

INDONESIA'S INTEREST IN WINNING BIODIESEL DISPUTES IN THE WORLD TRADE ORGANIZATION

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1 INDONESIA'S INTEREST IN WINNING BIODIESEL DISPUTES IN THE WORLD TRADE ORGANIZATION

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Abstract:

This article aims at analyzing Indonesia's interest in winning a series of biodiesel disputes against the EU, which formally entered the Dispute Settlement Body (DSB) at the World Trade Organization in 2014 (DS480) and in 2019 (DS593). This article has explored to what extent Indonesia could defend its political-economic interest by providing the necessary evidence to the Panel. The logic of the neoliberal institutionalist framework, which does not believe in the harmony of interest, allows an in-depth analysis of why Indonesia pursues institutional mechanisms within its litigation approach. This research argues that the WTO is perceived as the enabling factor to defend Indonesia's interest where resource nationalism justifies the state's capacity to play an increasingly complex and pervasive role that otherwise private sectors could not have done. Legal procedures provided in the WTO system align with Indonesia's interest in cooperation and conflict management.

Keywords: palm oil, biodiesel, WTO, DSB, European Union, Indonesia

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1. Introduction

The first round of the trade dispute between Indonesia and the European Union (EU) concerning anti-dumping measures against Indonesian biodiesel products (DS480), which formally entered the Dispute Settlement Body (DSB) of the World Trade Organization (WTO) in 2014, has resulted in Indonesia's victory. The Panel concluded that the EU is inconsistent with several articles in the Agreement on Anti-Dumping,³ requiring the EU to revoke its anti-dumping measures, which were into force following the implementation of the Council Implementing Regulation No. 1994/2013, which in the document the Council imposed additional tax on several Indonesian biodiesel producers that were accused of conducting dumping strategy⁴ in the EU market.

The increasing global demand for biofuel products has paved the way for Indonesia, economically motivated, to reap benefits from international trade enabled by economies of scale. The economy is viewed as a state's instrument for amassing power to mobilize a nation and even evaluate the state's legitimacy toward that nation.⁵ Specifically, biofuel demand in the EU, which is policy-driven,⁶ keeps incrementally increasing,⁷ thus providing opportunities for biofuel exporting countries such as Indonesia, Malaysia, Argentina, and others, to sell their products to the EU. Although the Union industry has homegrown biofuel—which includes rapeseed and sunflower oil—it cannot meet the market demand.⁸

However, an investigation was requested by the European Biodiesel Board (EBB), which represents 75 percent of EU biodiesel producers, to the European Commission after it claimed that the biodiesel products sold in the European market—mainly by Indonesia and Argentina whose import market shares are 27 and 42 percent respectively⁹—were purported to have been dumped and caused material injuries. Thus, the effect of anti-dumping is indeed trade restriction. This measure, however, is classified as the mechanism of trade remedy that can mitigate the detrimental effect of trade liberalization on the domestic industry.¹⁰ In this very context, the EU—which implemented anti-dumping measures that were later found to have imposed excessive additional tariffs and failed to provide objective calculations on the

³ WTO, "European Union — Anti-dumping Measures on Biodiesel from Indonesia," in WT/DS480/R, ed. World Trade Organization (Geneva, 2018). <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/480R.pdf&Open=True>.

⁴ According to the WTO's definition, dumping is defined as a situation under which the exporting companies sell their products in the importing country with price at which it is considered as less than the price of the exporting country. Dumping, in simplest term, can be assessed by comparing the different prices in two markets. See "Technical Information on anti-dumping," at https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm.

⁵ Azza Bimantara, "Donald Trump's Protectionist Trade Policy from the Perspective of Economic Nationalism," *Jurnal Hubungan Internasional* 7, no. 2 (2019).

⁶ A policy mandated to shift to biofuel as part of renewable energy under the principle of sustainability, replacing fossil fuel, has affected the biofuel market. See, for example, Adam Tyson and Eugenia Meganingtyas, "The Status of Palm Oil under the European Union's Renewable Energy Directive: Sustainability or Protectionism?," *Bulletin of Indonesian Economic Studies* (2020). 1

⁷ Bob Flach, Sabine Lieberz, and Sophie Bolla, *Biofuels Annual – EU Biofuels Annual 2019*, USDA Foreign Agricultural Service (Global Agricultural Information Network, 2019).

⁸ EU biodiesel production, supply and demand table from 2012 to 2019 suggests that imports range between 3,000 and 500 million liters, with around 20-30 percent of total consumption are imported. See *ibid.*

⁹ *Ibid.*, 26.

¹⁰ Joseph Michael Finger, "Flexibilities, Rules and Trade Remedies in the GATT/WTO System," in *The Oxford Handbook on the World Trade Organization* (2012).

¹ material injuries as claimed¹¹—can be categorized as mercantilist-toned actions under the framework of liberalism.¹²

¹ Whereas Indonesia has undertaken litigation over the anti-dumping dispute, the second round of the trade dispute (DS593) entered dispute settlement process in 2019 after Indonesia and the EU faced cul-de-sac in resolving the tension over the Renewable Energy Directive (RED II) and the Delegated Act which phased out biofuel products from palm oil due to Indirect Land Use Change (ILUC) risk that were explicitly made to factor deforestation,¹³ according to the European Parliament Resolution on Palm Oil and Deforestation of Rainforest, the Indonesian government asserted that this policy is inherently protectionist and discriminative.¹⁴ Moreover, according to the Indonesian Ministry of Foreign Affairs, the black campaign directed toward Indonesian palm oil by non-governmental organizations such as Greenpeace and Friends of the Earth, who lobbied European officials to restrict imports, heightened the tension, which became an increasingly complex issue that involved many actors.¹⁵

"Palm oil and biodiesel are the only commodity in Europe that could combine all political spectrums—between left-wing comprising NGOs and Green Parties and right-wing consisting of capitalist industry and farmers. So, it is a challenging task for Indonesia to fight them all."¹⁶

On the one hand, the bold move taken by Indonesia shows that Indonesia's palm oil diplomacy has not been effective in securing its political-economic interest on the global scale due to the two litigations which could have been avoided. On the other hand, however, the tension between Indonesia and the EU has burgeoned, as the former seeks to secure its political-economic interest, while the latter prioritizes sustainability and seems to have done mercantilist-toned policy. In this case, the efforts of the EU Parliament in carrying out a negative campaign have become an issue that has hit Indonesian entrepreneurs, especially palm oil entrepreneurs.¹⁷ As both could not resolve such a complex issue, the dispute settlement mechanism that provides a legal mechanism is perceived as the last resort. As a result, the Indonesian government has pursued a variety of market-oriented strategic policies. For instance, policies facilitating the issuance of permits, infrastructure availability, a low-risk

¹¹ WTO, "European Union – Anti-dumping Measures on Biodiesel From Indonesia: Report of the Panel," no. WT/DS480/R/Add.1 (January 25 2018).

¹² See Svein S. Anderson, Andreas Goldthau, and Nick Sitter, *Energy Union: Europe's New Liberal Mercantilism?* (Springer, 2016), v; Werner Raza, "European Union trade politics: pursuit of neo-mercantilism in different fora?," *Strategic arena switching in international trade negotiations* (2007).

¹³ Amzul Rifin, "Assessing the impact of limiting Indonesian palm oil exports to the European Union," *Journal of economic structures* 9, no. 1 (2020).

¹⁴ BPDP, "10 Point of the Indonesia's Response to the EU's Discrimination Against Palm Oil," (Jakarta), March 17 2019, at <http://www.bdpd.or.id/en/10-Point-of-the-Indonesia-s-Response-to-the-EU-s-Discrimination-Against-Palm-Oil>.

¹⁵ Center for Multilateral Policy Development and Studies, *Peran Diplomasi dalam Mendukung Tujuan Pembangunan Berkelanjutan: Tinjauan terhadap Pengelolaan Industri Minyak Nabati* [The Role of Diplomacy in Supporting Sustainable Development Goals: A Review of Vegetable Oil Industry Management], Ministry of Foreign Affairs (Jakarta, 2019).

¹⁶ Based on an interview with Arif Havas Oegroseno, Indonesian Ambassador to the Federal Republic of Germany and former Ambassador to Belgium, Luxembourg, and the European Union conducted on August 12, 2021.

¹⁷ Windratmo Suwarno, "Kebijakan Sawit Uni Eropa dan Tantangan bagi Diplomasi Ekonomi Indonesia," [European Union's Palm Oil Policy and the Challenge to Indonesia's Economic Diplomacy.] *Jurnal Hubungan Internasional* 8, no. 1 (2019).

¹ profile, and a guarantee of conduciveness are just some of the policies that facilitate and secure investment in Indonesia.¹⁸

On the other hand, Indonesia realized the use of international institutions, despite the high cost of taking legal process by which the complainant must hire international lawyers and other additional costs, would accommodate its political-economic interest. Therefore, this ¹ search objective aimed in this article seeks to further advance the knowledge on Indonesia's motives in pursuing formal trade disputes to the WTO, which can be costly for developing countries.

