. 5 of 2009*.

[70] Eve Warburton, "Resource Nationalism in Indonesia: Ownership Structures and Sectoral Variation in Mining and Palm Oil" (2017) 17:3 Journal of East Asian Studies 285–312; Fifi Junita, "Foreign mining investment regime in Indonesia: Regulatory risk under the revival of resource nationalism policy" (2017) 8:3–4 International Journal of Private Law 181–204.

[71] *the Government Regulation No. 96/2021 on The Implementation of Mineral and Coal Mining Business Activities (Pelaksanaan Kegiatan Usaha Pertambangan Mineral dan Batubara)*.

[72] World Trade Organization (WTO), *supra* note 59 art 5.

[73] *Ministry of Energy and Mineral Resources Regulation No. 11/2012 concerning Increased Added Value of Minerals through Domestic Processing and Refining of Mineral Activities*; *MEMR Regulation No. 20/2023 concerning Increased Added Value of Minerals through Domestic Processing and Refining of Minerals Activities*; *MEMR Regulation No. 1/2024 concerning Increased Added Value of Minerals*

Energy and Mineral Resources Regulation No. 11/2012 and No. 20/2023 prescribe the requirement to further process the mineral ore through refination.[74] The Minister of Trade Regulation No. 96/2019 Appendix IV referred to nickel ore and its concentrate (HS code 2604.00.00) as the prohibited export commodity.[75] Furthermore, the 2009 Coal and Mining Law prescribes mining license holders the obligation to carry out mineral processing domestically. This is enforced by several technical regulations by the Ministry of Energy and Mineral Resources.[76]

In a broader context, nickel needs to be understood as a strategic commodity for Indonesia. The Joko Widodo (Jokowi) administration has been focused on the development of downstream mineral industries. Although the mandate to further downstream the mineral is laid down through the 2009 Coal and Mining Law that was enacted before Jokowi's administration, the stronger enforcement and policy orientation towards the development of downstream industries such as smelter is apparent during the Presidency of Jokowi.[77]

Against Indonesia's export ban and mandatory mineral downstreaming policy, the EU argued that Indonesia violated Art. X:1 (Publication and Administration of Trade Regulations), XI:1 (Quantitative Restriction), as well as Art. 3.1(b) Subsidies and Countervailing Measures (SCM) of GATT 1994 on prohibited subsidies.

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through Domestic Processing and Refining of Minerals Activities; *Minister of Trade Regulation No. 1/2017 on Export Provisions for Processed and Purified Mining Products*.

[74] *Ibid.*

[75] *Peraturan Menteri Perdagangan No. 96 tahun 2019 tentang Ketentuan Ekspor Produk Pertambangan Hasil Pengolahan dan Pemurnian (Minister of Trade Regulation Number 96 of 2019 concerning the Provisions for the Export of Processed and Refined Mining Products)*.

[76] *Indonesia — Measures Relating to Raw Materials, Panel Report*, by World Trade Organization (WTO), DS592 (2022) WT/DS592/R Paragraph: 2.16.

[77] Angela Tritto, *How Indonesia Used Chinese Industrial Investments to Turn Nickel into the New Gold* (Washington DC: Carnegie Endowment for International Peace, 2023), p. 3.

B. Indonesia's Argument on sustainability

Mining activities are indeed inherently detrimental for the environment. They do not only harm the environment but also the social surroundings, including the local indigenous communities.[78] Interestingly, the panel report on *Indonesia - Raw Materials* provided background and context on how nickel mining works and impacts the environment. Nickel extraction would result in deforestation, loss of biodiversity, soil erosion and contamination, and agricultural and land pollution. This environmental impact is caused by the method of nickel mining that requires land clearing.[79] Thus, in principle, Indonesia is defending an inherently environmentally destructive industry with a sustainability argument. In countering the EU's contention, the Indonesian government relied on the General Exception, particularly Art. XX(d) of GATT 1994, as well as Art. XI:2 which allows temporary export restrictions to relieve critical shortages.

