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FINDING LEGITIMACY ON EUROPEAN UNION TRADE POLICY TO LIMIT THE IMPORT OF PALM OIL: WILL INDONESIA SURVIVE (AGAIN)?

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Abstract

In March 2019, the European Union considered palm oil to cause ILUC along with being one of the contributors for emission and pollution. However, the move has been condemned by palm oil exporting States, such as Indonesia. It is accused as a modern, “green protectionist” move to protect national market or other countries importing goods. Since European Union uses environmental justification to restrict palm oil import from Indonesia, it is inherently correlated with the general exception enshrined in Article XX of the GATT relating to the principles of international trade. Under the assessment based on Article XX and judicial decisions before the WTO, the article concludes that the DR is not the only measure possible and will not give significant effect on ILUC. It only creates unjustifiable and arbitrary discrimination towards Indonesia since there is no sufficient link between the environmental purpose of the DR and its provisions

Keywords : *Delegated Regulation, GATT, European Union, Indonesia, palm oil import, protectionist*

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I. INTRODUCTION

European Parliament and of the Council issued Directive (EU) 2018/2001 on 11 December 2018 concerning the promotion of the use of energy from renewable sources, hereinafter RED II.¹ Under RED II, European Union (EU) imposes an obligation to shift the use of energy to renewable sources from 2020 to 2030.² RED II also lays down limitations specifically on the use of crop-based biofuels, bioliquids and biomass fuels in order to meet the targets of the EU energy in the transport sector³ Such limitations are mainly based on the criteria of Indirect Land Use Change (ILUC), especially that with regard to the alleged risk of it. The ILUC “occurs when the cultivation of crops for biofuels, bioliquids and biomass fuels displaces traditional product of crops

¹ Directive 2018/2001 of the European Parliament and of the Council on the Promotion of the Use of Energy from Renewable Sources (Recast), Dec. 21, 2018, O.J (L 328/82) [hereinafter *RED II*].

² *Ibid.*, ¶128 (aims for 32% while previously RED only aimed for 20%)

³ *Ibid.*, Articles 26 and 27

for food and feed purposes”.⁴ The EU argues that, “[s]uch additional demand increases the pressure on land and can lead to the extension of agricultural land into areas with high-carbon stock, such as forests, wetland and peatland, causing additional greenhouse gas emissions”.⁵ The causal link between GHG and ILUC is strong, seen from the fact that, although the level of GHG emissions caused by ILUC “cannot be unequivocally determined”, “the highest risk of indirect land-use change have been identified for biofuels ... produced from feedstock for which a significant expansion of the production area into land with high-carbon stock is observed.” As a supplement and implementation of RED II, European Commission issued Delegated Regulation 2019/807 (hereinafter DR) on 13 March 2019, providing that ILUC “can occur when land previously devoted to food or feed production is converted to produce biofuels, bioliquids and biomass fuels.” This “may lead to the extension of agricultural land into areas with high carbons stock such as forests, wetlands and peatland, causing additional greenhouse gas emissions.” The DR strengthens RED II stating that the palm oil is one of the contributors of these indirect land-use, and is considered to be a high ILUC-risk feedstock. In accordance with RED II and DR, palm oil is the only feedstock that is high ILUC-risk and it includes in the target of renewable energy which must be gradually reduced and, ultimately, fully eliminated by 2030. There is no limitation and phase-out requirements applied to other feedstock. Indonesia has protested the policy classifying the crude palm oil (CPO) as not sustainable product, causing high risk ILUC, along with being one of the contributors for emission and pollution,⁶ and hence phasing out of the commodity from the list of raw materials for the eco-friendly transport biofuel. After negotiation with the European Union (EU) was failed, Indonesia officially sent a request for consultation with the EU on Dec. 9, 2019 as the initial step for the lawsuit, followed by communication, dated 18 March 2020, from the delegation of Indonesia to the Chairperson of the Dispute Settlement Body (DSB).

In response to the policy, President Joko Widodo and Prime Minister Mahatir Mohammad stated, “Both our governments view this as a deliberate, calculated, and adverse economic and political strategy to remove palm oil from the EU marketplace.”⁷ The changing of EU energy policy means biofuel,

⁴ *Ibid.*, Recital 81

⁵ *Ibid.*

⁶ Draft of the Commission DR on Supplementing Directive (E.U.) 2018/2001 as Regards the Determination of High Indirect Land-Use Change-Risk Feedstock for which a Significant Expansion of the Production Area into Land with High Carbon Stock is Observed and the Certification of Low Indirect Landuse Change-Risk biofuel, Bioliquids and Biomass Fuels (2019) [hereinafter *E.U. DR 2019*].

⁷ Bernadette Christina Munte & Philip Blekinsop, “Indonesia, Malaysia Send Letter Protesting EU Palm Oil Curbs,” Reuters, April 9, 2019, accessed May 29, 2019. <https://www.reuters.com/article/us-indonesia-malaysia-eu-palmoil/indonesia-malaysia-send-letter-protesting-eu-palm-oil-curbs-idUSKCN1RL0Y6>.

such as palm oil, may be endangered. Today, palm oil business in Indonesia and Malaysia together count for 85% of global palm oil production⁸ and EU is the second largest importer of palm oil.⁹ In reality, versatility of palm oil in several industries¹⁰, high productivity,¹¹ and inexpensive price¹² have not yet made palm oil unpopular. Thus, palm oil still has a place in the business and the EU DR is killing it.

Palm oil is one of the main export products of Indonesia¹³ and Malaysia.¹⁴ With the DR being enforced, the business faces its greatest challenge today. The DR indirectly put cap on the import of palm oil which, with the new regulation, has to fulfill requirements and certification if ever wanted to be in the EU market.¹⁵ Such standard is in line with the EU policy in curbing unsustainable energy which causes, in the case of palm oil, massive deforestation.¹⁶

Climate change and environmental damage have always been a major discourse in the 21st century¹⁷ and as enshrined in the 2030 Agenda of Sustainable Development Goals (SDGs), it is fair to say that environmental sustainability is a common goal for the international society.¹⁸ In 2014, the area of palm

⁸ Paul Tullis, *How the World Got Hooked on Palm Oil?*, The Guardian, February 9, 2019, accessed May 29, 2019. <https://www.theguardian.com/news/2019/feb/19/palm-oil-ingredient-biscuits-shampoo-environmental>.

⁹ Naveen Thukral & Emily Chow, “Global 2019 Palm Oil Demand Set for First Contraction in Two Decades,” Reuters, March 4, 2019 accessed May 29, 2019. <https://www.reuters.com/article/us-palmoil-outlook-demand/global-2019-palm-oil-demand-set-for-first-contraction-in-two-decades-idUSKCN1QK0RE>.

¹⁰ Pablo Pacheco, et.al, “The Palm Oil Global Value Chain: Implication for Economic Growth and Social and Environmental Sustainability, *Center for International Forestry Research Working Paper 220*, 2017, 3, www.cifor.org/publications/pdf_files/.../WP220Pacheco.pdf, accessed May 29, 2019. Palm oil has different fatty acid profiles, which increases the crop’s versatility in several industrial application.