In this wake, this article aims to answer the extent to which Indonesia's international trade interest could be defended through the WTO's dispute settlement mechanism, following the two trade disputes that occurred between Indonesia and the EU over biodiesel products and palm oil. This article provides the necessary evidence of Indonesia's interest in winning the litigation by playing the 'rule of the game' in which the WTO provides the negotiation forum and dispute settlement mechanism. The article also intends to challenge the mercantilist perspective on the anarchical global trading system resulting from the chaotic trade dispute by analyzing legal mechanisms in the dispute settlement process. Indonesia had been able to utilize the global rules-based trade regime under the WTO laws.

Although there have been several attempts to explain the trade dispute between Indonesia and the EU with a focus on the institution, none of them have provided sufficient evidence and comprehensive analysis in answering why Indonesia initiated the dispute in the first place and how the government of Indonesia utilized the dispute settlement mechanism. For instance, compliance and functional liberal institutionalism¹⁹ theories and international organizations and global governance concepts²⁰ have been employed to analyze the case studies. While both have their niche in the literature development on Indonesia's participation in the global trade regime, which addressed the specific role of the WTO in facilitating a trade dispute between the EU and Indonesia as both represent developed and developing countries. Nevertheless, they fail to address the conflicting vested interests underpinning the Indonesia-EU trade dispute over biodiesel and palm oil.

The mere focus on institutions has provided insights into why the WTO dispute settlement mechanism can bridge the conflicting interest. The role of an institution is indeed an essential aspect because the degree of the institution exerts influence on the flow of information, monitoring others' compliance, and solidity of international agreements that affect states' behavior is accounted.²¹ However, such a functionalism account has its limitation: it does not situate and address state-focused analysis, which is assumed to represent national interest, the core of neoliberal institutionalist tenets.

Therefore, the article will be followed by a literature review that elucidates neoliberal institutionalism and revisits its core tenets and a methodology that corresponds to the logic of neoliberal institutionalism as an analytical framework. The following section presents the

¹ ¹⁸ Faris Al-Fadhat and Mohammad Raihan Nadhir, "Foreign Investment and the Political Economy of Indonesian Capital Market in 2015-2016," *Humanities & Social Sciences Reviews* 7, no. 6 (2019).

¹⁹ Anggi Mariatulkubtia, "Peran WTO dalam Menjembatani Benturan Kepentingan Antara Uni Eropa dan Indonesia dalam Perdagangan Biodiesel," [The Role of the WTO in Briding the Conflicting Interest between th EU and Indonesia in Biodiesel Trade.] *Andalas Journal of International Studies (AJIS)* 9, no. 1 (2020).

²⁰ Niken Larasati Adhystya, "Peran WTO dalam Penyelesaian Sengketa Biodiesel Antara Indonesia dan Uni Eropa tahun 2014-2017" [The Role of the WTO in Resolving the Biodiesel Dispute between Indonesia and EU 2014-2017] (Bachelor's Degree: Universitas Muhammadiyah Yogyakarta, 2019).

²¹ Robert Keohane, "Neoliberal institutionalism," *Security studies: A reader* (2011).

¹ findings, including the political economy of green mercantilism through various manifestations and Indonesia's interest in utilizing the dispute settlement mechanism. The last part will summarize and present the conclusion.

2. Neoliberal Institutionalism and the WTO

Theories of neoliberal institutionalism and international regime share a similar view vis-à-vis the assumption that establishing the international organization, institution, and international agreement over a similar issue and urgency is indispensable. The neoliberal institutionalism theory, according to Keohane, places the importance of states as the center of world politics.²² Constructed based on liberalism, this perspective, however, differs from that of commercial and republican liberalism. The former refers to peacebuilding based on commerce, which is the leading variable to peace. Republican liberalism, on the other hand, perceives that the republic system has the necessary power separation mechanism as opposed to despotism.

Neoliberal institutionalism is deep-rooted in liberal principles of cooperation. Nevertheless, one must note that cooperation in international relations is not automatic—there is negotiation and planning—and must distinguish that neoliberal institutionalism, which emphasizes state interest but in cooperative ways, fills in the gap of international cooperation amid anarchical international order. It signifies the importance of an international regime that allows a particular set of rules to prevail over states' interests, thereby operationalizing a check and balance mechanism.

The General Agreement on Tariff and Trade (GATT) 1947, for example, is a manifestation of an international regime whose rules determine the international trade dynamics and are started by several countries to regulate international trade after the end of World War II. GATT developed over time, alongside many negotiation rounds, before it transformed itself from a regime to a formalized international institution in 1995 marked by the Marrakesh Agreement, hence the World Trade Organization (WTO). Such an establishment of an institution that deals with international trade mean a bifold: (1) political-economic interest, which requires the government to defend and gain the market access overseas proliferated; and (2) the needs of the institution to guarantee fair trading principles.²³

One could illuminate the GATT's institutionalization process from a regime to an institution through the international regime perspective—which is defined by a set of principles, norms, rules, and decision-making procedures among actors in a given converge area.²⁴ The institutionalization process is in line with GATT's transformation to an institutionalized international body. It is done by collectively gathering state actors to manage international trade flow through standardized agreements, procedures, and free and fair-trade principles—to name a few Most-favored Nation (MFN) and Special and Differential Treatment (SDT).

After eight rounds of negotiation, from Geneva 1947 until Uruguay 1986-94, the WTO was formed into an international institution through Marrakesh Declaration in 1994, taking into account the urgencies and needs to regulate other legally binding international trade laws. Moreover, the WTO's dispute settlement mechanism describes the ground assumption of neoliberal institutionalism in building cooperation through an institution that has legal capacity

¹ *Ibid.*

²³ Amrita Narlikar, Martin Daunton, and Robert M Stern, *The Oxford Handbook on the World Trade Organization* (Oxford University Press, 2012).

²⁴ Stephen D. Krasner, "International Organization Foundation Structural Causes and Regime Consequences : Regimes as Intervening Variables," *International Organization* 36, no. 2 (1982).

¹ in nature and rights and proportional immunity.²⁵ In order to support the neoliberal institutionalism spirit, Keohane advocates for international institutions that standardize cooperation under reciprocal relationships among member states.²⁶ Besides, institutions can provide information, reduce transaction costs, make the commitment even more credible, establish a coordination focal point, and facilitate reciprocal action.²⁷

¹ In nature, the core tenets of neoliberal institutionalism contradict that of mercantilism, whose ground assumption is rooted in realism, which perceives the international trade system as an 'anarchy' due to the absence of authority above the nations despite the existence of the international institution.²⁸ However, the WTO laws are inherently legally binding and complex, differentiating its nature from other international institutions. Such complexity is also caused by many international trade actors, including private sectors and interest groups.

Mercantilism also views the role and the interest of state actors in international economic relations as essential elements to determining a zero-sum game in the global system—in which one actor's gain is another actor's loss. Therefore, mercantilists regard international institutions such as the International Monetary Fund, the World Bank, and the WTO as an arena in which countries can exert their powers, unlike the liberalists who perceive international organizations as positive-sum that is mutually beneficial for all members.

Neoliberal institutionalists acknowledge that no hierarchy can be enforced between states—whether by the developed to the developing nations or by the global north to the global south—despite individual states' interests. Neorealists and mercantilists, on the other hand, view that the international system is pure anarchy. On the same page, both agree that conflict will always exist and is inevitable. The critical difference between the former and the latter depends on how conflict or dispute can be resolved. Concerning this perplexing entanglement, Stein, one of the leading neoliberal institutionalist scholars, has elucidated the fusion and the confusion.²⁹ Stein argues that the institutionalism and the regime's central premise, based on the state, power, and interest, was departed from 'the old institutionalism' rooted in a realist perspective. This hypothesis demonstrates that it is possible to integrate conflict and cooperation within one framework. Therefore, the function of the institution is present in managing the conflict. However, cooperation and conflict management can be a synonym—where the two share a similar parallel concept but are not overlapping.³⁰

The *raison d'être* of the WTO establishment is to manage the international trading system, including the GATT that covers the trade of goods, the General Agreement on Trade in Services (GATS) that regulates the flows of services, and the Agreement on Trade-related Intellectual Property Rights (TRIPS). The WTO's establishment depends on its primary factor: liberalizing the trade to be a free market with a non-discriminatory principle. The WTO is also present to facilitate trade among countries by eliminating tariff and non-tariff barriers and

¹¹ Thomas Schoenbaum, Petros C. Mavroidis, and Michael Hahn, *The World Trade Organization: Law, Practice, and Policy*, 2nd ed. (New York: Oxford University Press, 2003).