There are three elements that Indonesia must fulfill in order to defend its measure. *First*, the determination of whether export ban and the domestic processing requirement (DPR) are 'designed to secure compliance' with 'laws and regulation', in which the 'laws and regulations' themselves are not inconsistent with GATT 1994. Second, the determination of the necessity test of the export ban and DPR. Third, the *chapeau* test.[80]

Indonesia argued that the measure is based on Art. 96(c) Coal and Mining Law of 2009 and Art. 57 Law on Environmental Protection of 2009 (Law No. 32/2009) which are considered as a

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[78] Dimas Bagus Triatmojo, Warah Atikah & Nurul Laili Fadhilah, "Revisiting the Land Conversion of the Protected Forest for the Mining Industry in Tumpang Pitu, Banyuwangi" (2020) 1:1 Indonesian Journal of Law and Society 37–56.

[79] World Trade Organization (WTO), *supra* note 65 at para 2.49.

[80] *Ibid* at para 7.168.

'comprehensive framework' to regulate sustainable mining activities. Indonesia defended that the export ban and DPR is to ensure the imposition of sustainable mining practices and conservation of natural resources through sustainable mineral resources management.[81] This sustainability requirement is intended to protect not only forests but also the environment and the indigenous people that reside in the mining areas.[82]

According to Indonesia, sustainable mining and mineral resource management are a set of policy instruments that are consistent with WTO obligations and other international commitments. Indonesia considers laws and regulations that are consistent with the *sustainable use of* natural resources and conservation of the environment to be WTO/GATT-consistent laws and regulation within the meaning of Art. XX(d) GATT 1994.[83]

Indonesia stated that the preamble of the 2009 Coal and Mining Law explicitly refers the mandate to implement a sustainable and environment-oriented approach to mining.[84] This legal ground is used by Indonesia to claim that operationalisation of the mining regime in Indonesia aligns with the objectives of sustainable development. Furthermore, Indonesia argued that the DPR policy is aimed at preventing the depletion of raw nickel. This works by limiting the extraction capacity aligned with the industry capacity of domestic smelters. Thus, this approach would eventually remove the nickel ores supply in the domestic market which does not comply with sustainable mining and mineral resources management.[85]

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[81] *Ibid* at para 7.173.
[82] *Ibid* at para 7.251.
[83] *Ibid* at para 7.204.
[84] *Ibid* at para 7.241.
[85] *Ibid*, p. 50.

Temporary restrictions put in place during 2014 – 2017, according to Indonesia's claim, had successfully reduced the production to the sustainable level. In Indonesia, nickel productionis primarily aimed at future increased demand as a component for electric vehicles batteries. Thus, Indonesia argued that restriction would mitigate the risk of depletion of nickel at an unsustainable rate.[86]

As for the DPR policy, Indonesia defended that by bringing the smelter industry onshore, it would make material contributions to ensure compliance with the sustainable mining and mineral resource management requirement as set by Indonesian laws and regulation. This is Indonesia's approach to force market operators' behaviour to comply with the Indonesian regulatory requirements.[87]

Indonesia went further by arguing that imposition of the export ban contributed to the improvement of regulatory enforcement at the field level. This was done by showing the data on criminal cases and expert affidavit that demonstrated the reduction of illegal mining activities. Also, Indonesia presented an NGO report from *Wahana Lingkungan Hidup* (WAHLI), a renowned civil society organisation that is concerned with environmental matters.[88] Images of environmental destruction found in the WALHI report was subsequently used to enforce the argument of environmental destruction caused by unsustainable mining practices.

Interestingly, for domestic constituencies, the Indonesian government narrate the dispute through the optics of resource

[86] *Ibid*, p. 63.
[87] *Ibid* at para 7.287.
[88] *Ibid* at para 7.282.

sovereignty,[89] despite the fact that Indonesia never argued for sovereignty as part of their defence before the WTO dispute settlement panel. President Joko Widodo claimed that the outcome of the dispute was 'foreign coercion' (*pendiktean asing*) which certainly is at odds with state sovereignty to manage its natural resources.[90]

These argumentative practices demonstrate that there are two parallel arguments that were used by Indonesia in narrating the dispute depending on the audience. The first narrative is about the sustainability concern. This narrative was presented for largely the international audience in front of the WTO dispute settlement panel. The second narrative is about state sovereignty. In contrary with the sustainability argument, the sovereignty-centric argument is intended for domestic constituencies. The use of the sovereignty narrative for domestic constituencies is understandable, as sustainability narratives may backfire towards the government in the domestic setting. The government of Indonesia is often criticised regarding environmental negligence and the lack of concern for sustainability when implementing central government-led strategic projects.[91] Thus, sustainability narratives do not enhance the legal argumentation for the government as such in front of its domestic constituency.