¹¹ Melissa Thomas, et. al. “Sustainable Sourcing Guide for Palm Oil Users: A Practical Handbook for U.S. Consumer Goods and Retail Companies,” *Conservation International and World Wildlife Fund, May 2015*, at.8, https://www.conservation.org/publications/Documents/CI_Palm-Oil-Sourcing-Guide.pdf, accessed May 29, 2019.

¹² *Ibid.*

¹³ Indonesian Ministry of Trade, “10 Komiditi Utama dan Potensial [The 10 Primary Commodities and their potential],” Ministry of Trade, <http://www.kemendag.go.id/id/economic-profile/10-main-and-potential-commodities>, accessed May 29, 2019. Palm oil is 12% of the total number of non-gas and oil industry which contribute to export during the period of 2012-2017.

¹⁴ Lawrence Pines, “Malaysia’s Commodity Imports & Exports: How Political Stability Fuels a Vibrant Economy,” *Commodity*, <https://commodity.com/malaysia/>, accessed May 29, 2019. Palm oil is second after refined petroleum.

¹⁵ Ewa Krukowska, “Palm Oil is at the Heart of the Next Trade War,” Bloomberg, Mar. 13, 2019, <https://www.bloomberg.com/news/articles/2019-03-13/palm-oil-trade-war-looms-as-europe-sets-limits-on-use-in-biofuel>, accessed 29 May 2019. The law called on the EU to develop a certification system for biofuel linked to their impact on so-called indirect land-use change, known as ILUC.

¹⁶ *Ibid.*

¹⁷ Eileen Crist, “Beyond the Climate Crisis: A Critique of Climate Change Discourse,” *Telos* 141 (Winter 2017): 29-55.

¹⁸ G.A. Res/70/1, Transforming Our World: the 2030 Agenda for Sustainable Development (Oct. 21, 2015), ¶18. [hereinafter *SDGs*].

oil cultivation in Indonesia and Malaysia have reached 15 and 10 million Ha respectively.¹⁹ The massive growth of the industry is shown by the fact that 45% of what was a tropical rainforest in South East Asia in 1989, is now palm oil cultivation.²⁰ At the same period of time, Indonesia managed to turn 54% of its tropical rainforest into palm cultivation.²¹ Bearing in mind that 46% of global carbon discharge is being absorbed by tropical rainforest²² and so, by the trend of land-use change of such areas, more and more carbon emission and pollutants are being released to the atmosphere.²³

Nonetheless, the DR of the EU to restrict import of palm oil may not be as what it seems. EU is often accused of being a protectionist. The term “protectionist”, means “an economic policy of restraining trade between nations, through methods such as tariffs on imported goods, restrictive quotas, and a variety of other restrictive government regulations is designed to discourage imports, and prevent foreign take-over of local markets and companies”²⁴ which includes limiting quotas of products, tariffs, and non-tariffs barriers. Further, it seems there is a more favourable approach to really give these protectionist policies a stronger stance; countries are using environmental justification to form protectionist policies or “green protectionist.”²⁵

Protectionism provides safe competitive environment for “infant industries” until they are large enough to compete with international trading activities.²⁶ Similarly, the EU gives alternative vegetable oil a chance to be a contender to palm oil by enacting the DR. Consequently, the measure will surely heavily benefit alternative vegetable oils, such as rapeseed, soybean, or sunflower oil, produced either by local farmers or imported alternative vegetable oils. On the one hand, the DR favors the alternative vegetable oils by only granting incentives tax and tariffs towards products which are at least 50-65% produce less emission compared with traditional cultivated oils²⁷ and

¹⁹ Mark Barthel, et al. *Study on the Environmental Impact of Palm Oil Consumption and on Existing Sustainability Standards for European Commission DG Environment* (Luxemburg: European Union, 2017), 16.

²⁰ *Ibid.*, 51.

²¹ *Ibid.*

²² *Ibid.*, 60.

²³ EU DR 2019, Explanatory Memorandum, at.1; see European Union Delegation of the European Union to Indonesia Press Release, What is New on the E.U. Legislation? (Mar. 21, 2019). The E.U. DR 2019 states that more emission is caused by indirect land-use change and the palm oil is one of the contributors of these indirect land-use changes.

²⁴ Regine Adele Ngono Fouda, “Protectionism and Free Trade: A Country’s Glory or Doom?” *International Journal of Trade, Economy and Finance* 3 no. 5 (2012), 351

²⁵ Samuel Griffin, “The World Trade Organization: A Barrier to Green Energy” *Transnational Law & Contemporary Problems* 22 (Spring 2013), 206 ,207.

²⁶ Fouda, “Protectionism and Free trade,” 351.

²⁷ RED II, Art.29(10) (financial support will be granted to those biofuel, bioliquid, and biomass fuels which, depending on the sector, produce 50-65% less emission. Indonesia will waste precious time and money to

thus, palm oil will have a major change in the line production which costs time and money. Further, the rapid growth of alternative vegetable oils may not be a solution to a alternative product since its cultivation is less productive; produce less oil compared to palm oil if given the same amount of land area.²⁸ It means to produce the same amount of palm oil, alternative vegetable oils take much larger space or land than palm oil's cultivation which has been proven by the European Commission Report in 2013 entitled *The Impact of EU Consumption on Deforestation* which confirmed that soybean, as a more sustainable source of oil, contributed 19% (13 Mha) to deforestation while palm oil was 8% (6 Mha). This is due to the status of soybean as a part of consumption of ruminant livestock²⁹ which have never have significant drop on human's consumption.

This article will focus on the effect of the DR towards the survival of Indonesia's palm oil industry. As a major exporter of palm oil in the EU (even larger than Malaysia),³⁰ Indonesia's economy has also been heavily relying on the palm oil industry since 4 million smallholder farmers rely on the cultivation and provide workfield for more than 7 million labours in 2017 which contributed over USD \$23 billion to Indonesia's economy.³¹ In 2016, Indonesia even challenged the EU measure which considered Indonesia violated anti-dumping principle in the palm oil industry.³² The World Trade Organization (WTO) Dispute Settlement Body and Court of Justice of the EU entertained the case and both decision favoured Indonesia and simultaneously proved that E.U is lost due to its error in calculating the 'normal value'³³

After being defeated in *European Union - Anti-Dumping Measures on*

conform to the regulation with uncertainty up ahead as E.U. planning on keep setting the threshold higher for biofuel to enter the E.U. trademark).

²⁸ Editorial, "EU Bases Planned Palm Oil Restriction on 2015 Data," The Jakarta Post, Mar. 22, 2019, accessed 29 May 2019, <https://www.thejakartapost.com/news/2019/03/22/eu-bases-planned-palm-oil-restriction-on-2015-data.html>.

²⁹ Final Report on the Impact of E.U. Consumption on Deforestation: Comprehensive Analysis of the Impact of E.U. Consumption on Deforestation, 21, 22, E.C (2013) [hereinafter *Impact of E.U. Consumption on Deforestation*].