²⁵ Robert O. Keohane, "Twenty years of institutional liberalism," *International Relations* 26, no. 2 (2012).

²⁶ Robert O. Keohane and Lisa L. Martin, "The promise of institutionalist theory," *International security* 20, no. 1 (1995).

²⁷ Theodore H. Cohn, *Global Political Economy: Theory and Practice*, 7th ed. (New York: Routledge, 2016). p. 57

²⁸ Arthur A. Stein, "Neoliberal Institutionalism," in *The Oxford Handbook on International Relations*, ed. Christian Reus-Smit and Duncan Snidal (New York: Oxford University Press, 2008).

²⁹ I. William Zartman and Saadia Touval, *International cooperation: the extents and limits of multilateralism* (Cambridge University Press, 2010).

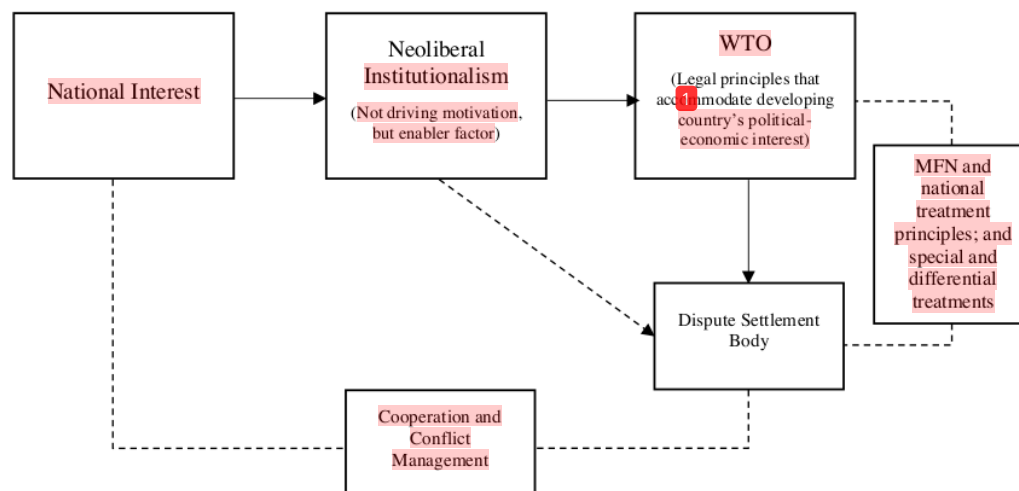
1 negotiation and dispute settlement mechanisms through a well-designed international agreement.³¹

The Uruguay Round and its legally binding products have marked a turning point in the international trading system that allows countries to perpetuate a liberal-order system under a global trade regime while also utilizing dispute settlement due to the heightened interactions followed by contractions. The establishment of the WTO and its dispute settlement mechanism, the DSB, and the legal text of Dispute Settlement Understanding (DSU) reflect institutionalization and international trade regime, which exclusively regulate *lex specialis* the actor's role in the international trade without discrimination. Hoekman and Mavroidis argue that there are two legal implications with the existence of DSU. First, the WTO, through DSB, 1 guarantees that none of its member states can unilaterally regulate illegality in their trade practices with other trading partners. Secondly, trading partners could not file lawsuits other than to the WTO forum.³²

Therefore, according to neoliberal institutionalism theory, the function, design, means, and ends of WTO DSB clearly show that the global trading system is conflictual. In fact, since 1995, there have been 606 disputes. In conducting dispute settlement mechanism, the WTO has explicitly regulated the DSU, which set rules and procedures administered by DSB. Cooperation and conflict management are parallelly maintained to preserve the integrity of common, reciprocal, free, and fair principles and objectively adjudicate the trade dispute without imposing additional rights or obligations to the member.

3. Neoliberal Institutionalism Framework

Figure 1. The logic of neoliberal institutionalism under the WTO³³



The assumption of national interest is derived from what Stein deemed as "institution as solutions to dilemmas of self-interest." One of the arguments in this section is that self-

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³¹ Bernard M. Hoekman and Petros C. Mavroidis, *The World Trade Organization: Law, economics, and politics* (New York: Routledge, 2007).

³² *Ibid.* p. 78

³³ Adopted from Stein, "Neoliberal Institutionalism." *op. cit.* and Keohane, "Neoliberal institutionalism." *op. cit.*; Keohane, "Twenty years of institutional liberalism." *op. cit.*; Keohane and Martin, "The promise of institutionalist theory." *op. cit.*

¹ interested behavior drives the dynamic in the institution to which game theory can be applied. However, as in this article, national interest is deliberately chosen based on the collective and ultimate result of an ideational projection of Indonesia as an export-led economy. However, indeed, national interest might not broadly represent the nation's interest—that there might be certain clientelism between the elites and the trade association that form a patron-client relationship. The economic interest that Indonesia brought to the global trade regime has been evident in the public-private partnership through which the trade ministry has consistently utilized the institutional mechanism available in the WTO to serve its interest.

According to Keohane, neoliberal institutionalism, as a theory that emphasizes the institution's importance in the international system, will only be as relevant as other perspectives if there are two prevailing conditions.³⁴ First, it is the conceived benefits from joining such an international institution that will bring positive-sum results. Second, there is a consensus that there is an extent to which institutions could affect state behavior. Both conditions are aligned with the case of Indonesia-EU trade disputes in which Indonesia's political-economic interest is reflected onto its policy to pursue institutional mechanism in hopes that the WTO legal principles could accommodate its interest. However, one should note that neoliberal institutionalism, albeit placing the institution's importance in its core tenets, takes the fundamental state interest into account, which is made possible by the institution *per se*.

The benefits of joining the WTO for developing country like Indonesia is of importance. Most Favored Nation (MFN) and national treatment principles guarantee reciprocal international trade. Furthermore, the mechanism within the dispute settlement process, which to some extent accommodates the interest of the developing country, is also the cornerstone of the WTO system.

Therefore, the differentiating factor in the analytical framework proposed in this article is placing institutions, such as the WTO, as the key enabler to serving Indonesia's political-economic interest. Otherwise, it would not have been possible, whereas a dystopian global trade regime in which mercantilist-toned trade policies would result in chaotic international economic relations and zero-sum games are hegemonizing. Underscoring the WTO under the framework of neoliberal institutionalism as the intervening variable, in turn, allows a more complex analysis that can pay attention to state-centric analysis while also bearing in mind the deep-rooted interest of state behavior in pursuing trade dispute although it might be costly.

By employing qualitative research, this article scrutinizes Indonesia's strategy to win the trade disputes against the EU, where the first round of which formally entered the DSB in 2014 and ended in 2018, resulting in Indonesia's victory. However, there is an ongoing trade dispute over palm oil due to discriminative indirect land-use change measures and renewable energy directives, as Indonesia claimed, which this article classifies as the second round of the trade disputes. This research attempts to answer an exploratory research question of how Indonesia could defend its trade interest. This research investigates the contemporary phenomenon and its real-world context with the chosen case studies. The data and information gathered in this research are from both primary sources consisting of government documents and WTO secretariat as well as interviews conducted with key figures such as Indonesian diplomats and trade negotiators, and secondary sources including relevant published materials such as books, journal articles, official reports, and news. The gathered data and information will be compared with different sources to produce a comprehensive and systematic analysis through triangulation.

³⁴ Keohane, "Neoliberal institutionalism." *op. cit.*

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4. Between Growth and Sustainability

Indonesia, strategically located in a geographic structure, has abundant natural resources. Indonesia's economic development history has shown its policy preference for export-led industrialization strategy, which utilizes natural resources such as fossil and palm oil, coal, nickel, gold, and others, as the extractive economies. During Soeharto's era, Indonesia benefitted from the oil boom in the early 1980s, contributing to windfall gains from oil- and gas-related revenue. In the 1980s, the increase in oil price justified the Indonesian government's export-oriented industrialization strategy. The government's decisive role in leading economic development through its state-owned companies has been apparent in its export-led economy.

However, in the contemporary era, Indonesia's export-led strategy from extractive industries still prevails, considering the contribution of those industries macroeconomically. The situation has compelled the Indonesian government to push forward its leadership and assertive role in the arena of international trade. A study on Indonesia's natural resources from a political economy perspective has classified Indonesia as resource nationalism.³⁵ The central premise of resource nationalism goes beyond liberal or illiberal economic policies. Instead, the nationalist motive, characterized by national sovereignty and interest, has prompted Indonesia to be more persistent in defending its interest. For example, the commodity boom during Yudhoyono's era had benefitted Indonesia in many ways. Its mass production capability, in turn, advantaged its competitiveness to provide a reasonable lower price than the international average price. However, although Indonesia is one of the countries that benefitted from the commodity boom, it was only temporary.³⁶

Characterizing trade policy based on liberal or illiberal, however, would enter a deadlock. Resource nationalism, on the other hand, provides the rationale from which economic policy will be determined. A robust liberal policy to support international trade in the CPO industry, even if the Indonesian government had to go to the trade dispute, underpins its nationalist motives. Conversely, another instance of why Indonesia could also become illiberal in its trade policy by restricting nickel export, which induced the EU to file a lawsuit to the WTO, further justifies resource nationalism. EU's reliance on nickel import from Indonesia for its steel industry and its move to bring the case to the WTO show how the EU starkly defends its interest.³⁷ And that is in part because Indonesia wanted to move up the global value chain,³⁸ whereas Indonesia has fulfilled its prophecy as a resource curse.

