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UNPROCESSED METAL MINERALS EXPORT BAN – IS JAPAN THE “WILD CARD”? ¹²³⁴⁵

INTRODUCTION

When the new Government of Indonesia (“**New GoI**”) takes office in late October, it will be faced with numerous issues requiring its immediate attention including (i) how best to deal with the adverse economic impact of the January export ban on unprocessed Category 2 Metal Minerals and (ii) the need to fast track infrastructure development as a key driver of improved economic growth. The potentially important inter-relationship between these 2 issues has recently been made clear, in the context of nickel, as a result of efforts by Japan to tie future loans to Indonesia, for infrastructure development, to a relaxation of the nickel ore export ban.

The New GoI may ultimately have to make a difficult choice between maintaining the export ban on unprocessed nickel ore exports and fast tracking infrastructure development with Japanese loan funds. At the same time, Indonesia is looking increasingly exposed to the risk of being on the losing side if and when Japan proceeds to file a complaint with the World Trade Organization (“**WTO**”) against the export ban on unprocessed nickel ore, which ban is said by Japan to represent a breach of Indonesia’s obligations under the General Agreement on Tariffs & Trade 1994 (“**GATT 1994**”).

New GoI may see a partial relaxation of the unprocessed nickel export ban as simply being the price that has to be paid for (i) additional Japanese loan funds for infrastructure development and (ii) avoiding a bruising WTO dispute which, if Indonesia loses, may make untenable the continuation of the export ban on all unprocessed metal minerals and not just on nickel.

The real challenge for New GoI will be how to present and package any relaxation of the export ban on unprocessed nickel ore without it appearing that New GoI has turned its back on the full implementation of domestic processing and refining of metal minerals or, even worse, simply caved in to Japanese pressure. Either of these public perceptions could be very damaging to New GoI given its minority support in the next Indonesian parliament.

In this article, the writer will explore the question of whether or not Japan is really the previously overlooked “wild card” in terms of the future of the unprocessed metal minerals export ban and how Japan’s strategy may play out for New GoI from a domestic economic policy perspective.

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BACKGROUND

Domestic Japanese companies are significant nickel ore refiners and have, traditionally, obtained almost 50% of their nickel ore needs from Indonesia.

Japan has long been concerned about the likely, very adverse impact of Indonesia's domestic processing and refining requirement, in general, and of the unprocessed metal minerals export ban, in particular, on the domestic Japanese nickel ore refiners.

To date, Indonesia has sought to address Japan's concerns by suggesting that Japanese domestic nickel refiners might like to relocate their nickel refining facilities from Japan to Indonesia, with Indonesia promising to ensure a reliable supply of nickel ore to the relocated refineries. Japan has, in turn, signaled to Indonesia that it does not regard this as a viable solution by repeatedly indicating its intention to file a WTO complaint against Indonesia unless Indonesia allows the continuation of unprocessed nickel ore exports to Japan.

Indonesia became a WTO member on 24 February 1995.

The surprising decision, in January, to immediately halt all exports of nickel ore and other Category 2 Metal Minerals that have not been fully processed and refined to the levels specified in 2012 while, at the same time, allowing the continued export, until 2017, of Category 1 Metal Minerals in semi-concentrate form has only served to heighten Japan's concerns and thereby make a WTO complaint more likely. It would be understandable if Japan feels that January's "Grand Compromise" is unfair and anything but even handed given nickel and other Category 2 Metal Minerals are now being treated differently from Category 1 Metal Minerals such as copper when, previously, there was no such differential treatment.

It was reported in the 4 April edition of the Investor Daily that Japan's Minister of Foreign Affairs had written to the Indonesian Trade Minister notifying him of the imminent filing of a WTO complaint by Japan. That Indonesia is taking seriously the risk of a WTO complaint is clearly indicated by the report in the 28 April edition of The Jakarta Post of the Ministry of Trade having set up a special team charged with the task of preparing strategies for dealing with such a WTO complaint if and when it is filed.