³⁰ Anuradha Raghu, "Malaysia Plans to Halt Palm Oil Expansion to Fight Bad Image," The Jakarta Post Mar. 2, 2019, accessed 29 May 2019, <https://www.thejakartapost.com/seasia/2019/03/02/malaysia-plans-to-halt-palm-oil-expansion-to-fight-bad-image-.html>. Since the article stipulates Malaysia as second largest in the area, the only competitor is Indonesia as both of them produce 85% of global palm oil production); Thukral & Chow, "Global 2019 Palm Oil Demand"

³¹ Elizabeth Robinson & Herry Purnomo, "Palm Oil: E.U. Ban Won't Save Asian Rainforest, but Here's What Might Help," the Jakarta Post, May 7, 2019, accessed 29 May 2019 <https://www.thejakartapost.com/academia/2019/05/07/palm-oil-eu-ban-wont-save-asian-rainforests-but-heres-what-might-help.html>.

³² European Union Delegation to Indonesia Fact Sheet, E.U. Anti-Dumping Duties on Biodiesel from Indonesia, Mar.23, 2018 [hereinafter *Anti-Dumping Factsheet*].

³³ See Report of the Panel, *European Union - Anti-Dumping Measures on Biodiesel from Indonesia*, ¶8, WT/DS480/R (Jan.25, 2018); see *Ibid.*, 29.

Biodiesel from Indonesia, EU issued the new policy through the issuance of RED II and DR, proposing essentially to restrict the CPO to enter the EU market. It is, therefore, not exaggerated if Indonesia views that EU is playing “a green protectionist” by applying the measures at issue allegedly violating some provisions of WTO, including TBT Agreement, Article I:1, Article III:2, Article XI and SCM Agreement. However, in this article, the discussion will be limited to the non-discrimination provisions under GATT Article I:1 concerning MFN and Article III:4 concerning National Treatment, Article XI on Quantitative Restriction and Article XX.

The WTO prohibits the implementation of discriminative trade policy which hamper foreign businesses to grow and expand their industry outside its country of residency.³⁴ It also prohibits countries to adopt of quantitative restriction, such as quotas and non-tariffs barriers which discourage foreign businesses sell products to the said country or limit the amount of the product that may be sold.³⁵ As for tariffs, the WTO encourage countries to create free trade environment which means dropping tariffs rate to almost or equal to zero.³⁶ These principles are three of many basic principles enshrined in the General Agreement on Tariffs and Trade (GATT) adopted by the WTO in regulating international marketplace. It aims at “raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services”.³⁷ Under Article XX of the GATT, these principles may be excepted when it comes to several conditions, *inter alia*: (i) to protect human, animal or plant life or health and (ii) in relation with conservation of natural resources.³⁸ Consequently, a restrictive policy to control a certain product may be permitted in the case of environmental reasons. At this end, it is easy to conclude that even though the DR violates some provisions of WTO, it is excepted by Article XX of the GATT since palm oil industry damages the environment.³⁹ However, as enshrined in the SDGs, there are three pillars to sustainable development which are: (i) enviromental aspect; (ii) social aspect; and (iii) economic aspect⁴⁰ and thus, an environmental reason cannot solely make up an entire policy; there has to be a balance between these pillars to benefit, not only the environment, but also men.

³⁴ *General Agreement on Tariffs and Trade*, 1948, Oct.30, 1947, Art.XIII [hereinafter *GATT*].

³⁵ *Ibid.*, Art.XI

³⁶ *Ibid.*, preamble.

³⁷ *Agreement Establishing the World Trade Organization*, 1995, April 15, 1994, preamble [hereinafter *WTO Agreement*].

³⁸ GATT, *supra* note 32, Art.XX (especially Article XX (b) and (g)).

³⁹ EU DR 2019, *See also*: Barthel, *Environmental Impact of Palm Oil*, 61-62. It explains how palm oil production also brings pollutants to land and air.

⁴⁰ SDGs, preamble & introduction (¶2).

The speculation is, when the DR comes into force, palm oil farmers and businesses will meet some difficulties to adjust the cultivation production line to conform with the new regulation and even when they comply, not all cultivation will surely continue its business since the DR and the EU Directive 2018/2001 prohibit export of products which utilize and change the land-use of high carbon contained lands, such as peatland or forrest.⁴¹ Indirectly, the DR, not only set a higher non-tariff barrier upon palm oil, but also threatens its labours' economic stability.

The first section of the discussion argues on the basic principles laid out under the GATT and its exception. Further, it will discuss the allegation of protectionism practiced by the EU. And lastly, the passage will be closed with the experience and prediction of Indonesia's palm oil industry and how it may survive (again) just like in 2016.

II. BASIC PRINCIPLES OF THE GATT AND ITS EXCEPTION UNDER ARTICLE XX

For the interest of this article, it will mainly discuss on the relevant principles of the GATT which are: (i) most favoured nations; (ii) protection through tariffs; and (iii) prohibition of quantitative restriction.⁴² Understanding the basic principles is vital to actually identify the purpose and framework of the principles and consequently, enables a more comprehensive analysis towards the existence of the principles and how to treat the exception without disrupting the balance of trading activities.

Most favoured nations principle dictates that no country shall treat certain countries with speciality and even if the country wants to implement a policy favouring certain countries, the country must implement such policy to all parties.⁴³ Protection through tariffs principle states that no contry shall implement tariffs to solely and excessively protect its local businesses; such tariffs may only be implemented to regulate the traffic of products which enter its territory and if such tariffs are being implemented.⁴⁴ Prohibition of quantitative restriction principle means that no country shall implement non tariffs barrier or restrictive quotas limit.⁴⁵

Article XX of the GATT provides the exception to these principles.

⁴¹ EU DR 2019, Art.1; RED II, , ¶81.

⁴² GATT, Art.I, VIII, XIII.

⁴³ *Ibid.*, Art.I(1).

⁴⁴ *Ibid.*, Art.XI.

⁴⁵ *Ibid.*, Art.XI

Among others are the protection of human, animal or plant life or health and in relation with conservation.⁴⁶ Such exception will be the main discussion of the paper due to its relevancy of the topic being the allegation of green protectionist policy implemented by the EU. At a glance, the consideration of the DR reflects the exception recognized under Article XX which emphasizes on environmental sustainability. If the provisions are truly for the environmentalist to win, then the basic principles may be excluded in the adoption of trade policy and restriction, such as through tariffs, non-tariffs barriers, or quotas restriction are allowed.