The state's justification in regulating top-down economic nationalism over the control of natural resources within Indonesia's territory is mandated in the constitution. Article 33 of the 1945 constitution explicitly governs the state's rights to manage the natural resources to benefit from strategic development and public interest.³⁹ Even though the policy preferences

³⁵ Eve Warburton, "Resource nationalism in post-boom Indonesia: The new normal?," (2017).

³⁶ Hal Hill, "15 The Indonesian economy during the Yudhoyono decade," *The Yudhoyono presidency: Indonesia's decade of stability and stagnation* (2015).

³⁷ GAPKI, "EU Needs Nickel, but Discriminates Palm Oil," *Warta Ekonomi*, February 2021, at <https://gapki.id/en/news/19858/eu-needs-nickel-but-discriminates-palm-oil>.

³⁸ Warburton, "Resource nationalism in post-boom Indonesia: The new normal?," *op. cit.*

³⁹ The statist nationalism approach to regulating top-down extractive economies has shown that the constitution, from political economy and legal political dimension, plays a determinant role. See, for example, Nelly Pinangkaan, "Makna Pasal 33 Undang-undang Dasar 1945 dalam Pembangunan Hukum ekonomi Indonesia," [The Interpretation of Article 33 of the 1945 Constitution in Indonesia's Legal-Economic Development.] *Lex Administratum* 3, no. 5 (2015); Kukuh Fadli Prasetyo, "Politik hukum di bidang ekonomi dan pelebagaan konsepsi welfare state di dalam Undang-Undang Dasar 1945," [Legal Politics in Economy and Institutionalization of Welfare State Concept in the 1945 Constitution.] *Jurnal Konstitusi* 9, no. 3 (2016); Irfan Nur Rachman, "Politik Hukum Pengelolaan Sumber Daya Alam Menurut Pasal 33 UUD 1945," [Legal Politics of Natural Resources

¹ that cited this very article might have been interpreted and manifested differently, the policy outcomes still depend on the vested interest of each issue (sectoral or cross-sectoral).

However, such state-led industrialization that drives economic development through agricultural commodities, such as palm oil, has many drawbacks, among which are environmental damages such as deforestation—that corresponds with the EU's decision to implement RED and ILUC indicator—and social issues regarding human rights, forced and child labor. In addition, a study on palm oil production in Indonesia and Malaysia that affected land-use change has shown that palm oil plantation comes at a prohibitive environmental cost despite the disparities in data collected from various sources. Nonetheless, the growing demand for palm oil and biofuel products such as biodiesel for many purposes, including foods, cosmetics, energy, and transportation industries, has altogether increased the economic profits of palm oil production.⁴⁰

In the latest UN Climate Change Conference (COP26), Indonesia said that the zero-deforestation it signed as an 'unfair' agreement.⁴¹ Jokowi had instructed all ministers that every development plan formulated by the government must heed the environmental factors, hedging in between balance growth and environment. Mahendra Siregar, Deputy Foreign Affairs Minister, whom Jokowi appointed to secure its palm oil diplomacy, said that the COP26 pledge was false and misleading.⁴² Furthermore, Siti Nurbaya Bakar, Indonesia's Environment and Forestry Minister, said that:

Major development and infrastructure projects in Jokowi's era must not halt in the name of carbon emission or deforestation. Stopping development in the name of zero-deforestation is the same as confronting the values and the goals of the 1945 constitution, which aims at securing national social and economic prosperity. Indonesia's natural wealth, including forests, must be managed for its use according to sustainable principles, besides being fair.⁴³

That statement was made right after COP26, and closer scrutiny should be understood in a larger context due to the possible implication. First, President Jokowi's arbitrary role in directing economic and infrastructure development, a political promise during his presidential campaign, that later has allowed big companies with enormous capital to continue operating despite concerns over environmental issues. Second, resource nationalism persists as the underlying ideological ground for this administration to continue having economic growth based on the 1945 Constitution, specifically Article 33, which stipulates that all-natural resources belong to the state and shall be utilized for people's prosperity. This finding is

¹ Management According to Article 33 of the 1945 Constitution.] *ibid.* 13, no. 1 (2016); Elli Ruslina, "Makna Pasal 33 Undang-Undang Dasar 1945 dalam Pembangunan Hukum Ekonomi Indonesia," [The Meaning of Article 33 of the 1945 Constitution in Legal Economic Development in Indonesia.] *ibid.* 9, no. 1 (2016); Suyanto Edi Wibowo, "The Meaning of Article 33 of the 1945 Constitution of the Republic of Indonesia on State Authority Over Natural Resources," *Jurnal Legislasi Indonesia* 12, no. 4 (2018).

⁴⁰ Birka Wicke et al., "Exploring land use changes and the role of palm oil production in Indonesia and Malaysia," *Land use policy* 28, no. 1 (2011).

⁴¹ Hannah Ellis-Petersen, "Indonesia says Cop26 zero-deforestation pledge it signed 'unfair'," *The Guardian*, November 5, 2021, at <https://www.theguardian.com/world/2021/nov/05/indonesia-says-cop26-zero-deforestation-pledge-it-signed-unfair>.

⁴² *Ibid.*

⁴³ Derived from a public statement made by Siti Nurbaya Bakar, Indonesian Environment and Forestry Minister, on [twitter](https://twitter.com/sitinurbayalh/status/1455762610771529731?s=21) (SitiNurbayaLHK), November 4, 2021, <https://twitter.com/sitinurbayalh/status/1455762610771529731?s=21>, which sparked heavy criticism, particularly from environmentalists.

¹ consistent with Choiruzzad's⁴⁴ whereby saving palm oil means saving the nation, which means palm oil companies have a more significant role in shaping the national interest.

Indonesia continues to expand its palm oil and biodiesel production capacity, despite concerns about sustainability and focuses on sustainable palm oil diplomacy, for which the Indonesian Ministry of Foreign Affairs has formulated strategies. It aims to increase palm oil-related revenue and boost biodiesel products as an alternative biofuel for the future, whereas fossil fuels are projected to be less accessible soon. Therefore, the global biofuel market is expected to increase as demand also increases to replace fossil fuel, with Indonesia as the biggest producer leading the development.⁴⁵ However, such an increased production capacity resulted from area expansion as opposed to yield improvement.⁴⁶

¹ The use of biodiesel is claimed to be environmentally sound. It can lessen global warming, as the Ministry of Energy and Mineral Resources (ESDM) has been continuously campaigning to use biodiesel B30⁴⁷ in the regulation of the Directorate General of New, Renewable Energy and Energy Conservation or Kepdirjen EBTKE, ESDM No. 197 K/10/DJE/2019. Notwithstanding the claims, many non-governmental organizations and activists have raised concerns about environmental protection, sustainable planning, deforestation, land dispute, and human rights issues.

In order to mitigate the environmental damages Indonesia has caused, Indonesia strives for getting sustainable certifications, governmental regulations in 2016 concerning land protection and management, presidential instruction on palm oil licensing review and evaluation. The aim of policy-driven response to Indonesia's sustainability issues is clear-cut; it is intended to further justify state power in facilitating business interests that contribute substantially to the national economy.

5. Economic Motives in the Trade Disputes

Data derived from the European Commission recorded biodiesel import from Indonesia to the EU market in 2009-12 before anti-dumping measures saw a significant surge with an eight-fold increase (see Figure 2). The commodity boom during this period, enabled by rapid palm oil expansion and production, had benefitted and contributed to the Indonesian economy before Indonesia's biodiesel export to the EU notably decreased due to additional tax imposed on Indonesian biodiesel suppliers in conjunction with dumping accusations. As a result, Indonesia brought this accusation to the WTO, which signifies its economic interest undertaken through an institutional mechanism.

While the second round of the trade dispute over palm oil at the WTO is still ongoing, it is too embryonic to speculate the result of the litigation. However, the economic motives of the second trade dispute share a similar view: the palm oil industry plays a critical role in the Indonesian economy. Therefore, the fact that Indonesia won the first trade dispute does not let Indonesian palm oil interest be retracted. Such a determinant move in the litigation process which took years to complete, therefore, deserves special attention with which this study will provide, in part, a positivist answer.