To date, Indonesia has seen very little in the way of tangible economic benefits from the unprocessed metal minerals export ban. At the same time, however, the short to medium term negative consequences of the unprocessed metal minerals export ban have become only too obvious, with (i) significant drops in Indonesia's export earnings and tax collections from mining and (ii) a presumed big increase in illegal exports of unprocessed metal minerals, something however that has proved difficult to measure. In addition, a significant number of Indonesian producers of bauxite and nickel have been forced to scale back or shut down altogether their operations because of their inability to export unprocessed bauxite and nickel ore production. The consequent negative impact on employment in traditional bauxite and nickel mining areas has, unquestionably, been considerable although, again, reliable figures are hard to come by. It has surely not been lost on many people, including key New GoI policy makers, that the only country **not** to benefit at all, as yet, from the dramatic run up in nickel

prices, post the January implementation of the export ban on unprocessed nickel ore, has been Indonesia.

Japan is Indonesia's biggest bi-lateral lender and foreign investor with nearly US\$21 billion in outstanding loans to Indonesia, mainly for infrastructure development.

COMMENTARY

1. Link between Export Ban and Infrastructure Funding

The link between Japan's status as the biggest lender to Indonesia and the potential effectiveness of Japan's opposition to the nickel export ban has only become clear in the last couple of months as the next President of Indonesia, Jokowi Widodo ("Jokowi") emphasized, in the course of this year's election campaigning, the importance he attaches to fast tracking infrastructure development as a way of increasing the country's economic growth.

As a practical businessman, Jokowi has not overlooked the issue of how New GoI is going to pay for the contemplated fast track infrastructure development. This is, indeed, a critical consideration given that the Head of the Presidential Working Unit for Supervision & Management of Development was reported in the 8 October edition of The Jakarta Post as saying Indonesia needs to invest US\$490 billion in new infrastructure projects, over the next 5 years, if the country is to achieve New GoI's economic growth target of 7% per annum.

It is understandable that New GoI should see Japan as the most likely source of a substantial amount of the funding required for the proposed infrastructure development. Indeed, although not yet inaugurated as the next President, Jokowi met with a former Japanese prime minister on 1 September to seek additional loan funds for infrastructure development. Jokowi was quoted in the 2 September edition of The Jakarta Post as having said, following this meeting, that:

"the relationship with Japan [will] be instrumental in the future development of Indonesia" and that:

"Discussions on loans [for infrastructure] are on the table along with our need for more investment."

At the same time, Japan has left no doubt in anyone's mind that it views relaxation of the nickel ore export ban as an important objective in ensuring the continuation of a "good working relationship" between Japan and Indonesia. By implication, this "good working relationship" is likely to involve a willingness on the part of Japan to consider favorably Jokowi's request for additional loan funds for infrastructure development. While Japan has been much too astute to publicly say that its willingness to extend additional infrastructure loans to Indonesia is conditional upon Indonesia relaxing the nickel ore export ban, it would be naïve in the extreme not to accept that this is, most probably, the reality. It was reported in the 13 August edition of The Jakarta Post that Japan's Foreign Minister had met, the previous day, with Jokowi to express Japan's continuing opposition to the nickel ore export ban and to call for a relaxation of the same. Jokowi was quoted as having said:

“I have emphasized that I will uphold the law and the Constitution, which mandates that all natural resources be used for the [benefit of Indonesian] citizens’ welfare.

However, I welcome them should they [Japan] want to talk about technicalities.”

Readers should pay particular attention to the highlighted words in the above quote and ponder what these words may imply, especially in light of Indonesia’s eagerness to obtain new infrastructure loans from Japan.

Further, in expressing a willingness to “talk about technicalities [of the nickel export ban]”, Jokowi has, arguably, highlighted the opportunity to bring about a relaxation of the nickel ore export ban provided this can be done in a way that may be explained on the basis of “technical considerations” and without compromising New GoI’s “official” support for domestic processing and refining.

2. **Understanding Japan’s Strategy**

Japan is pursuing a sophisticated 2 part, “stick” and “carrot”, strategy which could result in a partial relaxation of the export ban on unprocessed Category 2 Metal Minerals or, as a minimum, on unprocessed nickel ore exports.

The “stick” is, of course, Japan’s threat to file a WTO complaint against Indonesia on the grounds that the export ban on nickel ore amounts to a breach of Indonesia’s GATT 1994 obligations.

The “carrot”, meanwhile, is Japan’s recently expressed willingness to help New GoI fund fast track infrastructure development with additional loan monies, presumably on preferential terms.