The importance of environmental consideration in trade activities, especially in the context of WTO has been emphasized by David M. Park⁴⁷ in the early year of the formation of WTO in 1997. It is clear that there is an environmental urgency to restrict the export and reconsider the requirement of palm oil export due to its negative impact on the environment, whether directly through pollution or indirectly through land-use change.⁴⁸ However, excluding non-discriminative requirement for trade activities on mere Article XX (b) and (g) are superficial since it also need to fulfill two requirement to be adopted by States. First, the measures is justified under at least one of the exception enshrined in Article XX (a)-(j).⁴⁹ In *Korea-Beef*, the measure is justifiable when it is adopted in order to secure compliance with national regulation and must be deemed as necessary; it has no other means or alternative to achieve the intended purpose.⁵⁰ In such case, the the Dispute Settlement Body of the WTO (DSB) concluded that Korea measure to treat imported beef differently was not inevitable since other type of beef undertook a different measure and thus, it had alternative measure, rather than treating imported beef differently from other type of beef.⁵¹

Second, the measures are not applied in a manner which would constitute arbitrary or unjustifiable discrimination between countries where the same condition prevail or disguised restriction on international trade.⁵² In relation with the second requirement, the discriminative measure must be least GATT-inconsistent; meaning that the measure must not harm the rights of other coun-

⁴⁶ GATT, Art.XX(b),(g).

⁴⁷ David M. Park, "GATT and the Environment: Reconciling Liberal Trade Policies with Environmental Preservation" *UCLA Journal of Environmental Law and Policy* 15, no.2 (1997), 151.

⁴⁸ Barthel, *Environmental Impact of Palm Oil*.

⁴⁹ Lorand Bartels, "The Chapeau of the General Exceptions in the WTO GATT and GATS Agreements: A Reconstruction" *American Journal of International Law* 109 (2015), 104.

⁵⁰ Appellate Body Report, *Korea – Measures Affecting Import of Fresh, Chilled, and Frozen Beef*, ¶¶153,157,161, WTO Doc. WT/DS161/AB/R, WT/DS169/AB/R (Dec.11, 2000) [hereinafter *Korea-Beef*].

⁵¹ *Ibid.*, ¶182.

⁵² GATT, Art.XX.

tries whilst upholding one country's interest who invokes Article XX.⁵³ In this particular requirement, the assessment does not necessarily has to rely on a comprehensive analysis towards the DR as a whole; it only needs to assess specific parts of the measure which are allegedly discriminatory towards other States.⁵⁴ Further, it noted in the decision that the assessment of the chapeau of Article XX renders to be conducted in case-by-case basis⁵⁵ due to the variation of the interpretation and measure conducted by States.

In *U.S.-Shrimp* in 1998, the Appellate Body answered the U.S. claimed on the prohibition of shrimp and shrimp product import from other countries to protect sea turtles which are an endangered species. In its opinion, the Appellate Body argued that "if every WTO member were free to pursue its own trade policy solution to what it perceives to be environmental concerns, the multi-lateral trade system would cease to exist"⁵⁶ and therefore, it is necessary to lay down boundaries towards the implementation of Article XX. The Appellate Body noted that the policy under Article XX cannot be "disproportionately wide" and must reasonable to achieve the environmental goal of the policy.⁵⁷ The Appellate Body then also set the requirement of prior consultation that must be conducted by the importer country towards the exporter country before implementing policy in the context of Article XX. In *U.S.-Gasoline* in 1996, Appellate Body pointed out that the interpretation and implementation of biofuel-related policies must not be absolute; meaning that to reduce greenhouse gas emission, certain countries does not necessarily have to reduce or ban the import of biofuel⁵⁸ since there may be other alternative measure to achieve such goal.

It is easy to overlook and hastily assume that every dicriminative policy based on environmental reason is always legitimate. However, it has been found that the exceptions enshrined under Article XX of the GATT have its requirements to be legally implemented without violating the rights of other States. As much as WTO concerns about the well-being of men and other organisms along with enviromental sustainability, it frequently reminds States that those reasons alone cannot exclude States' economic interest.

However, not all measures relating to Article XX negated by the WTO. In *E.C. – Measures Affecting Asbestos and Asbestos-Containing Products* in

⁵³ Marie-Eve Rancourt, "Promoting Sustainable biofuel under the WTO Legal Regime," *McGill International Journal of Sustainable Development Law and Policy* 5, no. 1 (2009), 96 & 109.

⁵⁴ Umair Ghori, "An Epic Mess: 'Exhaustible Natural Resources' and the Future of Export Restraints after the China-Rare Earths Decision," *Melbourne Journal of International Law* 16 (2015), 403.

⁵⁵ Rancourt, "Promoting Sustainable biofuel," 101.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*, 103.

⁵⁸ Ghori, "An Epic Mess," 403.

2001 which was filed by Canada to the Appellate Body, the Body concluded that asbestos and asbestos containing products constitute health risks and thus, measures taken by France to restrict the export of such products were justified and in accordance with Article XX.⁵⁹ In contrary, in *U.S.-Shrimp*, *U.S.-Gasoline*, *Brazil-Retreaded Tyres*, and *EC-Seal Products*, it has been noted that the States were entitled to invoke the exceptions for the purposes enshrined in Article XX⁶⁰ and such measures were necessary to realize its purpose. However, the respective States lost since the measures were not in accordance with the chapeau of Article XX and the Appellate Body opined that the measures constituted as arbitrary and unjustifiable discrimination between States.⁶¹ And thus, it can be concluded that a discriminatory measure may be invoked under the general exception, but the measure must also fulfill the second most important requirement; it must not create arbitrary and unjustified discrimination. In the words of the Appellate Body in *U.S.-Shrimp*, the implementation of the Article must be according to the doctrine *abus de droit*; that States cannot abuse its treaty's rights and must exercise it reasonably and in good faith.⁶²

III. PROTECTIONISM IN GLOBAL TRADING MARKET AND THE DR ADOPTED BY THE EU: INDONESIAN PERSPECTIVE

This section will explore two main ideas in the interest of better understanding in practice of protectionism and how the DR may be one of them: (i) the practice of protectionism in global trading market and its effects and (ii) the allegation of protectionist practice of the EU by implementing the DR.

A. WORLD-WIDE PRACTICE OF PROTECTIONISM

Protectionism has long been practiced by trade actors around the globe, including, but not limited to, United States,⁶³ European Community,⁶⁴ and Ja-

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*, 403-404.

⁶¹ Appellate Body Report, *U.S. – Import Prohibition of Certain Shrimp and Shrimp Products*, ¶¶176,184, WTO Doc. WT/DS58/AB/R (adopted Oct.12, 1998) [hereinafter *U.S.-Shrimp*]; Appellate Body Report, *U.S. – Standards for Reformulated and Conventional Gasoline*, ¶¶6.29, 8.1, WTO Doc. WT/DS2/9 (May 20, 1996) [hereinafter *U.S.-Gasoline*]; Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, ¶258, WTO Doc. WT/DS332/AB/R (adopted Dec.3, 2007) [hereinafter *Brazil-Retreaded Tyres*]; Appellate Body Report, *E.C. – Measures Prohibiting the Importation and Marketing of Seal Products*, ¶6.1, WTO Doc. WT/DS400/AB/R, WT/DS401/AB/R (May 22, 2014).

⁶² *U.S.-Shrimp*, ¶¶158.