After the European Council issued Regulation No. 1994/2013, followed by the official imposition of anti-dumping measures on Indonesian biodiesel products in November 2013, a

¹ ⁴⁴ Shofwan Al Banna Choiruzzad, "Save palm oil, save the nation: palm oil companies and the shaping of Indonesia's national interest," *Asian Politics & Policy* 11, no. 1 (2019).

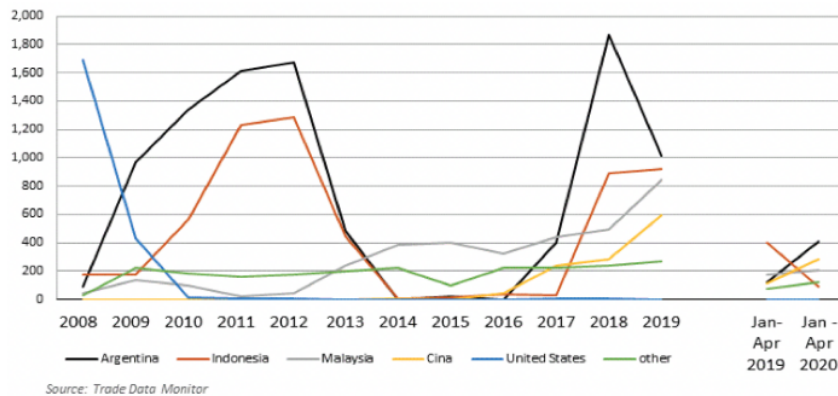
⁴⁵ Claire Carter et al., "Palm oil markets and future supply," *European Journal of Lipid Science and Technology* 109, no. 4 (2007).

⁴⁶ *Ibid.*

⁴⁷ B30 is a mixture of biodiesel as much as 30% with conventional fuel types.

1 significant decrease happened in the biodiesel export to the European market. The introduction of anti-dumping measures has indeed affected the trade flow. Indonesia and Argentina, which have been the leading supplier for EU's domestic biodiesel demand, which made up 27 and 42 percent of EU's total import, have been disadvantaged, causing a substantial decrease in biodiesel export to the EU in 2013 as shown in Figure 2. When the commodity boom took place, which increased biodiesel and palm oil prices in the international market, Indonesia offered a relatively lower cost due to its efficient production capacity and economies of scale. The decline in export started from 2013 to 2014 and reached its lowest point in 2017.

1 **Figure 2. Biodiesel Export and Import in the EU (million liters)⁴⁸**



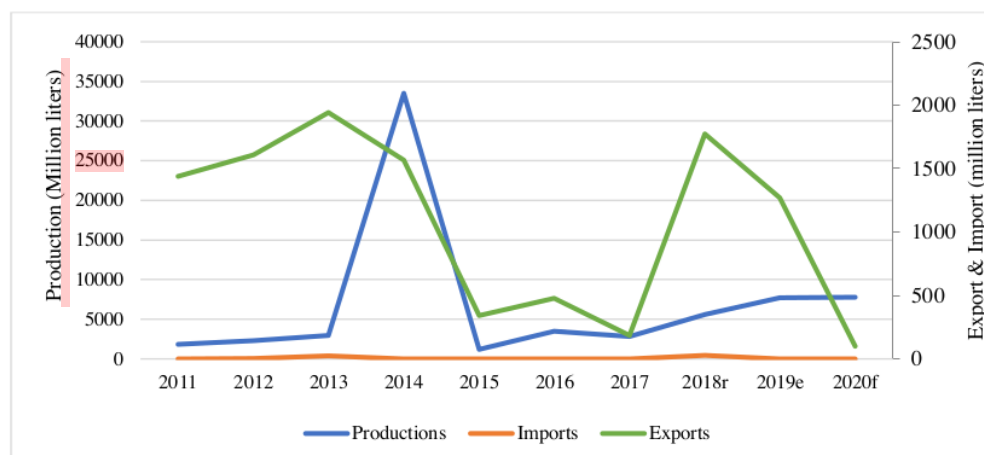
1 Indonesian Palm Oil Association (*Gabungan Pengusaha Kelapa Sawit Indonesia, GAPKI*) and USDA Foreign Agricultural Service data demonstrate that Indonesia has aggressively promoted its biodiesel product into the international market. The data of Indonesia's biodiesel export, as shown in Figure 2 above, indicates there was a sudden increase after the EU lifted its anti-dumping measures following its loss in the trade dispute in 2018. However, the increase in biodiesel export is short-lived. It underwent a decrease due to reheated tension between Indonesia and the EU, which later entered WTO's dispute settlement process in 2019 due to ILUC risks which Indonesia claimed to have discriminated against its palm oil.

Figure 3 below demonstrates collective data from 2011 to 2020 on Indonesia's palm oil production and its export and import. The commodity boom, which took place around 2013 and 2014, indeed benefitted Indonesia's foreign exchange and fiscal revenues. Furthermore, according to the Ministry of Foreign Affairs, the palm oil industry has significantly contributed to national revenue, labor absorption, technological advancement.⁴⁹

⁴⁸ Bob Flach, Sabine Lieberz, and Sophie Bolla, *EU Biofuels Annual*, USDA Foreign Agricultural Service (The Hague, 2020).

⁴⁹ Center for Multilateral Policy Development and Studies, *Peran Diplomasi dalam Mendukung Tujuan Pembangunan Berkelanjutan: Tinjauan terhadap Pengelolaan Industri Minyak Nabati*. *op. cit.*

1 **Figure 3. Production, Imports, and Exports of Biodiesel in Indonesia⁵⁰**



1 The first trade dispute between Indonesia and the EU concerns anti-dumping measures against which Indonesia claimed that such a policy is inherently discriminative. Although generally, dumping and anti-dumping practices have been regulated in Article VI of the GATT 1994 and the Agreement on the Implementation of Article VI, the process and verification of both dumping and anti-dumping require a thorough procedure and substantial evidence. As written in the anti-dumping clause, the dumping practice shall not be allowed when it impacts and harms the domestic market materially in the importing country's market. However, the anti-dumping regulation shall not be accepted if tariffs are applied to specific products on the grounds of tax increases before a precise calculation between the 'normal price' from where the products originate and the price of the products in the export destination.

Table 1. Dumping Margin on Indonesian Biodiesel Companies⁵¹

Companies	Margin <i>dumping</i>	Margin after <i>anti-dumping</i>
PT. Ciliandra Perkasa, Jakarta	0.0%	8.8%
PT. Musim Mas, Medan	2.8%	16.9%
PT. Pelita Agung Agrindustri, Medan	5.3%	16.8%
PT. Wilmar Bioenergi, Indonesia, Medan; PT Wilmar Nabati, Indonesia, Medan	9.6%	20.0%
Other cooperating companies	6.5%	18.9%
All other companies	9.6%	20.5%

While the anti-dumping measures have affected several Indonesian biodiesel companies comprised of the collector, distributor, and capital owner, it has also adversely impacted small farmers whose livelihood depends on this industry. GAPKI stated that palm oil production, both on the small and bigger (private) scale, had become the 'locomotive' to the economic development in the rural and countryside.⁵² Moreover, the increase in production capacity has a multiplier effect on revenue, value-added, and workforce (employing directly

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⁵⁰ Arief Rahmanulloh, *Biofuels Annual*, USDA Foreign Agricultural Service (Jakarta, 2020); Ministry of Trade, *Realisasi Value Ekspor Kelapa Sawit dan Produk Turunannya* [Realization of Palm Oil and its Derivative Products Export Values] (Jakarta, 2021).

⁵¹ WTO, "European Union – Anti-dumping Measures **1** Biodiesel From Indonesia: Report of the Panel."

⁵² GAPKI, "Peran Strategis Sawit Rakyat Indonesia," [Strategic Role of Palm Oil for Indonesian People] (Jakarta) 2017, at <https://gapki.id/news/3875/peran-strategis-sawit-rakyat-indonesia>.

¹ 4.2 million workers and indirectly 12 million people),⁵³ benefitting mainly domestic development.⁵⁴ Besides, the palm oil industry is the most significant contributor to gross domestic product (GDP) accounted for 3,5 percent, making it irreplaceable in the Indonesian economy.

GAPKI contends that any attack directed at palm oil will harm small farmers' livelihood.⁵⁵ In a labor-intensive industry such as palm oil, its role in the national economy includes employing 2.6 million small farmers and alleviating poverty since 2000.⁵⁶ Therefore, the export decline in 2013 onwards would significantly impact the GDP and national economic interest and the farmers in rural areas who rely on the palm oil industry.