While a WTO complaint has been threatened for the past couple of years, this “stick” was never likely, by itself, to achieve Japan’s objective. This is because the existing Indonesian government (“**Old GoI**”) has repeatedly shown itself to respond very badly to efforts by foreigners to make Indonesia accountable in international forums, whether this be international arbitration forums such as ICSID or UNCITRAL or international trade forums such as WTO. Inevitably, Old GoI views such efforts as attacks on the sovereignty of Indonesia and as foreign companies or foreign countries “ganging up” on Indonesia in an endeavor to pressure Indonesia into doing something it does not want to do. The fact that Indonesia has previously agreed to be bound by the rulings of such international forums is repeatedly overlooked in a surge of nationalistic and overtly anti-foreign sentiment. New GoI’s attitude, to such international accountability, is not likely to be much different.

Although Japan has long had a very good relationship with Indonesia, covering many economic, political and security dimensions, and Japan is not seen by Indonesia’s politicians in the same inherently suspicious light as, say, America or Australia, Japan would be risking a lot of goodwill in pursuing the WTO complaint without offering Indonesia “something” in return. A “carrot” was and is clearly required if the nickel ore export ban is to be relaxed without acrimony, which acrimony could, otherwise, imperil important economic, political and strategic understandings between Indonesia and Japan that go far beyond the nickel ore export ban.

The high priority which New GoI clearly intends to place on infrastructure development has been articulated by Jokowi at a most convenient time for Japan. This is because the need for additional loan funds, to finance the high priority infrastructure development, provides the perfect opportunity for Japan to step forward and offer new infrastructure loans to Indonesia as the “something” or “carrot” required to, potentially at least, enable Japan to get its way in terms of the relaxation of the nickel ore export ban without Indonesia feeling it has got nothing in return.

Japan does not actually have to formally file a WTO complaint against Indonesia for this still to be effective as a “stick”. As long as New GoI understands the likelihood of Japan proceeding with its WTO complaint if the nickel ore export ban is not relaxed and, at the same time, does not rate highly its chances of being able to successfully defend such a WTO complaint should it be filed, the threat of a WTO complaint may be more effective than actually filing the WTO complaint. This is because, once the WTO complaint is actually filed, Indonesia will be locked into a formal, international confrontation with Japan, something that would make it politically difficult, domestically, for New GoI to be seen to be backing down in the face of Japan’s action. While so long, however, as the threatened WTO complaint simply remains in the background, New GoI’s flexibility will be much greater in dealing with Japan on all issues including the nickel ore export ban.

Having regard to the foregoing, in pursuing its “stick” and “carrot” strategy, Japan needs to be careful to highlight the attractiveness of the additional infrastructure loans on offer while playing down the threat of the WTO complaint but, all the time, never allowing New GoI to forget that the “stick” is definitely there and can be quickly activated if necessary. So far, Japan has executed this 2 part strategy masterfully with a carefully choreographed series of meetings between past and present senior Japanese politicians and Jokowi. First a meeting, in August, with Jokowi to remind New GoI about how “seriously concerned” Japan is regarding the nickel ore export ban but no apparent direct mention of the WTO complaint – essentially, that was Japan saying to New GoI “don’t forget the stick, it is still there”. This was followed by another meeting, in September, with Jokowi to express interest in and support for New GoI’s plan to fast track infrastructure development, with this support being an indicated willingness to favorably consider additional infrastructure loans for Indonesia so long only as “the good working relationship between Japan and Indonesia is maintained” – essentially, that was Japan “dangling the carrot” of additional infrastructure loans in front of New GoI. At the same time, referring to the importance Japan attaches to “the good working relationship between Japan and Indonesia [being] maintained” is properly to be seen as Japan making clear the link between the “stick” and the “carrot”. No one, including most importantly New GoI, can or should be in any doubt as to what is Japan’s vision of a “good working relationship” with Indonesia, at least in terms of how it relates to the nickel ore export ban.

There is, of course, nothing improper at all about Japan pursuing the strategy outlined above as every country must do what it can to promote its own national economic interests. New GoI just needs to make sure that any resulting bargain, arrived at between Japan and Indonesia, sufficiently advances Indonesia’s own economic interests to justify change in New GoI’s approach to the nickel ore export ban.