The narrative of sustainability is also echoed *beyond* the dispute. Following the publication of the *Indonesia – Raw Materials* panel report, Indonesian government agencies' websites echoed the

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[89] Hamalatul Qurani, "Jokowi Soal Larangan Ekspor Nikel: Pendiktean Asing vs Kedaulatan Negara", online: *hukumonline.com* <https://www.hukumonline.com/berita/a/jokowi-soal-larangan-ekspor-nikel--pendiktean-asing-vs-kedaulatan-negara-lt639d685f8c954/>.

[90] *Ibid*.

[91] Siti Rakhma Mary Herwati & Pascal David Wungkana, "Human Rights Violations in Indonesia's National Strategic Development Project" (2023) 4:2 Indonesian Journal of Law and Society 1–32.

narratives of sustainable mining.[92] This is arguably to provide explanation for the public,as well as to gain public support as Indonesia submitted the appeal request to the dispute.

C. EU's counterclaim and Panel determination

As mentioned in the preceding section, the sustainability argument is often used by the EU to defend the trade measure. In facing Indonesia's sustainability defence, the EU asserted that it did not address the relative importance of sustainability as a value that Indonesia wishes to pursue. However, the EU counterclaim was regarding the question on whether the DPR and export ban *pursue the objective* of securing compliance with the environmental protection and natural resources conservation laws and regulations.[93]

The panel was persuaded and agreed that the regulatory requirement set by Art. 96(c) of the 2009 Coal and Mining Law set a sustainable mining requirement in the Indonesia regulatory context.[94] The panel noted that it lacked specific obligation that needed to be undertaken and lacked enforcement mechanisms such as sanctions. Thus, the panel determined that both Art. 96 (c) the 2009 Coal and Mining Law and Art. 57 of the Environment Protection Law, do not qualify as 'laws and regulations' that can be secured compliance by the Indonesian government.[95] Despite this provisional conclusion,

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[92] Aliyyah Damar Fitriyani, "Hilirisasi Bahan Tambang: Sebuah Upaya Peningkatan Kesejahteraan Masyarakat", (30 December 2022), online: *Sekretariat Kabinet Republik Indonesia* <https://setkab.go.id/hilirisasi-bahan-tambang-sebuah-upaya-peningkatan-kesejahteraan-masyarakat/>; Sabilla Ramadhiani Firdaus, "Pembatasan Ekspor Nikel: Kebijakan Nasional Vs Unfairness Treatment Hukum Investasi Internasional – LAN RI", (26 July 2022), online: *Lembaga Administrasi Negara (LAN)* <https://lan.go.id/?p=10221>; Rahmanta Saleh, "Kobarkan Terus Semangat Perjuangan!: Dari Tanam Paksa, Lalu Kerja Paksa, Kini Ekspor Paksa", online: *Bea Cukai Makassar* <https://bcmakassar.beacukai.go.id/artikel-kobarkan-terus-semangat-perjuangan-dari-tanam-paksa-lalu-kerja-paksa-kini-ekspor-paksa.html#!>.

[93] World Trade Organization (WTO), *supra* note 65 at para 7.251.

[94] *Ibid* at para 7.276.

[95] *Ibid* at para 7.199.

the panel continued the analysis on the 'securing compliance' argument. According to the panel, the export ban was to some degree capable in securing the compliance with Art. 96(c) of the 2009 Coal and Mining Law.[96] But, the panel was not persuaded on the evidence that Indonesia submitted, explicitly stated that it did not see a *causal* relationship between the export ban vis-à-vis Indonesia's improvement of sustainablemining practices.[97] Since the panel report is now being appealed, given the current vacancy of the Appellate Body members, the bindingness of the panel report is therefore uncertain. Irrespective of the panel outcome, however, in the following section this paper will critically frame the sustainability argument used by Indonesia as legal mimicry.

