ICJ Jurisdiction Over the Case of Policy to Stop Nickel Exports: European Union v. Indonesia

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Abstract

The purpose of this paper is to explore the jurisdiction of the International Court of Justice (ICJ) regarding the European Union’s legal action against Indonesia in response to Indonesia’s policy to halt the export of raw materials derived from nickel ore. The research methodology employed for this paper is normative legal research, relying primarily on legal materials that encompass normative law for data collection. The outcome of this study indicates that Indonesia has implemented a measure to cease the export of raw materials derived from nickel ore, leading to the domestic downstream management of mineral resources within the country. In addition, the purpose of the export stop is the strong desire of the Indonesian government so that all raw materials are managed domestically and can invite investors
from abroad to invest in Indonesia. However, the European Union (EU), as one of the enthusiasts and consumers of nickel ore raw materials, objected to the policy issued by Indonesia. The form of objection from the EU is to sue Indonesia to the WTO. The EU objected to the policies issued by the Indonesian government because they could interfere with various policies taken by the EU. The policy is expected that in 2050 the EU will be free from CO2 emissions. Furthermore, the EU argues that the cost of nickel ore, once domestically managed, is anticipated to undergo a significant increase, surpassing the prevailing market price. The author scrutinizes the jurisdictional aspects regulated by the International Court of Justice (ICJ) within this context.

**Keywords**: Nickel, ICJ Jurisdiction, European Union, Indonesia.

**A. Introduction**

Each country in the world has different natural resources. From these natural resources, each country has natural resources that they use as their mainstay and become a source of state dividends in terms of the economy. With the differences in natural resources owned by each country in the world, the country exchanges the results of natural resources or conducts buying and selling transactions from the results of these natural resources. Some countries have advantages in their natural resource sector, but on the other hand, they lack in terms of human resources.

The management of natural resources, especially mineral resources, must be managed properly and maximally. If managed properly and processed optimally, it will produce materials that have good quality and can be sold in the global market. Suppose the results of mineral resources are processed properly and can be sold in the global market. In that case, it is not impossible for the country to get a significant income and can prosper its people. Indonesia itself, as a country has an abundance of natural resources, especially mineral resources, which are many and can be processed into finished materials that are needed by other countries.

The 1945 Constitution of Indonesia clearly regulates the management of natural resources in the territory of the Republic of In-
Indonesia as regulated in Article 33 paragraph (3) of the 1945 Constitution. Besides that, many are also regulated in-laws and regulations relating to the management and protection of natural resources in Indonesia. The constitution is very clear about handling and managing natural resources in any area managed by Indonesia, managed by foreigners with reasons. Trade monopoly, especially monopoly in the field of natural resources, is clearly not allowed to happen because it is contrary to Article 33 of the 1945 Constitution.¹

One of Indonesia’s natural resources is nickel ore. The location of Indonesia, which is on the equator, makes the process of weathering rocks easy. Nickel laterite deposits in Indonesia have a very strong connection with the global path of the Mesozoic-Cenozoic Circum Pacific ophiolite. The position of this line can be found in the eastern part of Indonesia. About 71.06% of nickel ore produced in Indonesia is of excellent quality or saprolite. Indonesia’s nickel reserves are 3.57 billion tons, and the annual production of nickel ore reserves is 17 million in one year. With the abundance of natural resources, especially nickel, in Indonesia, the Indonesian government has made a hedging policy for mineral and coal mines that have not been down streamed through Law Number 4 of 2009 concerning mineral and coal mining.²

The agreement to establish the WTO was ratified by Indonesia in 1994. The legal product of the ratification is Law Number 7 of 1994 concerning Ratification of the Agreement Establishing the WTO. After the ratification, Indonesia officially becomes an official member of the WTO and must comply with the world trade rules that have been agreed upon and stated in The General Agreement on Tariffs and Trade 1994 or abbreviated as GATT 1994. Countries that are members of the WTO signed the WTO agreement.³