The real issue is how committed is Japan to its strategy of tying new infrastructure loans for Indonesia to relaxation of the nickel ore export ban. It has been suggested to the writer that Japan’s commitment to achieving a relaxation of the nickel ore export ban may not be as firm and unconditional as it might

otherwise seem. This is said to be for at least 3 reasons. First, Japan's domestic nickel ore refining industry is in decline and has been for a long time. Accordingly, as a "sunset" industry, does it really make sense for Japan to risk a lot of international political capital on seeking to prop up this industry for a few more years by ensuring a steady supply of cheap nickel ore from Indonesia? Second, other Japanese industries including, most notably, the stainless steel industry, may benefit considerably from being able to buy refined nickel from Indonesia at prices less than those that Japan's high cost domestic nickel ore refiners can offer. Third, the economic importance which Japan attaches to the continued supply of nickel ore from Indonesia is far outweighed by Japan's geopolitical concerns regarding the struggle with China for control over and the right to exploit the resources of the South China Sea, which concerns dictate Japan should not risk alienating Indonesia, a potentially key player in this struggle, by making too big a fuss about the nickel ore export ban.

3. Evaluating the Seriousness of a WTO Complaint

3.1 **Overview:** Japan's threatened WTO complaint puts Indonesia in a difficult position.

Much as Indonesia dislikes and objects to efforts by foreign companies and foreign countries trying to make it accountable in international forums, Indonesia cannot afford to "thumb its nose" at any WTO ruling made in response to Japan's complaint against the nickel ore export ban if and when this complaint eventuates. To do so, would expose Indonesia to the risk of retaliatory action by its trade partners and fellow WTO members. It would also not fit comfortably with Indonesia's growing perception of itself as a responsible member of the international community and a "serious player" on the world stage. Long gone are the days when Indonesia's first president, Sukarno, could afford to defiantly say (so it is claimed) to the then US ambassador to Indonesia:

"To hell with the West and its capital"

Further, Indonesia has not hesitated to file its own WTO complaints against other countries, including the United States and Australia, which Indonesia believes are acting unfairly in trade matters relevant to Indonesia's interests. Accordingly, Indonesia has already indicated that it will comply with any adverse ruling made by WTO in response to a complaint from Japan. The head of the special team, established by the Ministry of Trade for the purpose of preparing to defend any WTO complaint from Japan, was quoted in the 28 April edition of The Jakarta Post as having said:

"As a member of the WTO, we [Indonesia] will carry out our duties at the international level. We must be ready for every possibility."

3.2 **Merits of WTO Complaint:** New GoI has good reason to be concerned that it may well end up on the losing side if Japan proceeds with filing a formal WTO complaint in respect of Indonesia's nickel ore export ban.

Article XI of GATT 1994 ("**Article XI**") provides that:

“No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, export licenses or other measures, shall be instituted or made by any contracting party on the exportation of any product destined for the territory or another contracting party.”

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

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

There are various exceptions to the otherwise sweeping prohibition of export restrictions provided for in Article XI. including exceptions for:

- (a) temporary prohibitions or restrictions imposed for the purpose of relieving a critical shortage of food stuffs in the relevant WTO member;
- (b) restrictions to safeguard a member country’s balance of payments;
- (c) quantitative restrictions necessary to the development of a particular industry of a member country in the early stages of economic development;
- (d) restrictions necessary for the protection of human, animal or plant life or health; and
- (e) restrictions necessary for the conservation of exhaustible natural resources so long as such restrictions are made effective in conjunction with restrictions on domestic production or consumption.

The problem Indonesia faces is none of the above exceptions seem to cover the nickel ore export ban which has been introduced for the avowed purpose of promoting domestic processing and refining of metal minerals mined in Indonesia as supposedly required by the 2009 Mining Law. More particularly, the nickel ore export ban is **not** for the purpose of (i) relieving a chronic shortage of foodstuffs in Indonesia, (ii) protecting Indonesia’s balance of payments, (iii) protecting Indonesian human, animal or plant life or health or (iv) conserving Indonesia’s exhaustible natural resources. The absence of any domestic restrictions on the consumption of nickel ore is almost certainly fatal in the case of the potential applicability of this last exception.

Further, as Indonesia can no longer be said to be a country in the early stages of economic development, it cannot rely on the exception for industry development initiatives which might have otherwise covered the promotion of a domestic metal mineral refining and smelting industry for Indonesia. In this regard, the export ban on nickel ore is very different from the long proposed, but never as yet implemented, ban on the export of low calorific value coal which has its origins in ensuring that Indonesia has sufficient domestic supplies of low calorific value coal to meet the long term, fuel needs of Indonesia’s existing and contemplated network

of coal fired power plants.