IV. THE ARGUMENT OF SUSTAINABLE DEVELOPMENT AS LEGAL MIMICRY

The preceding sections elaborated on the core concepts, origin, and the debates of sustainable development in the context of international trade. This paper has already highlighted that the contemporary discourse on sustainable development originated from the Global North, despite the face that the practices of sustainability have existed since ancient times. The Global South was skeptical to put the discussion of environmental matters, as part of the sustainable development agenda, under the umbrella of the international trade regime during the GATT period. However, from the *Indonesia - Raw Materials* dispute, we can observe that the degree of reception of the concept of sustainability has changed. And now, the Global South *mimics* how the Global North would argue to defend the measure when the measure is labeled as a 'non-compliant' measure by other

[96] *Ibid*, p. 82.
[97] *Ibid* at para 7.229.

WTO Members. This is what this paper frames as 'legal mimicry' or '*mimétisme juridique'*;

A. On 'Legal Mimicry'

Legal mimicry resonates similarly with the concept of legal transplant.[98] Both are about the implementation of legal concepts, rules, and norms which do not originate from that particular jurisdiction. From the plain dictionary terms, one definition defined 'mimicry' as "the action or art of imitating someone or something, typically in order to entertain or ridicule."[99] In this sense, the term 'mimicry' has to certain degree of comical element to it. In other words, the term reflects the element of irony when one is said to be mimicking something.

In social context, mimicry is commonly observed in interpersonal social relations.[100] Bourgeois & Hess summarises that in social contexts, one of the functions of mimicry is to increase "rapport between interaction partners." The study also finds that mimicry can be shaped by social contextual elements, one of them being group membership.[101] Drawing from the study, it can be argued that mimicry also resonates with the identification of the membership of the group. This is because there are identities or characteristics attributed to a certain group in social surroundings.

The discipline of history is already familiar with the concept of 'colonial mimicry'. Colonial mimicry is the practice of copying the European style in colonial society for indigenous society. Mimicry is

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[98] Mindy Chen-Wishart, "Legal Transplant and Undue Influence: Lost in Translation or a Working Misunderstanding?" (2013) 62:1 The International and Comparative Law Quarterly 1–30.

[99] Archie Hobson, ed, *The Oxford Dictionary of Difficult Words*, 1st edition ed (New York, NY: Oxford University Press, 2004), p. 277.

[100] Bourgeois & Hess, *supra* note 10.

[101] *Ibid*, p. 349.

also practiced by the colonial agent upon the practices of indigenous society by *going natives*.[102]

In this sense, legal mimicry can be best described as the practice of imitating or mimicking legal systems, rules, and expressions. Legal mimicry also occurs in the post-colonial context.TPost-colonial states have tendencies to adapt former colonisers' laws, legal system, and legal expression.[103] A TWAIL scholar observed that during this post-colonial period, development scholars tried to implement Western-style legal institutions to developing countries for the sake of strengthening the market economy, rule of law, and democratic values.[104] Push and pull factors occur when states mimic other legal ideas which are external to the mimicking states' jurisdiction. Domestic actors also often times mimic the legal substance, structure, and the legal expression of the 'international trendsetter'. The arguements of 'international trendsetters' are apparently appealing to the mimicking states' domestic actors. Subsequently, 'modern ideas' originating from the external to the mimicking states is transplanted into the mimicking states' internal laws and regulations.[105]

B. Indonesia's Sustainability Argument as 'Legal Mimicry'

Indonesia's sustainability argument to defend their export ban and downstreaming policy is rather novel and could be framed as a legal mimicry, precisely because of Indonesia's historical and political

[102] Ricardo Roque, "Mimesis and Colonialism: Emerging Perspectives on a Shared History" (2015) 13:4 History Compass 201–211.

[103] Willy Tadjudje & Clément Labi, *What Law for what Development in Africa in the 21st Century ?* (2020); Vabigne Donzo, *Le mimétisme juridique en Afrique francophone* (Saint-Ouen: Les Éditions du Net, 2020).

[104] Mohsen Al Attar, "Counter-revolution by Ideology? Law and development's vision(s) for post-revolutionary Egypt" (2012) 33:9 Third World Quarterly 1611–1629.