¹ A recent study analyzed the impact of palm oil prohibition in the EU after it issued the Delegated Act. Using the Global Trade Analysis Project (GTAP), which is part of computable general equilibrium (CGE), linking ILUC risks to deforestation, and RED II, has shown that the ban would have little effect on macroeconomic conditions in Indonesia.⁵⁷ On the other hand, impacts on sectoral conditions—such as output, land, price, unskilled and skilled labor—although they would experience a decrease,⁵⁸ are nonsignificant. Instead, if the EU were to stop Indonesian palm oil imports completely, the negative impacts would have been more pronounced. In turn, Indonesian palm oil producers and exporters would seek a new market.

However, the empirical analysis above slightly contradicts the palm oil vested interest for which palm oil exporters and the Indonesian government are struggling globally, which concurs with the institutional mechanism Indonesia pursues. Therefore, the provided data above offers a compelling argument that the ban would have little effect on Indonesian palm oil. Nevertheless, Indonesia's political-economic interest is mainly driving its palm oil diplomacy by which the officials keep approaching the European (green) parties, both European Commission and Parliament, private sectors, and non-governmental organizations.⁵⁹

6. EU and Palm Oil

The commitment of the EU to sustainable economic development has been evident in the various manifestation of its policies. One of which is the recent ambitious goal of becoming the first climate-neutral continent by 2050, encapsulated in the new green deal. In addition to reducing the use of extractive resources in supporting economic growth, the EU started implementing Climate Change Package (CCP) in 2007⁶⁰ that also set Renewable Energy Directive (RED) in 2009 before the revised version was published in 2018.

⁵³ GAPKI, "Palm Oil has Irreplaceable Role in Indonesian Economy," *Investor Daily*, September 23, 2021, at [https://gapki.id/en/news/20660/palm-oil-has-irreplaceable](https://gapki.id/en/news/20660/palm-oil-has-irreplaceable-role-in-indonesian-economy) ¹ [role-in-indonesian-economy](https://gapki.id/en/news/20660/palm-oil-has-irreplaceable-role-in-indonesian-economy).

⁵⁴ Center for Multilateral Policy Development and Studies, *Laporan Kinerja Pusat P2K Multilateral* [Performance Report of Center for Multilateral Policy Development and Studies, MOFA Indonesia], Ministry of Foreign Affairs, (Jakarta, 2020).

⁵⁵ GAPKI, "Attacking Palm Oil Means Stopping Small-farmers' Livelihoods," *Kontan*, March 2021, at <https://gapki.id/en/news/20020/attacking-palm-oil-means-stopping-small-farmers-livelihoods>.

⁵⁶ *Ibid.*; Wayan R Susila, "Contribution of oil palm industry to economic growth and poverty alleviation in Indonesia," *Jurnal Litbang Pertanian* 23, no. 3 (2004).; Ryan Edwards, ¹² *Is plantation agriculture good for the poor? Evidence from Indonesia's palm oil expansion* (2015); Ryan B Edwards, "Export agriculture and rural ¹verty: evidence from Indonesian palm oil," *Dartmouth College: Hanover, Germany* (2019).

⁵⁷ Rifin, "Assessing the impact of limiting Indonesian palm oil exports to the European Union." *op. cit.*

⁵⁸ *Ibid.*

⁵⁹ Interview with Arief Havas Oegroseno on August 12, 2021

⁶⁰ Artur Runge-Metzger and Jean-Arnold Vinois, *The new energy and climate package of the European Commission – 20% renewables in the European Union by 2020 - kicking off Carbon Capture and Storage* (European Commission, 2007).

¹ As the EU's main agenda to shift to more sustainable energy has been taking place; however, the EU began to address different issues by implementing the indirect land-use change (ILUC) factor, under the RED II scheme, that measures biofuel production expansion which could have increased greenhouse gas. Although ILUC does not directly address the import ban, palm oil is the only crop that is affected due to certain risks under ILUC,⁶¹ thereby affecting palm oil producers worldwide economically, including Indonesia, Malaysia, Argentina, and other palm oil-exporting countries. Moreover, the criteria of ILUC, which determines the degree of risk to the environment, only applies to crude palm oil, which Indonesia claimed that this regulation is inherently protectionist and discriminatory.⁶²

EU's environmental motives are clear-cut. Its commitment to sustainable land use and economy under the sustainable development goal is enhanced because RED II regulates technical obligations for biofuel suppliers to meet specific standards that uphold sustainable principles in the production process. The transition to a green economy seems to have undermined developing countries' economies from which developed countries can reap benefits by imposing additional technical trade barriers.⁶³ However, as the UN Environment argues that the green economy, on the contrary, will result in positive growth, income, and jobs, and particularly address the myth that there would be a trade-off between economy and sustainability, especially for developing countries.⁶⁴

Changoe, a trade campaigner with Friends of the Earth Europe, pointed out that there is an inconsistency and internal contradiction in the EU green ambition.⁶⁵ The fact that the EU is now aiming for a green transport fuel target, which requires biofuel production and import, is problematic, particularly because of the free trade deal it has set up. One of the examples is that the EU-Mercosur free trade deal—a trade agreement with Argentina, Brazil, Paraguay, and Uruguay—which focuses on agricultural production and import from these countries, will lead to increased productions.⁶⁶ The trade deal will increase exports of sugarcane-based ethanol to the EU by 650,000 tons or six-folds. As the trade deal would increase the turnover of agricultural productions, it would also be responsible for destroying the South American ecosystem.

That would also apply to the Indonesian case where high demand for biofuel would likely perpetuate direct and indirect land change because of the pragmatism of most Indonesian palm oil companies. In fact, the Indonesian government released a data discrepancy between the recorded licenses and the area of plantation in December 2019. The license, which the Directorate General of Estate Crops records, covers 14.3 million ha, while the actual coverage reaches 16.3 million hectares.⁶⁷ The moratorium that the president had issued in 2018 is also

⁶¹ Stefan Mayr, Birgit Hollaus, and Verena Madner, "Palm oil, the RED II and WTO law: EU sustainable biofuel policy tangled up in green?," *Review of European, Comparative & International Environmental Law* 30, no. 2 (2021), <https://doi.org/10.1111/reel.12386>.

⁶² Tyson and Meganingtyas, "The Status of Palm Oil under the European Union's Renewable Energy Directive: Sustainability or Protectionism?"

⁶³ UNEP, "Towards a green economy: Pathways to sustainable development and poverty eradication," *Nairobi, Kenya: UNEP* (2011).

⁶⁴ *Ibid.*

⁶⁵ Audrey Changoe, "How the Mercosur deal's ethanol boost contradicts EU green promises," *EURACTIV*, November 12, 2021, at <https://www.euractiv.com/section/transport/opinion/how-the-mercocor-deals-ethanol-boost-contradicts-eu-green-promises/>.

⁶⁶ *Ibid.*

⁶⁷ Im Fathimah Timorria, "Pemerintah Rilis Data Tutupan Sawit, Masalah Legalitas Diharapkan Rampung," [Government issued palm oil plantation coverage data, legality issues expected to be resolved] *Bisnis*, January 20,

¹ inconsistent with the Job Creation law in which Article 110A allows palm oil companies' operations if they deposit some amount of money to the state. Besides, Article 110B stipulates that unlicensed operations in the forest areas can be legalized, and the violators would only be subject to administrative sanctions.⁶⁸

As a response to massive deforestation the EU has caused abroad due to its high demand for biofuel products, the EC is pushing for the legislation of due diligence for agricultural products—such as soy, beef, palm oil, wood, cocoa and coffee, and other products—before they get imported to the EU market to ensure that they are not linked with deforestation and illegal production.⁶⁹ This proposal, according to a press release published by the Commission, is part of a broader plan of actions which was outlined in the 2019 Commission Communication on Stepping up EU Action to Protect and Restore the World's Forest.⁷⁰

¹ As the second biggest importer of global deforestation—after China—and 16 percent of which is associated with international trade, the EU is left with the responsibility to ensure that the products entering its market do not contradict its green deal. This normative approach to tackling deforestation and forest degradation that, in turn, affects supply and demand has become the norm that characterizes the EU's intervention in the market.

The legislation is now being strictly pushed by EU climate chief, Frans Timmermans, and EU's Environment Commissioner, Virginijus Sinkevičius, and is supported by green parties, according to which companies will bear the responsibility for collecting information and for making sure that the products they import and sell to the EU market are not linked with deforestation, and for promoting the consumption of deforestation-free products.⁷¹

However, criticism addressed toward this legislation, as many environmentalists have pointed out, is that the scope is too narrow, as it only focuses on deforestation, leaving out other issues such as indigenous community, biodiversity, and endangered species.⁷² This narrow scope would extend with time as there is also a possibility that other commodities might be included. Sinkevičius, as reported by *Euractiv*, said that the inclusion of the covered products in the initial scope was the Commission's political decision.⁷³

The due diligence legislation, which specifically regulates the production of said commodities to have not caused deforestation or land degradation, would affect Indonesia's palm oil market after December 31, 2020. Although Indonesia's palm oil production has been at a high rate, President Jokowi has issued a moratorium that bans palm oil expansion that affects Indonesian palm oil companies because there are many unregistered lands beyond the scope of the license otherwise allowed.