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3 Ardiansyah, 2021, Kedudukan WTO Valuation Agreement dan Perjanjian
Since January 1, 2020, the Indonesian government, through the Minister of Energy and Mineral Resources (ESDM), has issued the Minister of Energy and Mineral Resources Regulation Number 11 of 2019 concerning the Second Amendment to the Regulation of the Minister of Energy and Mineral Resources Number 25 of 2018 concerning Mineral and Coal Mining. The Indonesian government has officially stopped exporting nickel ore from Indonesia through this ministerial regulation. As a result of this policy, on November 22, 2019, the EU sued Indonesia for the WTO. The EU submitted a dispute settlement understanding or DSU to the WTO. Indonesia is suspected of violating the provisions and principles of The General Agreement on Tariffs and Trade or GATT. The violation in question is related to the prohibition of quantitative restrictions as regulated in the provisions of Article XI: I GATT.

Indonesia has also filed a lawsuit against the EU at the WTO. The lawsuit is related to the EU’s anti-dumping policy on biodiesel products in Indonesia. In 2013, the EU adopted the policy, arguing that Indonesia sold its biodiesel products very cheaply, resulting in disappointment with biodiesel producers in the region. This results in unfair trade competition, and the EU imposes very high import duties on Indonesian biodiesel products exported to Indonesia. In 2018, the WTO itself won Indonesia over the lawsuit.

The dispute has significant repercussions on trade relations between Indonesia and the European Union. The EU contends that Indonesia

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Indonesia has breached the agreement established by the World Trade Organization (WTO), leading the EU to file a lawsuit against Indonesia at the WTO. Based on this background, this paper will discuss the jurisdiction of the International Court of Justice or ICJ on the EU dispute against Indonesia related to the Indonesian government’s policy to stop exports of nickel ore. This article discusses the issue of How is the jurisdiction of the ICJ in the case of a dispute between the EU and Indonesia regarding the Indonesian government’s policy to stop the export of nickel ore?

B. Dispute Resolution Between the European Union and Indonesia Regarding the Indonesian Government’s Policy to Stop the Export of Nickel Ore Based on the Jurisdiction of the ICJ

On January 14, 2021, the EU gave information or notification that the lawsuit filed by the EU against Indonesia to the WTO is still ongoing. The case filed by the EU against Indonesia is related to the Indonesian government’s policy to stop the export of nickel ore raw materials to the EU. This policy is effective from January 1, 2020.

This policy began when the Minister of Energy and Mineral Resources (ESDM) issued the Minister of Energy and Mineral Resources Regulation Number 11 the Year 2019 regarding the ban on nickel ore exports. This regulation was signed by the Minister of Energy and Mineral Resources at the time, Ignasius Jonan, on August 28, 2019. As a result of this policy is implemented, Indonesia, as a nickel ore exporting country, changed its export scheme to Indonesia to export nickel that has been processed in Indonesia. The reason for Indonesia to stop exporting raw materials from nickel ore is so that there are downstream mineral resources, and their management is managed domestically so that the country can get more profit.\(^7\)

The issue of the Indonesian government’s policy to stop the

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export of nickel ore raw materials first emerged in 2014. The issue arose when Joko Widodo was elected as the seventh president of the Republic of Indonesia. This issue is not without significance, as it contributes to the conservation of natural resources in Indonesia and safeguards the country’s interests in the natural resources sector. The primary motives behind the draft policy include fostering the growth of the nickel pig iron industry (NPI) and the stainless-steel smelting industry. With this policy, global miners have many choices, except for materials that have been completed domestically or investing in Indonesia to open a factory for processing raw materials from nickel ore.  

In a lawsuit filed by the EU against Indonesia regarding the issue of the Indonesian government’s policy to stop raw materials from nickel ore, Indonesia accepted the lawsuit with the title Dispute Settlement Complaint Number (DS) 592. The EU used the argument that Indonesia had violated Article XI. 1 General Agreement Tariffs and Trade or GATT. The EU argued that this policy could complicate and disrupt the distribution of nickel supplies to countries within the EU.  