[105] Kenneth Bo Nelsen & Alf Gunvald Nilsen, "Love Jihad and the Governance of Gender and Intimacy in Hindu Nationalist Statecraft" (2021) 12:12 Religions 1–18.

stance on the trade and sustainable development issue. A previous section elaborated on the skeptical views of the Global South when the Global North tried to integrate the agenda of sustainable development within the trade context at the GATT meetings. Indonesia shared the view as well, and channeled its concern through ASEAN. Moreover, there were also historical occasions where Indonesia's foreign trade interests were disrupted because of the trade and sustainability issue that, according to Indonesia, amounted to trade protectionism.

In the early 1990s, Austria put an import restriction on tropical timber through a series of measures such as import taxes and a mandatory ecolabelling law. These measures were deemed as unfair non-tariff barriers (NTBs) by Indonesia and Malaysia, the two dominant ASEAN Member States. Joining forces, Indonesia and Malaysia used ASEAN as the common platform to protest the imposition of these measures by Austria. Timber was Indonesia's dominant export commodity in its New Order era.[106] Malaysia protested Austria's measures for being a unilateral determination on "sustainably managed forest" when there was no international consensus on that matter. Similar positions were also shared by ASEAN Member States, including Indonesia.[107] However, this dispute did not continue to the GATT panel stage, as the tension was defused with the withdrawal of the measures by the Austrian government in late 1992.[108]

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[106] Pau K Gellert, "Renegotiating a Timber Commodity Chain: Lessons From Indonesia on the Political Construction of Global Commodity Chains" (2003) 18:1 Sociological Forum 53–84.

[107] Brian F Chase, "Tropical Forests and Trade Policy: The Legality of Unilateral Attempts to Promote Sustainable Development under the GATT" (1994) 17:2 Hastings International and Comparative Law Review 376–377.

[108] *Ibid.*

Santoso, who had analysed Indonesia's politics on sustainable development in the 1990s, finds that Indonesia's trade policy agenda was detached from the emerging sustainable development agenda.[109] At the time, the foreign trade interests for Indonesia were to promote exports derived from natural resources and trade surplus, rather than conservation efforts or alignment with social and environmental protection through trade.[110] Thus imposition of environment-related measures has been detrimental to the trade interests of Indonesia.

Interestingly, trade tension between Austria and ASEAN coincides with the initial mainstreaming of the concept of sustainable development in international community in the early 90s. In this sense, it is understandable that Indonesia was quite sceptical about the trade and sustainable development issue. This is because legal implementation of sustainable development as a concept, in the field of international trade, would endanger the trade interests of Indonesia. Thus, arguably, Indonesia sees itself as the 'victim' when the Global North used trade and sustainability as an argument to defend the trade measures.

Another peculiarity about Indonesia's legal mimicry is the use of Art. XX(d) of GATT 1994 instead of Art. XX(g) or Art. XX(b) to defend the export ban and nickel downstreaming policy. As discussed above, Indonesia was not the only one to implement an export restriction for strategic mineral commodities. Before Indonesia, there was also China which did the same and faced the complaint from the WTO dispute settlement panel earlier in the

[109] Chase, *supra* note 107.
[110] *Ibid*.

following disputes: *China – Raw Materials I (US)*[111] *& Raw Materials II (EU),*[112] and *China – Rare Earths*.[113]

In *China – Rare Earth*, China also invoked the sustainable development argument in the context of Art. XX(b) and XX(g) of GATT 1994.[114] Export restriction of rare earth metals is part of Chinese policy to implement sustainable development, relating to the conservation efforts of non-renewable minerals. In *China – Raw Materials*, the justification of the export quota of bauxite was to conserve the domestic reserve of bauxite,[115] whereas imposition of export duties on scrap metals was argued to protect public health because of the health risk posed by the scrap metals.[116] Both public policy concerns fall under the larger umbrella of 'sustainable development'.

If Indonesia followed the logic of China's argument, the most direct route would be to invoke Art. XX(g) and argue that the trade measures implemented is *'relating to'* the *'conservation of exhaustible natural resources,'* and demonstrate the *'even-handedness'* of the measure. Instead, Indonesia chose to argue through the justification provided under Art. XX(d) which is a more complicated argument, and is a subject to the necessity test. The nexus test under Art. XX(g),

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[111] *China — Measures Related to the Exportation of Various Raw Materials, Panel Report*, by World Trade Organization (WTO), DS394 (2011) WT/DS394/R.