Despite the fact that the EU will ensure that imported and domestic products will be treated the same, this would likely prolong developed and developing countries debate on green

¹ 2020, at <https://ekonomi.bisnis.com/read/20200120/99/1191913/pemerintah-rilis-data-tutupan-sawit-masalah-legalitas-diharapkan-rampung>.

⁶⁸ Robby Irfany Maqoma, "Tak hanya diperpanjang, moratorium sawit juga harus diperkuat." [Not only extended, palm oil moratorium should also be strengthened] *The Conversation*, September 17, 2021, at <https://theconversation.com/tak-hanya-diperpanjang-moratorium-sawit-juga-harus-diperkuat-168169>.

⁶⁹ Kira Taylor, "Europe proposes mandatory due diligence to stop deforestation in supply chains," *EURACTIV*, November 17, 2021, at <https://www.euractiv.com/section/energy-environment/news/europe-proposes-mandatory-due-diligence-to-stop-deforestation-in-supply-chains/>.

⁸ European Commission, "Questions and Answers on new rules for deforestation-free products," November 17, 2021, https://ec.europa.eu/commission/presscorner/detail/en/qanda_21_5919.

⁷¹ *Ibid.*

⁷² Taylor, "Europe proposes mandatory due diligence to stop deforestation in supply chains."

⁷³ *Ibid.*

¹ mercantilism in which developed countries—which reaped benefits from exploiting natural resources from their colonial countries—are now implementing a policy which hinders developing countries from utilizing their own resources for economic development.

6.1 Renewable Energy Directive

The Renewable Energy Directive (RED) was originally part of the EU Energy and Climate Change Package (CCP), which came into force in 2009 before the Union introduced the revised version in 2018 that is equipped to achieve 40 percent renewable energy use in 2030. As outlined by RED II, EU member states are legally bound to develop tools and policies for achieving the goal.⁷⁴

RED II, a policy directive opposed by Indonesia and Malaysia,⁷⁵ is a series of discriminative policies against palm oil-exporting countries after the first round of trade dispute between Indonesia and the EU (biodiesel case: DS480) has ended. On the other hand, the EU's rhetoric on sustainability divides the camps, resulting in ambiguity: between the proponents of sustainability and economy.⁷⁶

¹ Under the WTO laws, RED II and other non-tariff barriers are not a direct violation. Nevertheless, it may potentially violate Agreement on Technical Barriers to Trade (TBT), the agreement Indonesia put forward to the WTO dispute settlement process. The Indonesian government responded to the classification of Indonesian palm oil as high-risk ILUC, enabled by RED, with a strong objection, claiming that vegetable oil—rapeseed and sunflower oil, which are categorized as like-products—as homegrown products that are prioritized over imported biodiesel products, thereby having legal impacts under the WTO framework.⁷⁷

Tyson and Meganingtyas argue that RED II contains legal ambiguity vis-à-vis WTO laws because of the likeness of biofuel produced from palm oil and other vegetable oil products, despite different physical characteristics, in terms of end-use have the same end-use. That means that CPO and other vegetable oil, according to the WTO terms, should be considered as a like product. Yet, the criteria determined by the EU suggest that palm oil has caused more emissions and indirect land-use change.

CPO, used for biofuel production, in this case, should be treated the same with other vegetable oils, including homegrown ones; this entails article I and Article III of the GATT to be applied to all products. Although RED II could also be exempted under the General Exception Article XX of the GATT, the indicators for classifying high or low risks ILUC 'give rise to the uncertainties of extraterritoriality.'⁷⁸ Besides, Indonesia has repeatedly claimed that ILUC indicators are flawed.⁷⁹

However, the evidence suggests that RED II was not initially been designed to protect homegrown biofuels from foreign competition.⁸⁰ The EU is nonetheless committed to sustainability by prioritizing low-risk ILUC. It could be achieved if the biofuel producers had fulfilled the listed certifications under delegated resolution, whereby the crops are cultivated on abandoned and degraded lands without expanding and deforesting new areas while also

⁷⁴ Flach, Lieberz, and Bolla, *Biofuels Annual – EU Biofuels Annual 2019*.

⁷⁵ Tyson and Meganingtyas, "The Status of Palm Oil under the European Union's Renewable Energy Directive: Sustainability or Protectionism?"

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ BPDP, "10 Point of the Indonesia's Response to the EU's Discrimination Against Palm Oil." *op. cit.*

⁸⁰ Tyson and Meganingtyas, "The Status of Palm Oil under the European Union's Renewable Energy Directive: Sustainability or Protectionism?"

¹ taking smallholders into account. Nevertheless, the WTO also needs to find the direct linkage between climate change and transboundary emissions. It means that it will be difficult for the EU to demonstrate that its policy is not discriminatory and phasing out a like-product such as palm oil.⁸¹

In response to the accusation addressed toward Indonesian palm oil that it caused deforestation, GAPKI stressed the importance of getting Indonesian Sustainable Palm Oil (ISPO) certification for Indonesian palm oil planters, which uphold the principles of sustainability, transparency, compliance with regulations, good plantation practices, social responsibility through economic empowerment and environmental protection.⁸²

6.2 EU Parliamentary Resolutions on Palm Oil and Deforestation

European Parliament resolution on palm oil and deforestation of rainforest recognizes several sustainability principles based on international frameworks: United Nations Sustainable Development Goals, Framework Convention on Climate Change, and based on intra-region conventions, such as Amsterdam Declaration, to name a few. The robust foundation to claim that palm oil production increases risks to deforestation, according to the document, is apparent. The resolution specifically cited fires in Indonesia due to land clearing for palm oil plantations which contribute to global warming.⁸³

Although the EU acknowledges that the increasing production of palm oil is mainly possible due to low cost, it also emphasizes the fact that economies of scale could have only resulted from pervasive deforestation.⁸⁴ In this regard, the EU burdens the global responsibility for direct deforestation because it is one of the major biofuel importers. In addition, the EU is also aware of human rights violations during the palm oil production process, which includes child labor and discrimination against local and indigenous communities.

However, the policy-driven resolution that the Commission further implements affects the market mechanism under sustainability, thereby putting Indonesia, which is economically motivated, at a disadvantage due to the EU's policy. The document also recommends that the Commission introduce non-discriminatory tariffs and non-tariff barriers based on the carbon footprint of palm oil. As a response, the Indonesian government issued a presidential instruction in 2018 in which the decree halted palm oil expansion and reviewed the existing licenses to address the accusation of massive deforestation, violation of human rights, child labor, and land dispute.⁸⁵ Moreover, after the moratorium expires in September 2021, it will be replaced by Omnibus Job Law, which applies administrative sanctions to outlawed land clearance for palm oil production.⁸⁶

The questions on Indonesia's commitment to sustainable economic growth further drive environmentalists and farmers, including Indonesia's Palm Oil Farmer Union (SPKS), to urge

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⁸¹ *Ibid.*

⁸² GAPKI, "Palm Oil has Irreplaceable Role in Indonesian Economy," *op. cit.*

⁸³ European Parliament, European Parliament resolution of April 4, 2017 on palm oil and deforestation of rainforests (Brussel, 2017).

⁸⁴ *Ibid.*

⁸⁵ A. Muh. Ibnu Aqil, "Calls mount for Indonesia to extend oil palm moratorium," *The Jakarta Post* (Jakarta), July 12, 2021, at <https://www.thejakartapost.com/news/2021/07/12/calls-mount-for-indonesia-to-extend-oil-palm-moratorium.html>.

⁸⁶ A. Muh. Ibnu Aqil, "Job Law insufficient to replace palm oil ban, activists say," *ibid.* (Jakarta), September 23, 2021, at <https://www.thejakartapost.com/news/2021/09/22/jobs-law-insufficient-to-replace-palm-oil-ban-activists-say.html>.

¹ the government to extend the moratorium.⁸⁷ Such deforestations for palm oil and other agribusiness expansion, requiring permits from and environmental assessment by the government—something that is subject to collusion—are usually carried out by large companies, which then undermine smallholders. On the other hand, some smallholders are also linked to large companies,⁸⁸ making the situation even more complex. The EU, in writing, also supports Indonesia's moratorium because it is aligned with the EU's interest.⁸⁹

However, as suggested above, palm oil is considered efficient due to its low-cost production. Thus, the sustainability principle being promoted in the resolution becomes a pretext to promote homegrown biofuel products in lieu of imported biodiesel, which is clearly stated in the recommendations point 83.⁹⁰ Against this backdrop, Indonesia claimed that the EU has been discriminative against Indonesia and other palm oil-exporting countries under the principle of sustainability. The two litigations which Indonesia brought to the WTO referred to national treatment and most favored nations principle, regulated under the agreement on anti-dumping, technical barriers to trade, and GATT 1994. These suggest that what Indonesia filed to the WTO corresponds to the inherent protectionist nature of EU policies against Indonesian palm oil and biodiesel products.