The management of natural resources in Indonesia is also an order from Article 33 Paragraph 3 of the 1945 Constitution, which states, “the earth and water and the natural resources contained therein are controlled by the state and used for the greatest prosperity of the people...”. As a result, Indonesia stopped the export of nickel ore raw materials to carry out the mandate and orders of The 1945 Constitution. Hence, the handling of raw materials, such as nickel ore, should involve their processing into finished goods domestically. Natural resource management is also regulated in TAP MPR Number IX/MPR/2001. These principles include the principles

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of justice, democracy, and environmental sustainability.\(^\text{10}\)

Nickel ore itself is needed by the EU for the development of batteries for emission-free vehicles. The EU itself has a target by 2050 to be free from CO2 emissions of carbon dioxide. In this regard, the EU is serious about developing this program. The European climate law stands as a notable example of the European Union’s commitment to advancing this program. The EU itself is aware that transportation contributes a quarter of the total emissions that develop within the EU.\(^\text{11}\) The zero CO2 emission policy imposed by the EU has forced battery manufacturers in the EU to change their business strategy to import nickel ore. One of these battery companies is The Global Li-ion battery manufacturers.\(^\text{12}\) The increase in the cost of the current technological process used to recover nickel due to high energy costs and fluctuations in metal prices in the market, in the context of the current global financial crisis, is also the cause of the increase in nickel prices in the market.\(^\text{13}\)

Nickel itself can be understood as a non-ferrous metal that is needed in various needs, both industrial and non-industrial. Nickel has resistance to ductility, strength, high thermal and resistance, and has high thermal and electrical conductivity. Based on the advantages possessed by nickel, it can be said that nickel is needed in various aspects. Nickel is widely used in the manufacture of base metals in nickel-based alloys. Batteries and metal alloy components can be used in high-temperature situations. In addition, nickel is also used

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in the manufacture of stainless steel and the manufacture of electric cars. Nickel ore is the main source of nickel and has two types of deposits, namely oxides and sulfides. Nickel ore processing techniques also vary, namely hydrometallurgical processing, pyrometallurgy, and a combination of the two processing methods.\textsuperscript{14}

The WTO is an international organization under the auspices of the United Nations. This organization also has a specialty in terms of international trade. This makes the WTO the only international organization in the world that regulates international trade. This organization was founded in 1995 based on negotiations called the Uruguay Round, which began in 1986 until 1994. These negotiations were a follow-up to the General Agreement on Tariffs and Trade or abbreviated as GATT. Indonesia is a member of a total of 154 countries that are members of the WTO.\textsuperscript{15}

ICJ is currently headquartered in The Hague, and it was established in 1945.\textsuperscript{16} In carrying out its duties, the ICJ has two main tasks, first is resolving international legal disputes between countries or contentious jurisdictions. It can be said that the method used by the ICJ in resolving disputes between countries or international organizations is by peaceful means. The method must also comply with applicable international law. The second task is, the ICJ provides legal advice or legal considerations to organizations under the jurisdiction of the United Nations.\textsuperscript{17}

The ICJ’s operations are governed by the ICJ Statute, which was adopted as an annex to the UN Charter in 1945. Article 38(1)(d) of the ICJ Statute is an unusual example of a treaty (or other official instruments) that directly addresses teachings. The purpose of this

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chapter is to demonstrate the guidance provided by the provision on the ICJ’s application of teachings to offer a framework for later consideration of the Court’s and judges’ conduct. This is accomplished by reading the provision’s words.\textsuperscript{18}

As a judicial organ, the ICJ has absolute authority to investigate, examine and adjudicate cases or cases presented to it. ICJ must have a passive attitude by acting when a party raises a case. The ICJ cannot take the initiative on its own to prosecute or investigate a case or case. If a country is registered as a member of the United Nations, it does not make that country comply with the jurisdiction of the ICJ. A country’s membership in the United Nations and the ICJ cannot be justified with jurisdiction or authority to try the tribunal.\textsuperscript{19}

Jurisdiction can be defined as the authority held by a country to enact its own laws. The law is useful for regulating relationships or relating to human activities or society. In addition, the laws made by the country are useful for regulating the running of the administration or for carrying out orders from the executive. The form of the law is a law, decisions made by courts and others.\textsuperscript{20} Jurisdiction can also be understood as the power possessed by a court in resolving or adjudicating a case or dispute. The Court will issue contradictory or confusing decisions if the Court accepts all claims that are not within its jurisdiction.\textsuperscript{21}

The jurisdiction of the ICJ is regulated in article 36 of the ICJ Statute. All cases that his party refers to are all matters that are separately regulated in the United Nations charter and also based on ex-

isting conventions and treaties. In general, the jurisdiction of the ICJ can adjudicate claims in all forms of cases, from violations of the law of armed conflict to maritime delimitation and environmental claims to claims involving financial matters. Based on article 92 stated in the Charter in the principal judicial organ of the United Nations and judge Lachs, the ICJ is a judicial institution that maintains legality for the international community as a whole, both outside and within the United Nations.