[112] *China — Duties and Other Measures Concerning the Exportation of Certain Raw Materials*, , WT/DS509. This dispute has yet to enter panel stage.

[113] *China — Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum, Panel & Appellate Body Report*, by World Trade Organization (WTO), DS431 (2014) WT/DS431/R (Panel Report)WT/DS431/ABR (Appellate Body Report).

[114] "China refers to conservation measures that China adopted to manage its raw materials in a sustainable manner, including extraction and production caps for refractory-grade bauxite, that affect availability." World Trade Organization (WTO), *supra* note 65 at para 7.229.

[115] *Ibid*.

[116] Barbara Cooreman, "Addressing Environmental Concerns Through Trade: A Case for Extraterritoriality?" (2016) 65:1 The International and Comparative Law Quarterly 229–248.

arguably has a lower threshold to prove compared to invoking Art XX(d).

Within the trade disputes related to natural resources, the argument of sovereignty over natural resources (PSNR) is also relevant. This is due to the character of the principle which has attained customary international law status.[117] However, this argument is less appealing in today's world because the language of resource nationalism is at odds with the neoliberal logic of trade and investment flows. China had invoked the principle of permanent sovereignty of natural resources in the *China – Rare Earths* dispute to strengthen the defence made under Art. XX(g) of GATT 1994. The panel acknowledged the existence of the principle and used it as interpretative tools in conjunction with the General Exceptions.[118]

In contrast, Indonesia did not invoke the permanent sovereignty over natural resources argument, however, the panel at its own discretion looked at the principle and found that its determination does not contradict with the principle. Thus, in *Indonesia – Raw Materials*, it could be observed that Indonesia realised that the sovereignty narrative is less appealing compared to sustainable narratives when used for the defence.

It is plausible here to explain that both China and Indonesia are indeed inspired by the invocation of the sustainability argument in conjunction with the General Exception defence by the Global North in the past. Particularly, Indonesia mimicked the EU practices *precisely* when it faced the EU in the trade dispute. This observation is apparent if we refer and compare to the legal arguments used by

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[117] Stephanie Switzer, "The principle of sovereignty over natural resources and the WTO" in P Delimatsis & L Reins, eds, *Encyclopedia on Trade and Environmental Law* Elgar Encyclopedia of Environmental Law (Cheltenham, UK, 2021) 136.

[118] Hobson, *supra* note 99 at para 5.76.

the EU in *EC – Seals* dispute. The EU in protecting the population of seals against the unsustainable harvesting conduct invoked Art. XX(a) on public morals as a defence, instead of using Art. XX(g) or XX(b) of GATT 1994. Protection of animal welfare indeed also falls under the broader concept of sustainable development. As mentioned above, typical environmental and sustainability justification relied on Art. XX(g) and XX(b) of GATT 1994. Instead, in *EC – Seals,* the EU unconventionally argued the justifiability of the measure against the practice of seals clubbing using the public morals defence.

Another peculiar layer of mimicry in Indonesia's argument is pertaining to the government relationship with civil society. Existing scholarships have observed the 'challenging' relationship between the Indonesian government and the civil society organisations (CSOs) that are critical for the government.[119] Instead, in *Indonesia – Raw Materials*, Indonesia used materials such as satellite imagery reproduced from the report by WALHI, a local environment-oriented CSO, to demonstrate the destruction caused by unsustainable mining practices.[120] Ironically, within the same report, WALHI was critical towards the attitude of the government to expand the nickel industry without putting enough attention towards sustainability.[121] Thus,

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[119] Randy W Nandyatama, *Indonesian Civil Society and Human Rights Advocacy in ASEAN: Power and Normative Struggles* (Palgrave Macmillan, 2021), p. 163.

[120] *Indonesia — Raw Materials, Panel Report*, by WALHI (Wahana Lingkungan Hidup Indonesia), Exhibit IDN-68 WALHI Report, Exhibit IDN-68.