Technical arguments can, of course, always be made as to why Indonesia's nickel ore export ban should be regarded as falling within 1 or other of the above described exceptions to Article XI. These technical arguments are, however, all likely to fail for 1 of 2 reasons. First, Old GoI has been so bellicose in its defense of the unprocessed metal minerals export ban, as being essential to Indonesia's economic development, that any arguments as to why the various exceptions, unrelated to promoting economic development, should apply are easily contradicted by Old GoI's own repeated statements on this score. Second, in 2012, WTO considered a complaint brought by the European Union, Japan and the United States against China and in respect of China's efforts to prevent the export of rare earth minerals through a combination of duties, quotas and licensing restrictions ("**China RE Complaint 2012**").

The China RE Complaint 2012, and the way WTO dealt with the same, have important implications for how WTO would be likely to rule on a complaint by Japan in respect of Indonesia's nickel ore export ban. This is because of (i) the similarities between the restrictions China sought to impose on exports of rare earth minerals and Indonesia's unprocessed nickel ore export ban and (ii) the guidance provided by WTO in terms to how Article XI and its various exceptions should be interpreted and applied. More importantly, WTO essentially found against China on the basis that:

- (a) while a country does not infringe Article XI by (i) prohibiting altogether the mining of a particular product or (ii) imposing quotas on the quantity of a particular product that may be mined;
- (b) once a particular product has been mined and enters the market, no restriction on export is permissible unless 1 or other of the previously highlighted exceptions applies.

The difficulty WTO's analysis of and ruling on the China RE Complaint 2012 creates for Indonesia, in the event of any complaint by Japan against the unprocessed nickel ore export ban, is that Indonesia has not imposed any prohibition or quantitative restriction on the mining of nickel and other metal minerals. Instead, Indonesia is allowing unlimited mining of nickel ore and other metal minerals while, at the same time, trying to restrict the export of nickel ore and other unprocessed metal minerals once they are mined and have otherwise entered the market. The fact that unprocessed nickel ore and other metal minerals can be sold domestically, without any restrictions, may also be used to establish that Indonesia's unprocessed nickel ore and other metal minerals have, indeed, entered the market and, therefore, Old GoI is simply trying to restrict their export. Again, coal and the production quotas proposed by the Directorate General of Minerals & Coal for 2015 and beyond highlight the differential treatment of coal and metal minerals as well as provide a good example of the sort of restriction which would be acceptable for Article XI purposes. Imposing quotas on or even banning altogether the production of nickel ore and other metal minerals, just as Indonesia has proposed doing for coal, would not give rise to any WTO problems because such quotas or ban (i) may be said to be for the purpose of conserving an exhaustible natural resource and (ii) have their impact before nickel ore and other metal minerals are mined and otherwise enter the market.

Indonesia could, of course, replace the unprocessed metal minerals export ban with quotas on the production of nickel and other metal minerals. This, however, would not achieve Old GoI's objective of creating a domestic metal mineral refining and smelting industry and otherwise ensuring greater local value added activity in respect of metal minerals.

4. Assessing New GoI's Policy Options

The policy objectives of (i) promoting domestic processing and refining of metal minerals and (ii) fast tracking infrastructure development are, of course, not mutually exclusive. However, to the extent that (i) fast tracking infrastructure development is dependent, in part, upon obtaining additional loan funds from Japan and (ii) the availability of those additional Japanese loan funds is conditional upon New GoI relaxing the export ban on unprocessed nickel ore, New GoI could well face the difficult decision of which policy objective should be given the higher priority. Is it more important for New GoI to rigorously enforce the export ban on all unprocessed Category 2 Metal Minerals, including nickel ore, and thereby give priority to the promotion of domestic processing and refining of metal minerals? Alternatively, is it more important for New GoI to fast track infrastructure development? This is really an issue of trying to determine how Indonesia's "national interest" may be best served. Of course, to the extent that New GoI can, with greater or lesser difficulty, find cost effective alternatives to Japanese loan funds for infrastructure development, there is no need for New GoI to have to choose between the 2 policy objectives in terms of priority setting. China might be an alternative source of loan funds for infrastructure development given the interest various Chinese companies have, supposedly, shown in building nickel ore smelters in Indonesia.

In trying to resolve the above described policy dilemma, it would be understandable and, indeed, correct if New GoI focused on which policy objective is likely to make the greatest contribution to advancing economic growth in Indonesia and otherwise helping New GoI to realize its stated economic growth target of 7% per annum.