In the decision-making process, the Court refers to the assessment of the legality of the policies decided by member states related to their obligations to comply with international law and as an essentially judicial task. Courts must follow up legal disputes and interpret the legal case that does not exceed the limits that have been determined in international law. The context of the case must also be considered by the Court to give a good decision.

The potential for influence and political considerations to impact every case or legal dispute brought before the ICJ is an ever-present reality. In resolving these problems, the courts only exercise their jurisdiction in resolving legal disputes and apply legal principles that are by international law. However, other elements that arise cannot reduce the characterization of disputes transferred to the Court as legal disputes.

The ICJ holds expansive subject matter jurisdiction. When adjudicating disputes, the ICJ draws upon established international law, recognized international customs indicative of universal practice and accepted as legal standards, as well as general principles acknowledged by civilized nations. Countries that are members of the case where the case is not at the request of people, non-governmental organizations, companies, or others are eligible to submit their disagreement cases.28

The ICJ decision in resolving disputes is a legal judgment binding on the parties to the issue. While the ICJ’s opinion is not a binding decision, the ICJ has jurisdiction over two sorts of cases. The first is disputed matters with binding conclusions between countries that are parties to the case and have already agreed to submit to the decision. The first is to offer advisory opinions that provide legal reasons/answers to questions addressed within the scope of international law but are not binding.29

In the case of dispute resolution submitted by the EU against Indonesia, the ICJ can provide legal guidelines and opinions to the WTO to decide the dispute. The WTO, as one of the organizations under the auspices of the United Nations, has the right to obtain legal guidance and considerations from the ICJ. The ICJ’s authority is part of its authority to provide guidelines, as well as work support for organizations under the auspices of the United Nations. The form of guidance and support is through an advisory opinion. Opinions or advice given by the ICJ must include possible legal issues that will arise because of decisions taken by the organization seeking legal opinions or opinions from the ICJ. In submitting the opinion, ICJ also provides supporting documents to strengthen its opinion.30

30 Indien Winarwati, 2014, Eksistensi Mahkamah Internasional Sebagai Lem-
In addition to the ICJ, the EU, acting as an international organization, can avail itself of the consultative function provided by the ICJ. This is related to the status of the EU as one of the international organizations that have the right to obtain opinions and opinions from the ICJ in terms of making decisions made by the EU regarding its case with Indonesia. The ICJ also has the potential to collaborate with the WTO in addressing disputes between the EU and Indonesia. This is regulated in Article 34 paragraphs 2 and 3 in the Statute of the Court that Cooperation between international organizations and the ICJ can be carried out to resolve a case.\textsuperscript{31}

In the International Court of Justice Statute, contained in chapter 2, the authority possessed by the ICJ is divided into 2 powers:\textsuperscript{32}
1. The authority of the Ration Personae is the authority that has the right to bring the case to Court.
2. Ration Material Authority, namely what types of disputes can be submitted in Court.

International organizations, including the EU, do not have the capacity to initiate legal proceedings against the ICJ. such as the EU cannot bring a case against the ICJ. This is by the ICJ’s authority, namely the rationale personae. This is also by Article 34 Paragraph 1 in the ICJ Statute, which stipulates that the state is a party included in cases that are brought before the Court.\textsuperscript{33} The EU, as one of the international organizations in the world, cannot file a case. Although the EU cannot submit cases to the ICJ, the EU can take advantage of the consultative function of the ICJ to consult on cases brought by the EU against Indonesia at the WTO.