[121] See *Catatan Akhir Tahun 2021, Red Alert Ekspansi Nikel di Sulawesi*, by Walhi Region Sulawesi (2021) at 39. "*Ambisi pemerintah menjadi produsen nikel terbesar di dunia dengan memanfaatkan isu transisi energi ke energi baru terbarukan ini melahirkan berbagai dampak buruk bagi masyarakat dan lingkungan seperti pengkaplingan wilayah hutan, deforestasi, pencemaran lingkungan dan perampasan ruang-ruang hidup masyarakat adat dan komunitas lokal yang berada dalam dan sekitar kawasan hutan.* (translation: The government's ambition to become the world's largest nickel producer by leveraging the issue of energy transition to renewable energy has led to various negative impacts on society and the environment, such as forest land appropriation, deforestation, environmental pollution, and the seizure of living spaces of indigenous peoples and local communities within and around forest areas.)"

despite the content of the CSO report, Indonesia pragmatically used it to strengthen the argument and its scientific legitimacy.

The use of CSOs in dispute settlements regarding environment-related trade is nothing new. Participation of CSOs through *amicus curiae* brief was first recognised in *US – Shrimp*.[122] Under the dispute settlement process, CSO *amicus* brief is part of an information collection effort by the panel and the Appellate Body.[123] However, given the critical position of WALHI, the use of the report by Indonesia to enforce its argument is rather surprising.

This legal mimicry of using legal expressions and arguments of sustainability also arguably indicates a paradigm shift for the Global South. Instead of being skeptic and critical against the implementation of environmental and social concerns in trade, the Global South is shifting towards utilitarian and pragmatic views on the trade-sustainable development nexus. The Global South is now using the language of sustainable development to empower themselves.

From the Koskenniemian analytical perspective, international legal argument indeed swings back and forth between the *apology* and *utopia*.[124] Here, the Global South acknowledged the objective of sustainable development as *utopia* while also being critical towards the application. However, on the other hand, the Global South also demonstrated its ability to express in the language of sustainability to defend the *prima facie* WTO non-compliant trade measures. Thus, this demonstrates that the use of the sustainability argument might be also deemed as the expression of *apology*.

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[122] General Agreement on Tariffs and Trade (GATT), *supra* note 47.

[123] August Reinisch & Christina Irgel, "The Participation of Non-Governmental Organisations (NGOs) in the WTO Dispute Settlement System" (2001) 1 Non-St Actors & Int'l L 127–151.

[124] Sen, *supra* note 28, p. 35.

Through the perspective of international law as language, international law does not only serve as a communicative medium between the international actors, it also enables marginalised international actors to speak for the greater range of participants in the international community.[125] The use of international law as language also reflects the *thymos* – the need for certain international actors to be recognised.[126] By using the language of international law, international actors may establish a reasoning to conduct certain acts, even though it is immoral or illegal. In the past, the vocabulary of '*terra nullius*' was used for the European empire to alienate non-European indigenous land possession.[127] Instead of unapologetically taking the indigenous land, international law through doctrine of '*terra nullius*' is therefore to provide the *legal* justification. This is a useful form of international law as language in the past.

In contemporary times, the language of sustainability is used to provide greater rationality for legal arguments. This is because of the cosmopolitan ideals that 'sustainable development' brought, and the common interest that the idea encompasses. The sustainability argument would create a better reception in contrast with the sovereignty-centric argument. In this way, WTO Members would tend to use the language of sustainability in defending the trade measures to assert legal validity of the claim.

VI. CONCLUSION

This paper particularly dives into 'sustainable development' as a legal argument used by Indonesia in the *Indonesia – Raw Material* WTO dispute. Historically, the concept of sustainable development

[125] Bourgeois & Hess, *supra* note 10, p. 405.
[126] Azzahra & Dewi, *supra* note 9, p. 131.
[127] *Ibid* at 132.

cannot be separated from the Global North's initiatives and epistemic origin. However, the sustainability argument is now used as the justification used by the Global South, as demonstrated in the *Indonesia – Raw Materials* dispute. This use of sustainability as an argument is legal mimicry. Indonesia mimicked legal arguments that have been used by the EU to defend its trade policy before the WTO dispute settlement body. By using sustainability as 'common language of international law', international actorsin this context, WTO Memberstried to assume legal soundness in the argument, and gain attention of the broader audiences to voice their interest.

This paper does not intend to provide a systematic overview of 'sustainable development' used as a legal argument across the Global South. However, future research on similar topics may explore more of a systematic manner on the use of the sustainability argument in trade disputes.

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