⁶³ e.g. Enrico Sassoon, "Protectionism and International Trade Negotiations During the 1980s", in *The New Protectionist Wave*, Enzo Grilli & Enrico Sassoon eds, (MacMillan, 1990), 1-2. As demonstrated in the effort of the U.S. in 1989 to limit import of Japan's car to revitalize car industry in the U.S.

⁶⁴ e.g. Carlo Secchi, "Protectionism, Internal Market Completion, and Foreign Trade Policy in the European

pan.⁶⁵ It is then a common idea adopted by States to protect their national interest, whether to let local businesses grow, economic interest related to fiscal policy, or in relation with public and environmental well-being. The latter have its own justification as we have discussed in the previous section. As early as the 19th Century, tariff barriers seems to be a popular fashion to showcase protectionist trade policy, as shown by tariff barriers put by many European countries, such as Portugal⁶⁶ and Spain⁶⁷ through customs or tax levies on import goods to boost their national economy. Even after the Uruguay Round, protectionism and its following disputes still haunt the application of GATT due to loopholes in its provision being misused, such as anti-dumping and anti-countervailing regulation.⁶⁸ However as proven in the previous section, in the framework of GATT, such effort of protectionism proven to be a difficult business to do since States have agree to create a freer trade.⁶⁹ With such a challenge, the practice of protectionism has indeed evolved; not only limited to tariff barriers, but also, e.g subsidies⁷⁰ or national treatment.⁷¹ Environmental necessity now also serves as a cloak for protectionist to implement a discriminative measures.⁷²

In light of such reality, protectionist measures adopted by States are common, so why do States still criticize such measures when they are all adopting it to protect their own interest? For one thing, protectionist measures adopted by a State harm other States' dynamic in exporting their local products. Further, the uneven distribution and consumption of resources around the world does

Community”, in note 61, 39 & 51. Between 1970s-1980s-, the E.U. adopted numerous protectionist policy in order to realize their design to unify the European market, thus the trade between E.U. and third countries were faced with, usually, non-tariff barriers or non formal protection.

⁶⁵ See Chandler H. Udo, “Japanese Rice Protectionism: A Challenge for the Development of Agricultural Trade Laws” *Boston College International and Comparative Law Review* 31, no. 1 (2008), 170. Japan has long been the model of protectionism in rice products. It gives subsidies to local farmers and put NTB and tariff barriers towards foreign rice products.

⁶⁶ Pedro Lains, “Protectionism and Portugese Industrialisation”, in *Classical Trade Protectionism*, Jean-Pierre Dormois & Pedro Lains, eds. (Routledge, 2006), 243-48.

⁶⁷ Antonio Tena Junguito, “Spanish Protectionism during the *Restauracion*, 1875-1930,” in *ibid.*, 267-269.

⁶⁸ See Nancy Williams, “The Resilience of Protectionism in U.S. Trade Policy” *Boston University Law Review* 99 (2019), at.711-12, 716-17.

⁶⁹ GATT, Preamble.

⁷⁰ Simon Lester, “The Problem of Subsidies as a Means of Protectionism: Lessons from the WTO *EC – Aircraft Case*” *Melbourne Journal of International Law* 12 (2011), 351-3, 345-372. The prohibited type of subsidies are export subsidies and domestic content subsidies); e.g Appellate Body Report, *EC and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WTO Doc WT/DS316/AB/R, adopted May 18, 2011, ¶1414 (j) (where it is decided that the E.C has adopted a prohibited subsidies on export so Airbus gained advantage over Boeing in international market).

⁷¹ *Korea – Beef* ¶186(e). Where Korea was guilty of non compliance with Art.3 of GATT where there cannot be unnecessary and discriminating different treatment towards imported products in the market of Korea.

⁷² Griffin, “The World Trade Organization”

not make room for protectionism.⁷³ For example, Smoot-Hawley Act adopted by the U.S. in 1930 increased some tariffs to 100% and triggered and intensified the Great Depression due to retaliation taken by other States affected by the Act⁷⁴ and thus, a trade war was in motion which foreshadowed and ended with World War II.⁷⁵ In a less dramatic and simpler consequence, protectionism predominantly affects the dynamic of economic activities of other States as proven by the protectionist measure taken by Japan in protecting its local production of rice; both from high tariff rate of import rice and subsidies given to local farmers.⁷⁶ Following an article written by Cramer, *et.al* in 1999, even after the Uruguay Round, Japan's tariff barrier would have a negative impact on the U.S. export of rice since it was expected that approximately 50% of Japan's requirement for rice comes from the U.S.⁷⁷ Such measures contributed to the high price of rice which had to be paid by consumers in Japan.⁷⁸

Today in the midst of Trump's trade policy, the rice industry's threat not only comes from Japan, but also countries which seeks to retaliate U.S. trade policy in increasing tariff in imported goods, for instance, the tariff adopted by Mexico which indirectly threatens the appeal of rice from the U.S. as the tariff on rice from Asian, main competitor of rice from U.S, has been removed.⁷⁹ Rice industry is not the only business being threatened by the tariff war. India adopted new duties, some as high as 70% on imported goods from the U.S. as a retaliation on U.S. new tariff on aluminium and steel export to the U.S..⁸⁰ And the U.S. is not the only person of interest in this war; it hurts global economy since the export of goods from certain State which is impaired by the tariff war will create a ripple effect and change the export flows, monetary, and fiscal policies⁸¹ to avoid, for example, dumping measure to stabilize the balance sheet. All of that commotion is just to protect national interests of States.

⁷³ Fouda, "Protectionism and Free Trade," 352.

⁷⁴ *Ibid*; see Douglas A. Irwin, "The Smoot-Hawley Tariff: A Quantitative Assessment" *Review of Economics and Statistics* 80, no. 2 (1998), 326. Irwin went further by saying the Act triggered a worldwide protectionist movement.

⁷⁵ Nikolaus Wolf, "Europe's Great Depression: Coordination Failure After the First World War" *Oxford Review of Economic Policy* 26, no. 3 (2010), 339, 344, 362.

⁷⁶ Chandler H. Udo, "Japanese Rice Protectionism," 174 & 177.

⁷⁷ Gael L. Cramer, *et.al*, "Impact of Rice Tariffication on Japan and the World Rice Market" *American Journal of Agricultural Economy*, 81, no. 5 (1999), 1153.

⁷⁸ Fouda, "Protectionism and Free Trade," 353.

⁷⁹ Editorial, "The Trump Effect on Trade," USA Rice, Jun.13, 2018, accessed May 29 2019, <https://www.usarice.com/news-and-events/publications/usa-rice-daily/article/usa-rice-daily/2018/07/13/the-trump-effect-on-trade>.

⁸⁰ Editorial, "India Announces Retaliatory Trade Tariffs against the US," BBC, Jun.15, 2019, May 29, 2019, <https://www.bbc.com/news/world-asia-india-48650505>.

⁸¹ Ben Holland and Cedric Sam, "A \$600 Billion Bill: Counting the Global Cost of the U.S.-China Trade War," Bloomberg, May 28, 2019, accessed May 29, 2019, <https://www.bloomberg.com/graphics/2019-us-china-trade-war-economic-fallout/>.