International entities lack the authority to initiate legal proceedings against the ICJ. One example of a case that was allowed by the ICJ to handle cases submitted by international organizations was the 

\textsuperscript{31} Serena Forlati, The International Court of Justice An Arbitral Tribunal or a Judicial Body, (Heidelberg: Springer, 2014) p. 127-128.
\textsuperscript{32} Chapter 2 International Court of Justice Statute.
case of the murder of Count Folk Bernadotte in Jerusalem in 1949. In this case, the United Nations asked the ICJ for an advisory opinion, and the ICJ believed the United Nations could submit the case to the ICJ. The Court determined that the Organization was intended to exercise functions and powers that could only be explained by the possession of a significant amount of international personality and the ability to operate on an international scale. As a result, the Organization was able to file a claim and give it the appearance of international action for recompense for the harm done to it.34

The authority possessed by the ICJ or the WTO in giving an opinion or in other terms, an advisory opinion is not owned by all international organizations that can resolve a dispute or case. Like the WTO, the jurisdiction of the WTO dispute settlement system is (1) compulsory; (2) exclusive; and (3) only contentious (i.e., it does not provide for advisory opinions).35

The ICJ, as an international judicial body, does not possess the authority to mandate countries to submit disputes or present their cases before the ICJ. The ICJ also does not have the authority to adjudicate a case if the parties involved in the case do not submit the case for trial by the ICJ. It should be noted that the EU is one of the international organizations in the world, so the EU cannot file a case with Indonesia before the ICJ.

An advisory opinion is defined as an “opinion issued by an international court or tribunal at the request of a body authorized to request it, with a view to clarifying a legal question for that body’s benefit” or “judicial statements on legal questions submitted to the Court by authorized organs of the United Nations and other international legal bodies.” In other words, certain international organs of the UN or institutions affiliated with the UN might refer to the ICJ as a request for a legal opinion on an issue of international law

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that arises within the course of the organ’s activity. In this approach, the Court can clarify the judicial dimensions of such organs’ political actions.\(^{36}\)

The legal basis for an advisory opinion can be found in article 96 of the United Nations Charter is as follows:\(^ {37}\)

1. The General Assembly or the Security Council may ask the International Court of Justice for any legal matter.
2. Other agencies of the United Nations and specialized agencies, which the General Assembly may at any time designate, may also seek advice in the form of advice from the Court on legal matters arising within the scope of their activities.

Furthermore, arrangements regarding advisory opinions, which are the authority of the ICJ, are regulated in its Statute as contained in articles 65 to 68:\(^ {38}\)

Article 65

1. The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.

2. Questions upon which the advisory opinion of the Court is asked shall be laid before the Court by means of a written request containing an exact statement of the question upon which an opinion is required and accompanied by all documents likely to throw light upon the question.

Article 66

1. The Registrar shall forthwith give notice of the request for an advisory opinion to all states entitled to appear before the Court.

2. The Registrar shall also, by means of a special and direct communication, notify any state entitled to appear before the Court or international organization considered by the Court, or, should it not be sitting, by the President, as likely to be able to furnish information on the question, that the Court will be prepared to receive, within a time-limit to be fixed by the President, written statements, or to hear, at a public sitting to be held for the purpose, oral statements relating


\(^{38}\) Article 65 – 68 of The Statute of International Court of Justice.
to the question.

3. Should any such state entitled to appear before the Court have failed to receive the special communication referred to in paragraph 2 of this Article, such state may express a desire to submit a written statement or to be heard; and the Court will decide.

4. States and organizations having presented written or oral statements, or both shall be permitted to comment on the statements made by other states or organizations in the form, to the extent, and within the time-limits, the Court, or should it not be sitting, the President, shall decide in each case. Accordingly, the Registrar shall in due time communicate any such written statements to states and organizations having submitted similar statements.

Article 67

The Court shall deliver its advisory opinions in open Court, notice having been given to the Secretary-General and to the representatives of members of the United Nations, of other states and of international organizations immediately concerned.

Article 68

In the exercise of its advisory functions, the Court shall further be guided by the provisions of the present Statute, which apply in contentious cases to the extent to which it recognizes them to be applicable.