Given the very uncertain economic benefits of promoting domestic processing and refining of metal minerals and the, arguably, much more certain economic benefits of fast tracking infrastructure development, it seems entirely possible to the writer that New GoI could decide that its economic growth target of 7% per annum stands a better chance of being achieved, and at an earlier stage, if the policy objective priority is infrastructure development and not domestic processing and refining. Such a decision is all the more likely if New GoI's internal assessment is that Indonesia will, most probably, be on the losing side of any WTO complaint by Japan.

Notwithstanding the foregoing, the writer does not expect New GoI will cease to promote domestic processing and refining of metal minerals as a laudable policy objective. This is almost certainly not possible even if New GoI recognizes and accepts the reality of the very uncertain economic benefits of promoting domestic processing and refining of metal minerals. Resource nationalism and the promotion of domestic processing and refining have become so central to Indonesia's national identity over the past few years that it would seem to be too difficult, politically, for New GoI to officially and openly deny the merits of resource nationalism and the promotion of domestic processing and refining. Rather, it is much more likely that, if New GoI decides to make fast tracking infrastructure development its overriding priority, this will be packaged and presented for public consumption as a

belated realization that fast tracking infrastructure development is necessary as a pre-condition to making full domestic processing and refining of metal minerals a reality. In other words, infrastructure development is not taking the place of domestic processing and refining as New GoI's priority objective but is simply being carried out first so as to maximize the benefits to be ultimately obtained from domestic processing and refining of metal minerals. This may be an appealing approach to New GoI's "spin doctors" because it is consistent with the long and loudly expressed reservations of many metal minerals producers that Indonesia currently lacks the supporting infrastructure, in terms of electricity supply, ports and roads, to make full domestic processing and refining of metal minerals an obtainable objective today. New GoI can then claim, with some degree of justification, that it is simply pursuing a more practical and realistic approach, than has Old GoI, to the promotion of domestic processing and refining by ensuring the necessary infrastructure is in place before it insists on metal mineral producers carrying out full domestic processing and refining.

Having justified making infrastructure development, rather than domestic processing and refining, its immediate priority, it should then be much easier for New GoI to allow a "temporary" relaxation of the export ban on nickel ore and, possibly, on bauxite as well. The writer would not be surprised to see New GoI revisit the "Grand Compromise" of January and decide that, after all, Category 2 Metal Mineral producers should be allowed the same 3 year grace period that Category 1 Metal Mineral producers now enjoy in terms of being able to continue to export metal mineral products, in other than fully processed and refined form, as long as various conditions are met.

5. **The Residual Difficulties**

The practical difficulties that New GoI will face, if it allows nickel ore producers the same leeway as Category 1 Metal Mineral producers, are several.

First, the writer understands there is no semi-concentrate form of nickel that can be used as a "half way house" between unprocessed nickel ore and fully processed and refined nickel. Accordingly, New GoI cannot simply provide that nickel ore producers may continue to export their mineral products in "semi-concentrate form" for the next 3 years and thereby bring about a perfectly "level playing field" between nickel ore producers and Category 1 Metal Mineral producers. Fortunately, though, for New GoI the 2009 Mining Law may provide the solution to this apparent conundrum. After all, Articles 102 and 103 of the 2009 Mining Law merely require mineral producers to "*enhance the added value of their mineral resources*" and "*process and purify mining outputs in the country*" without, however, specifying what this actually requires. Indonesia's coal producers have, very arguably, already provided some direction as to how this ambiguity in the 2009 Mining Law can be used to advantage in the instant case. In 2009 – 2010, when it was believed that Old GoI was going to insist upon coal producers, as well as metal producers, carrying out "local value added activity", before being able to export their coal products, coal producers were quick to make the argument that, because they crushed, graded, sorted and washed their coal production as a matter of course, this was sufficient "local value added activity" to satisfy their obligations under the 2009 Mining Law. It is hard to believe that, if this argument would have worked for Indonesia's coal producers, the ever-resourceful Indonesian Nickel Miners' Association could not identify some element of local value added activity, no matter how marginal, in the way nickel producers currently deal with their nickel ore production to be able to make the case that, like the coal producers, nickel ore producers already satisfy their obligations under the

2009 Mining Law.

Second, there is the “slippery slope” difficulty for New GoI. If and when New GoI allows nickel ore producers to resume export of substantially unprocessed and unrefined nickel ore, other Category 2 Metal Mineral producers, especially bauxite producers, will be able to claim, with some justification, that nickel producers are getting special treatment from New GoI and even handedness requires that New GoI scrap the January “Grand Compromise” so that there is no longer any distinction between Category 2 Metal Minerals and Category 1 Metal Minerals for export purposes. As it is bauxite producers, along with nickel producers, which have been most adversely affected by the export ban on unprocessed Category 2 Metal Minerals, a possible compromise would be (i) to retain the distinction between Category 2 Metal Minerals and Category 1 Metal Minerals while (ii) reclassifying both nickel **and** bauxite as Category 1 Metal Minerals.