In the following sub-section, it will be assessed whether the allegation thrown at the EU by adopting the DR as a protectionist move has some valid grounds to identify whether the regulation leads to an unjustifiable discrimination which may lead to another war on trade.

B. DELEGATED REGULATION ADOPTED BY THE EU AS A PRACTICE OF PROTECTIONISM

As fossil fuels became less desirable due to its continuing decline of supply and high price,⁸² States made biofuel as their alternative or substitute.⁸³ Due to its early fame, biofuel, such as one comes from palm oil, were targets to tax incentives and other policy to promote its production and use.⁸⁴ However, today, palm oil produces a significant drawback; it intensifies environmental damage and climate change, despite cleaner emission compared to fossil fuels.⁸⁵ The production process of palm oil poses as a genuine threat through the use of fossil fuels in fertilizer, machinery, and refining.⁸⁶ Further, the cultivation of palm oil spreads at the expense of natural areas rich in carbon stocks, such as in forests, grassland, and peatlands which makes the release of greenhouse gasses increases⁸⁷ and contributes to climate change. The land-use change also allows the production of biofuel to be monoculture and chemically intensive production⁸⁸ which in turn pollutes the soil or degrades its function, from water qualities to biodiversity. Additionally, ILUC also occurred to cattle ranching or cropland areas⁸⁹ which threatens food security. These factors make biofuel to, in reality, causes no significant difference amount of emission compared to fossil fuel if seen from their life cycle. In this section, palm oil will be the main type of biofuel to discuss since it is the most commonly used product in industries, not to mention that the E.U is its main importer.

For a second, the DR which dictates certain standards for imported biofuel fulfills the general exception enshrined in Article XX of the GATT, especially paragraph (b) and (g) on well-being of human, animal, and plant as well as conservation of the environment. However, we also must take into account the

⁸² Christine C. Benson, "Putting Your Money Where Your Mouth Is: The Varied Success of biofuel Incentive Policies in the United States and the European Union" *Transnational Law & Contemporary Problems* 16 (2010), 640.

⁸³ *Ibid.*, 634-5.

⁸⁴ *Ibid.*; see Mairon G. Bastos Lima, "Biofuel Governance and International Legal Principles: Is It Equitable and Sustainable?" *Melbourne Journal of International Law* 10 (2009), 471, 480.

⁸⁵ *Ibid.*, 473; see Benson, "Putting Your Money" 641.

⁸⁶ Lima, "Biofuel Governance" 473.

⁸⁷ EU DR 2019, Art.1; RED II, ¶81; Sanchez, et.al, "Accounting for Indirect Land-Use Change in the Life Cycle Assessment of Biofuel Supply Chains" *Journal of the Royal Society Interface* 9 (2012), 1106..

⁸⁸ Lima, "Biofuel Governance" 474.

⁸⁹ Sanchez, et. al. "Accounting for ILUC," 1113.

two-tier assessment as practiced by the WTO as discussed in the previous section. The purpose of a measure which disregard the provisions and principles of the GATT must be: (i) enshrined as at least one exception in Article XX and is the most feasible measure to achieve such purpose and (ii) not amounting to arbitrary and unjustifiable discrimination between States and not served as disguised restriction on trade.

C. THE ELIGIBILITY OF THE DELEGATED REGULATION ACCORDING TO THE GENERAL EXCEPTION OF GATT

As the first part of the assessment, the DR must be adopted in order to secure compliance with the other EU regulations and is the most feasible measure to secure such compliance. Due to the continuous negative effects of biofuel, the DR's purpose is to reduce the import of palm oil which contribute to ILUC⁹⁰ and such measure is in accordance with the RED II.⁹¹ Further, in *Korea-Beef*, the Appellate Body outlined that an indispensable measure is always necessary.⁹² *In casu*, the DR set forth certain standards for its member States in importing biofuel;⁹³ only certified low ILUC-risk that may entered the region which will decrease the import and production of high ILUC-risk biofuel from other States. To decrease ILUC, such measure is not the only one of its kind, there are other alternatives. The EU surely may adopt a measure which put incentive towards low ILUC-risk products to come to the EU, such as lower rate tariffs for exporters and subsidies to their local farmers to increase or encourage the production of low-ILUC-risk products to compete with palm oil and provide more supply in the market. Other alternative includes the promotion of bilateralism on environmental issues, including international trade, which also has been conducted by the EU multiple times with other countries,⁹⁴ it even cooperated with Indonesia before in 2003 to fight against illegal logging and export of timber to the EU⁹⁵ Thus, it is clear that limiting the import of palm oil is not the only feasible measure to face ILUC. "Import limitation is the heaviest "weapon" in a Member's armoury of trade measures"⁹⁶ and accordingly, such limitation shall not be adopted if there are other alternatives to

⁹⁰ EU DR 2019, Explanatory Memorandum, at.1.

⁹¹ RED II, Art.26.

⁹² *Korea-Beef*, ¶161.

⁹³ *EU DR 2019*, Art.3-6; It sets out the criteria of high ILUC-risk products, and certification of low ILUC-risk products.

⁹⁴ e.g Elisa Morgera, "Bilateralism at the Service of Community Interest? Non-judicial Enforcement of Global Public Goods in the Context of Global Environmental Law" *European Journal of International Law* 23, no. 3 (2012), at.756-7,764, 743-67 (E.U. bilateral agreement with Central American Countries and U.S. bilateral agreement with Peru. Morgera further concludes that bilateralism is a compliment to multilateralism, it strengthens the implementation of environmental law).

⁹⁵ Robinson & Purnomo, "Palm Oil"

⁹⁶ *U.S.-Shrimp*, ¶171.

achieve the same purpose.

Even if such measure is not the only measure possible, it may still be justified.⁹⁷ As a further assessment towards its necessity, the *Korea-Beef* also dictated that if such measure is not the only feasible measure, it may be deemed as necessary by considering the weigh and balancing towards:⁹⁸ (i) the contribution made by the compliance measure to the enforcement of the law or regulation at issue; (ii) the importance of the common interests or values protected by that law or regulation; and (iii) the accompanying impact of the law or regulation on imports or exports.

First, the contribution made by the DR, although cannot be calculated yet, can be predicted. By enacting such measure, the import of high ILUC-risk will decrease and farmers will change their methods of cultivating palm oil. The production and fame of renewable energy or at least low ILUC-risk biofuel will increase which promote the use and production of alternative vegetable oils, such as sunflower, rapeseeds, or soybean oils. It is interesting note, however, these biofuel still pose as a threat to the future environmental sustainability. As discused in the introduction, the mass of land needed to cultivate alternative vegetable oils to produce the same amount of oils as palm oil is much larger than the palm oil.⁹⁹ It is even proven by EU's own study in 2013 that these type of alternative vegetable oils produce a higher environmental risk compared to palm oil.¹⁰⁰ Perhaps, due to its relatively small cultivation, compared to palm oil, these alternative vegetable oils have not yet showed its alarming negative impact.