WTO has a very strong role in maintaining world trade stability. One of the functions and duties of the WTO is to settle disputes submitted by its members. The purpose of having the authority of the WTO to be able to accept and resolve cases submitted by its members is so that no member or country that is a member of the WTO unilaterally blocks trade activities that occur with WTO members or other member countries. In addition, the trade will be healthy, meaning that small countries or members of the WTO that have small trading power compared to large countries and have strong trading activities have the opportunity to settle their cases before the WTO. Issues brought to the WTO can protect trade sovereignty owned by each country or member of the WTO.39

In the stage of resolving the case, the WTO will start a trial when one of the WTO members objected to the policies taken by other WTO members and submitted their objections in the form of a case to the WTO. WTO member as a plaintiff who objected to a policy taken by another WTO member as a defendant claimed that the defendant committed an Action that violated the commitments or rules issued by the WTO and covered by the GATT 1994. The plaintiff will also include a non-infringement complaint. The purpose of the non-infringement complaint is that the plaintiff argues that the policy taken by the defendant has no benefit and can damage the international trade system.\textsuperscript{40}

In settling cases filed by the EU against Indonesia regarding the Indonesian government’s policy of stopping the export of nickel ore raw materials, the ICJ can only provide an advisory opinion or a non-binding opinion. The purpose of the advisory opinion is a non-binding opinion or opinion for the parties involved in the case. This advisory opinion can be given to the WTO and the EU because both are part of an international organization under the auspices of the United Nations.

An illustration of a case in which the ICJ furnishes an advisory opinion is exemplified by its provision of an advisory opinion to the General Assembly to address the matter concerning Nicaragua and nuclear weapons. In addition to the case of Nicaragua and nuclear weapons, in another case, the general assembly also asked for an advisory opinion to resolve conflicts in Africa. The parties involved in the case are Namibia and southwest Africa. In this case, the purpose of the general assembly is to request an advisory opinion from the ICJ so that the general assembly can fully understand the case or problems that occurred in the case.\textsuperscript{41}

Another example of the exercise of the ICJ’s authority in pro-

\textsuperscript{40} Craig VanGrasstek, \textit{The History and Future of the World Trade Organization} (Geneva: World Trade Organization, 2013) p. 53-54.

Providing advisory opinions is the United Nations Economic and Social Council requesting that the ICJ issued an advisory opinion on the application of the United Nations Convention on Privileges and Immunities for Dumitru Mazilu, a Romanian National and Special Rapporteur from the Sub-Commission on Prevention of Discrimination and Protection of Minorities. Mazilu filed the motion after alleging that the Romanian government prevented him from submitting a human rights report by denying him a travel visa to leave the country. The Romanian government also refused the entry of United Nations members into Mazilu.  

In settlement of this case, the WTO acted as the organization that received the lawsuit. In addition to accepting, the WTO also has a duty to resolve this case so that it can be resolved properly. Indonesia, as a member country in the WTO, has an obligation to settle its case with the EU at the WTO. Indonesia itself has ratified the establishment of the WTO into Law Number 7 of 1994 concerning the ratification of the Agreement Establishing the WTO. This proves and adds to the validity that Indonesia is a member of the WTO.

C. Conclusion

The ICJ as an international judiciary institution does not have special jurisdiction in settling cases filed by the EU against Indonesia regarding the policies issued by the Indonesian government regarding the termination of exports of nickel ore raw materials. The Indonesian government implemented this policy to grow investment in the country and get more income from the management of these raw seeds. In this case, the EU as the plaintiff filed a lawsuit with the WTO. The EU also cannot file a lawsuit with the ICJ because the EU is an international organization, not a country. This is regulated in that international organizations cannot submit cases to the ICJ because it is not regulated in article 34 Paragraph 1 in the ICJ Statute.

Although the ICJ has no jurisdiction and role in the resolution

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of these disputes, the EU, as an international organization under the auspices of the United Nations, can exercise its right to request opinions and opinions from the ICJ. This request for an opinion is referred to as an advisory opinion. This can be done by the EU so that it can settle its case with Indonesia properly. In addition, the WTO can also ask for legal opinions or opinions to produce decisions that can resolve the cases of the EU and Indonesia that are submitted to them.

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