Third and, arguably, most importantly, New GoI will need to carefully consider how allowing, the even temporary, continued export of unprocessed nickel ore is likely to impact the construction of domestic nickel ore smelters. To the extent that the construction of some domestic nickel ore smelters has already commenced in reliance upon the export ban on unprocessed nickel ore remaining in place, is it fair to penalize the promoters of these nickel smelting projects by removing, even temporarily, the nickel ore export ban after the event? Of course, New GoI’s “spin doctors” will surely present any relaxation of the unprocessed nickel ore export ban as (i) being temporary only (**i.e.**, until 2017 as for Category 1 Metal Mineral producers) and (ii) just so as to give sufficient time to enable Indonesia to put in place the necessary infrastructure to ensure Indonesia derives maximum benefit from domestic processing and refining of metal minerals. Whether this “spin” will satisfy the promoters of domestic nickel ore smelting projects already under construction seems, however, inherently unlikely to the writer. Such promoters will, no doubt, be inclined to ask how can they be sure that, having backed away from the January “Grand Compromise”, New GoI will not, likewise, back away again when 2017 is upon us? This may be a question New GoI will find it difficult to convincingly address. Of course, as New GoI is meant to be much more business minded and pragmatic than is Old GoI, New GoI may simply play “hard ball” and take the position (officially or, more likely, unofficially) that, unless it makes good economic sense, on a standalone basis and without any export ban, to build domestic nickel ore smelters, Indonesia would be better off, in the long run, without the domestic nickel smelters. This would then force the promoters of domestic nickel ore smelters to very carefully consider the future, long term international competitiveness of their proposed nickel ore smelters; something that is not likely to be pretty to watch and would, almost certainly, give rise to much finger pointing and acrimony.

SUMMARY AND CONCLUSIONS

New GoI’s avowed commitment to fast tracking infrastructure development is likely to give rise to some difficult policy choices if the only or, at least, the best source of foreign infrastructure loans is Japan.

Japan has made clear that, while it is willing to consider additional infrastructure loans for Indonesia, it wants to see a relaxation of the export ban on unprocessed nickel ore.

To the extent New GoI believes that its economic growth target of 7% per annum is more likely to be realized by making infrastructure development, rather than domestic processing and refining of metal minerals, its immediate priority, there will be a strong temptation to acquiesce in Japan's request for a relaxation of the export ban on unprocessed nickel ore in order to secure the necessary financing for infrastructure development. This is especially so if it means that Indonesia can thereby avoid a WTO complaint from Japan, which WTO complaint, if it is ultimately decided against Indonesia, will cast doubt on the viability of the export ban in its entirety and not just in respect of unprocessed nickel ore.

Although New GoI cannot afford to be seen to be caving into Japanese pressure or abandoning domestic processing and refining of metal minerals as a policy objective, there are undoubtedly ways the immediate prioritization of infrastructure development, in preference to the immediate prioritization of domestic processing and refining of metal minerals, can be packaged and presented to the Indonesian public so that it becomes politically acceptable to "temporarily" relax the export ban on unprocessed nickel ore. Of course, once this happens, who is to say when, how and if the export ban on unprocessed nickel ore will ever be fully re-imposed.

While the consensus of most commentators has been that the export ban on unprocessed Category 2 Metal Minerals is here to stay and will not be relaxed by New GoI, the writer believes that these commentators have given insufficient attention to the sophisticated strategy Japan is pursuing in its endeavor to have the export ban on unprocessed nickel ore relaxed. The combination of a "stick", in the form of the threatened WTO complaint, and a "carrot", in the form of additional infrastructure loans, may be a winner. Japan could well be the "wild card" which causes a major re-think, by New GoI, of the short term merits of the unprocessed nickel ore export ban.

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