Second, the environmental interest of the DR is the common interest of mankind since healthy environment is one of the recognized human rights¹⁰¹ and is important for its well-being and continuing existence on Earth to sustain life, especially human life. The protection and conservation of the environment in general has also been enshrined as early as Stockholm Declaration¹⁰² and in several international treaties such as, 1992 United Nations Framework Convention on Climate Change¹⁰³ and 1992 Convention on Biological Diversity.¹⁰⁴ The importance of sustainability of the environment further is shown

⁹⁷ *Korea-Beef*, ¶161.

⁹⁸ *Ibid.*, ¶164.

⁹⁹ Editorial, EU Bases Planned Palm Oil Restriction on 2015 Data

¹⁰⁰ Impact of E.U. Consumption on Deforestation

¹⁰¹ Declaration of the United Nations Conference on the Human Environment 1972 [hereinafter Stockholm Declaration].

¹⁰² *Ibid.*

¹⁰³ United Nations Framework Convention on Climate Change, New York, 9 May 1992, United Nations, Treaty Series , vol. 1771, p. 107 Art.2

¹⁰⁴ Convention on Biological Diversity, Rio de Janeiro, 5 June 1992, United Nations, Treaty Series , vol. 1760, p. 79, Art.1

by the widespread movement of renewable energy policy and investment by States around the globe.¹⁰⁵

Third, the impact of the Delegated Act will heavily affect major palm oil exporter, Indonesia and Malaysia which contribute up to 85% of palm oil¹⁰⁶ with other countries only contribute below 5%.¹⁰⁷ And thus, the measure will have a huge impact on palm oil industry in Malaysia and Indonesia. Approximately, only less than half of the total palm oil plantation are being cultivated by smallholder farmers¹⁰⁸ who are granted the certification of low-ILUC-risk by the DR.¹⁰⁹ Further, these two States do rely on their palm oil industry,¹¹⁰ not only directly from its sale, but also how the industry brings works for its population. Consequently, EU must have the answer to the incoming issue should the DR be implemented.

From the first-tier assessment, the DR checks almost every box, but the indispensability test and further, impact assessment of the measure. In *U.S.-Shrimp*, the Appellate Body elaborated that when a measure is found unjustifiable under the general exception in Article XX (a)-(j), then it cannot be justified under the chapeau of Article XX.¹¹¹ Supposedly it had fulfilled the first assessment, the section would continue to the second-tier in the interest of being thorough.

D. THE ASSESSMENT OF THE DELEGATED REGULATION UNDER THE CHAPEAU OF ARTICLE XX OF GATT

The second-tier assessment provides that the measure must not amount to unjustifiable and arbitrary discrimination or disguised restriction. The DR *will* be an unjustifiable and arbitrary discrimination and disguised restriction to palm oil from Indonesia and Malaysia. The unjustifiable and arbitrary dis-

¹⁰⁵ Keishamaza Rukikaire & Jennifer Pollak, “Renewable Energy Investment in 2018 Hit USD 288.9 billion, Far Exceeding Fossil Fuel Investment,” United Nations Environment Programme, Jun.18, 2019, accessed Jun 18, 2019, <https://www.unenvironment.org/news-and-stories/press-release/renewable-energy-investment-2018-hit-usd-2889-billion-far-exceeding>. With massive amount of investment, even bigger than investment on fossil fuel, it shows how the international society already have concern about the environment and the investment shows it is the designated measure all countries agree upon. Consequently, E.U.’s import restriction shall not be the frontline on the effort to reduce ILUC and its impact.

¹⁰⁶ Tullis, “How the World Got Hooked on Palm Oil?”.

¹⁰⁷ Daniel Workman, “Palm Oil Exports by Country,” World’s Top Exports, May 9, 2019, accessed May 29, 2019, <http://www.worldstopexports.com/palm-oil-exports-by-country/>. Indonesia contributes to 54.6%, Malaysia contributes to 28.7%, and followed by Netherlands with 3.8%. Other countries each contribute to less than 2%.

¹⁰⁸ Idsert Jelsman, et. al, “Unpacking Indonesia’s independent oil palm smallholders: An Actor-disaggregated Approach to Identifying Environmental and Social Performance Challenge” *Land Use Policy* 69 (2017), 281. Smallholder farmers count for 40.8% of palm oil production in Indonesia.

¹⁰⁹ see EU DR 2019, Art.5.

¹¹⁰ Robinson & Purnomo, “Palm Oil”

¹¹¹ *U.S.-Shrimp*, ¶149.

crimination will be discussed first. The test focuses on the competition aspect of the international trade;¹¹² whether or not products from other States treated differently from the others or from the local products where the same condition prevails. In addition, as elaborated in *Brazil-Retreaded Tyres*, a measure is considered to be an unjustifiable and arbitrary discrimination “when the reasons given for this discrimination bear no rational connection to the objective falling within the purview of a paragraph of Article XX, or would go against that objective”.¹¹³ What is then allowed and considered as a necessary discrimination is one that is needed to comply with the purpose of such measure. Disguised restriction on international trade is demonstrated by the existence of an arbitrary and unjustifiable discrimination, even such restrictive implication is unannounced or concealed.¹¹⁴

In casu, the purpose of the DR is to reduce ILUC and its impact. Indonesia’s palm oil industry is going to be affected by such measure due its massive deforestation and land-use change.¹¹⁵ Similar to the rationale in *U.S.-Shrimp* where the U.S. found to be discriminatory when its measure essentially required other countries to adopt the same standard in harvesting shrimps,¹¹⁶ the DR requires all exporting countries to adopt the same standards to assess their biofuel industry risk on ILUC to comply and to synchronize with the measure and to be certified to enter EU.

Without any proper consideration in the different condition States, the DR will unjustifiably and arbitrarily discriminate certain parties, including Indonesia. For instance, the measure makes a bigger impact on Indonesia’s economy which contribute to half of global stock of palm oil compared to Netherland which only contribute 5%.¹¹⁷ Further, the measure benefits alternative vegetable oils, both from the local farmers in the EU or from importing countries. In *U.S.-Shrimp*, the DSB noted that it is acceptable to adopt a national measure throughout its region, however it is not appropriate for an extra-jurisdictional implication from such measure in international trade.¹¹⁸ The consequences of such broad interpretation will result in countries posing unilateral measure which other countries must follow.¹¹⁹ Consequently, the measure does not consider different condition of those who are affected and

¹¹² Bartels, “The Chapeau of the General Exceptions” 110.

¹¹³ *Brazil-Retreaded Tyres*, ¶227.

¹¹⁴ *U.S.-Gasoline*, 25.

¹¹⁵ EU DR 2019,; Krukowska, “Palm Oil is at the Heart of the Next Trade War”; EU Delegation to Indonesia, What is New on the E.U. Legislation?.

¹¹⁶ *U.S.-Shrimp*, ¶161-4.

¹¹⁷ Workman, “Palm Oil Exports by Country”

¹¹⁸ *U.S.-Shrimp*, ¶164; see Carol J. Beyers, “The U.S./Mexico Tuna Embargo Dispute: a Case Study of the GATT and Environmental Progress” *Maryland Journal of International Law* 16, no 2 241.

¹¹⁹ *Ibid.*

is a form of discrimination, beneficial for certain countries and detrimental to others.

The DR may as well be necessary since moratorium would be in place to comply with the standards of the DR so ILUC-risk and its impact will reduce. However, the DR has another implication towards alternative vegetable oils; it encourages the industry to increase products and as we have discussed, alternative vegetable oils would take much more space than palm oil to produce the same amount of biofuel stock.¹²⁰ Additionally, to compete with the demand of palm oil,¹²¹ the promotion of alternative vegetable oil will surely increase global food prices which do not only hurt the producer, but also the customers. It is also interesting to note that in 2018, Indonesia's palm oil export generally increased 8% although its export to India and Europe dropped due to its tariff's rate.¹²² Therefore, the discrimination is not justified since the DR allows a new wave of ILUC from other type of biofuel and does not give a significant effect to the export of palm oil.

With the everlasting need of biofuel, such contention of prediction cannot be dismissed by the E.U or by international society. The effort to protect and preserve environment should be a multilateral effort, consensus amongs States, not a unitary act¹²³ that discriminate certain parties. It needs a multilateral cooperation to fights against a transboundary issue. Although the impact of the DR has not yet to be seen, the adoption of such measure may bring about dispute which leaves for the DSB to settle. For now, it is only prediction of what might transpire from such measure.

IV. THE EFFECT OF THE DELEGATED REGULATION AND INDONESIA'S LIKELIHOOD TO SURVIVE (AGAIN)

The DR will have implication towards the continuance of Indonesia's import of palm oil. As occurred when the U.S. restricted the amount of automobile's import from Japan in 1989, the EU consequently adopted similar trade policy on Japan's automobiles due to their concern that Japan would diverge their automobile's import to the EU due to the lack of export quota to the U.S.

¹²⁰ Impact of E.U. Consumption on Deforestation

¹²¹ Robinson & Purnomo, "Palm Oil"

¹²² Bernadette Christina Munte, "Indonesia's 2018 Palm Oil Exports Rise 8 Percent: GAPKI," Reuters, Feb.6, 2019, accessed May 29, 2019, <https://www.reuters.com/article/us-indonesia-palmoil/indonesias-2018-palm-oil-exports-rise-8-percent-gapki-idUSKCN1PV0PA>.

¹²³ *U.S.-Shrimp*, ¶171; see Rio Declaration 1992, Principle 12. Rio Declaration further emphasizes that "... Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus."

and to limit Japan's penetration on the market.¹²⁴ A much more contemporary consequence is the trade war between the U.S. and China which contribute to the tariffs war imposed by both sides and harm local farmers¹²⁵ and consumers.¹²⁶ The future of palm oil and bio-diesel market from Indonesia may be endangered based on these examples; other countries may adopt restrictive policy to limit the palm oil and bio-diesel import from Indonesia to prevent the import's re-route and limit Indonesia's palm oil penetration to other countries. A tariffs or trade war may also be initiated by the DR if Indonesia tries to accomodate their loss and to balance their spending to comply with the standard imposed by the DR towards their palm oil cultivation.

Indonesia surely remembers how the EU implemented regulation against dumped imports from countries not members of the European Community in 2014 where Indonesia and other countries; Argentina, Australia, Canada, China, India, Japan, Norway, the Russian Federation, Singapore, Turkey and the United States who acted as third parties to the dispute filed a complaint to the WTO against such EU regulation.¹²⁷ The regulation affected the import of Indonesia's bio-diesel since it included bio-diesel as dumped imports from Indonesia.¹²⁸ On the Appellate Body Report, the DSB's decision is in favor of Indonesia since the EU failed to realize that the cost production of palm oil cultivation in Indonesia is cheaper than other countries and thus, the assessment of the cost production and foreseen profit must be calculated differently.¹²⁹ Indonesia's "survival" may repeat itself if it is proven that the DR is not a legitimate exception to the Article XX of the GATT. The EU also has been accused of using 2015 data to determine the DR.¹³⁰ The EU admitted such conduct the 2008-2015 data offers consistent data to be the basis of the DR.¹³¹ However in May 2019, the EU visited Indonesia's palm oil cultivation in Riau in which the representative stated that the sustainability of the cultivation has improved. Thus, the use of the 2015 data may no longer be relevant to determine a fair regulation to restrict biodiesel import since it is not the most recent and updated data to reflect Indonesia's effort in establishing sustainable palm oil cultivation.

¹²⁴ Sassoon, "Protectionism and International Trade Negotiations,"

¹²⁵ e.g. Su Jingxiang, "US Farmers at Risk of Losing China's Soya Bean Market Forever," The Telegraph, Jun.27, 2019, accessed June 27, 2019, <https://www.telegraph.co.uk/china-watch/business/us-risks-losing-china-soybean-market..>

¹²⁶ e.g. Katie Lobosco, "What Trump's China Trade War Means for You," CNN, Aug.2, 2019, accessed Aug 2, 2019, <https://edition.cnn.com/2019/08/02/economy/trade-war-consumer-prices/index.html>.

¹²⁷ Appellate Body Report, *European Union – Anti-Dumping Measures on Biodiesel from Indonesia* p.8, ¶1.6, WTO Doc. WT/DS480/R, (Jan.25, 2018) [hereinafter *E.U. – Anti-Dumping Measures on Biodiesel*].

¹²⁸ *DS480: European Union – Anti-Dumping Measures on Biodiesel from Indonesia*, WTO, < https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds480_e.htm#>.

¹²⁹ *E.U. – Anti-Dumping Measures on Biodiesel*, p.67.

¹³⁰ Editorial, "EU Bases Planned Palm Oil Restriction on 2015 Data."

¹³¹ *Ibid.*

V. CONCLUSION

The DR does not offer a genuine environmental purpose as the provisions do not end indirect land-use change since Indonesia's palm oil import is not significantly affected by EU policy proven by the 2018 data which stated that Indonesia's import rate increased globally albeit the drop of palm oil import to the EU. Further, regardless the significance of the DR, the regulation does not offer a solution to indirect land-use change since (i) it only lets other types of oil (such as rapeseeds) to take over the land and replace palm oil as the major factor of ILUC; (ii) the DR is not the only measure possible to reduce ILUC; and (iii) the DR imposes huge negative impact on exporting States, such Indonesia who relies on palm oil cultivation for State's income. Additionally, the DR may be an unjustifiable and arbitrary discrimination due to the inexistence of *nexus* between the environmental purpose and its provisions. As a consequence of the DR, similar trade policy may be implemented by other countries to prevent Indonesia's act to re-route their palm oil import. In facing this challenge, Indonesia has a chance to win over the challenge considering the circumstances of the DR's provisions and its basis of formation which is the 2015 data.

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