In responding to this discriminative decision, the Indonesian government, through the Ministry of Foreign Affairs, expressed its disappointment, claiming that the European Parliament has denied the fact that palm oil production is more sustainable as it is more efficient in terms of land use and is more productive as opposed to other vegetable oils.⁹¹

7. Indonesia's Interest in Securing its Palm Oil Diplomacy

Indonesian Ambassador to Germany, Arif Havas Oegroseno, stated that defending Indonesia's interest in exporting its palm oil to the international market is not easy. The attacks against Indonesia's biodiesel products are threefolds: dumping, unsustainable, and subsidy—of which Indonesia was accused.⁹² Countervailing duties and anti-dumping measures were directed to Indonesia because of subsidies and dumping. The obstacles to securing its interest, in turn, prompts Indonesia to file a complaint to the WTO.

However, the Ministry of Foreign Affairs emphasizes a "win-win solution," considering palm oil's role in the Indonesian economy.⁹³ Although the EU is not the biggest importer of Indonesia's palm oil products, it is an important actor who can be the global market trendsetter that could affect global trade flow.⁹⁴ Another obstacle Indonesia faces is expanding the biofuel market aside from nurturing the current market if the EU ban crude palm oil entirely, which will likely occur under the green deal.

⁸⁷ Aqil, "Calls mount for Indonesia to extend oil palm moratorium." *op. cit.*

⁸⁸ Tyson and Meganingtyas, "The Status of Palm Oil under the European Union's Renewable Energy Directive: Sustainability or Protectionism?" *op. cit.*

⁸⁹ European Parliament, Short European Parliament resolution of 4 April 2017 on palm oil and deforestation of rainforests.

⁹⁰ *Ibid.*

⁹¹ Ministry of State Secretariat, "Indonesia Tolak Keputusan Parlemen Eropa Soal Biofuel Berbahan Dasar Kelapa Sawit," [Indonesia Rejects the European Parliament's Decision on Palm Oil-based Biofuel Restriction] news release, January 22, 2018, <https://setkab.go.id/indonesia-tolak-keputusan-parlemen-eropa-soal-biofuel-berbahan-dasar-kelapa-sawit/>.

⁹² Interview with Arif Havas Oegroseno on August 12, 2021

⁹³ Ministry of Foreign Affairs, "Indonesia Reiterated the 'Win-Win Solution' Related to Oil Palm to the European Union," March 27, 2019, at <https://kemlu.go.id/brussels/en/news/451/indonesia-reiterated-the-win-win-solution-related-to-oil-palm-to-the-european-union>.

⁹⁴ Interview with Arif Havas Oegroseno on August 12, 2021

¹ Andri Hadi, the current Indonesian Ambassador to Belgium, Luxembourg, and the EU, asserted that the EU might face a series of lawsuits.⁹⁵ Andri further explained that the European Green Deal, part of the European Union Climate Law (EUCL), takes an ambiguous stance on palm oil because vegetable oil used to produce biofuel is allowed while palm oil is mainly targeted as the sole deforestation cause. Therefore, Hadi suspected that the green deal is aimed at protecting the EU's homegrown vegetable oils while palm oil-based products continue to dominate the market.⁹⁶

The Indonesian government claimed that the policy undertaken by the EU is discriminatory and double-standard.⁹⁷ The Deputy Trade Minister, AM Fachir, said that refusing to use palm oil means rejecting the SDGs, as its first goal aims to alleviate poverty.⁹⁸ Yanto Santosa, a scholar from the Department of Forestry and Environment of the Bogor University of Agriculture, extensively argues that RED II – ILUC, which discriminates against palm oil from Indonesia, is a form of crop apartheid.⁹⁹ Such a claim is indeed predictable as the strategic interest of Indonesia in exporting its palm oil commodities is hindered by the EU, which represents developed countries and imposed technical barriers on emerging economies like Indonesia, hence the difference of economic development stage.

The Indonesian government responded to such discriminatory measures orchestrated by the EU against Indonesian palm oil, demanding that equal treatment in line with the national treatment principle in the WTO should be prioritized.¹⁰⁰ The government also claimed that classifying palm oil as ILUC high-risk, while maintaining vegetable oil such as rapeseed industries that operate in Europe as low risk, is a unilateral and arbitrary scientifically flawed standard.¹⁰¹ This strong opposition is accompanied by ten points of response, which include: (1) that the decision made by the Commission was intended to impose ban on Indonesian biodiesel and to prioritize homegrown products in lieu of promoting sustainability; (2) that the decision was politically driven; (3) that palm oil production is more efficient with 38 MT/ha/year as opposed to rapeseed and soya which only could produce 0.6 and 0.5 MT respectively; (4) that Indonesia put a moratorium on forest clearance for palm oil plantation in force; (5) that there is a lack of impact assessment on palm oil productivity; (6) that palm oil industry in Indonesia has played an essential role in alleviating poverty, contending that social and economic factors of that of palm oil are not value to the EU; (7) that the EU, while promoting multilateral rule-based trade system and SDGs, is double standard toward palm oil; (8) that this dispute may affect broader Indonesia-EU trade and investment relations; (9) that Indonesia would continue working with palm oil producing countries and ASEAN frameworks; (10) that Indonesia will be focused on poverty alleviation goal of the SDGs.¹⁰²

However, the use of palm oil as energy and food products faces different treatments as palm oil to produce biodiesel is particularly affected due to the new green deal. That is because

⁹⁵ GAPKI, "EU will Face Many Lawsuits in WTO," *Warta Ekonomi*, September 19, 2021, at <https://gapki.id/en/news/20642/eu-will-face-many-lawsuits-in-wto>.

⁹⁶ GAPKI, "Foreign Perspective Not Objective on Deforestation," September 2021, at <https://gapki.id/en/news/20618/foreign-perspective-not-objective-on-deforestation>.

⁹⁷ Ministry of Foreign Affairs, "Indonesia Reiterated the 'Win-Win Solution' Related to Oil Palm to the European Union."

⁹⁸ Shah Suraj Bharat, "ASEAN, EU Collaboration Needed to Resolve Palm Oil Dispute," *ASEAN Studies Center* (Yogyakarta), May 13, 2019, at <https://asc.fisipol.ugm.ac.id/2019/05/13/asean-eu-collaboration-needed-to-resolve-palm-oil-dispute/>.

⁹⁹ GAPKI, "Foreign Perspective Not Objective on Deforestation." *op. cit.*

¹⁰⁰ BDP, "10 Point of the Indonesia's Response to the EU's Discrimination Against Palm Oil." *op. cit.*

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

¹ rapeseed, soybean, and sunflower will not be able to replace palm oil.¹⁰³ On the other hand, the EU keeps importing palm oil-based food products.¹⁰⁴ The accusation of deforestation in Indonesia has been taken as a basis of legality for the EU to promote its green protectionism, which ultimately affected the palm oil market in the EU. However, deforestation data put forward by the Ministry of Environment and Forestry, which GAPKI uses in response to the accusation, shows that deforestation in Indonesia has decreased due to regulations the Indonesian government has implemented, including the moratorium issued by the president to review existing licenses for palm oil plantation and to prohibit palm oil expansion due to environmental damage.

Indonesian officials in the EU have been assigned to approach key players in the public and private sectors. However, while Indonesia has approached the government bodies, including European Parliament and Commission, political parties, and private sectors who were also the complainants, Havas claimed that Indonesia achieved nothing as if it was "uneven drizzling," referring to the goals for which Indonesia aim but with insignificant results.¹⁰⁵

Havas went insofar as arguing that anti-dumping measures are the instrument resulting from persuasive lobbying in which industries and trade associations have set out their interest. On the other hand, Indonesia's lobbying skills in Europe are limited, so Indonesia chose the WTO as a last resort. If only Indonesia's palm oil diplomacy had worked well, the government would not have filed a trade dispute with the WTO. According to Havas, the decision on Indonesia to go to the WTO signifies the failure of preventive measures that otherwise could have been less detrimental.¹⁰⁶

Equally important, Indonesia also acknowledged a strong opposition led by the Union trade associations, particularly in rapeseed industries in Europe, against Indonesian palm oil and its biodiesel products. Havas stated that Fediol and Avril Group, trade associations operating in agricultural industries, have the necessary resources, tools, and leverage to approach important players in both public and private sectors.¹⁰⁷ Again, Indonesia's ability to counteract such resistances through soft power is in question. Thus, it is contended that the WTO provides a mechanism that can 'discipline' the EU to comply with fair trade practices.

In 2019, the Center for Multilateral Policy Development and Studies, Indonesian Ministry of Foreign Affairs published *The Role of Diplomacy in Supporting Sustainable Development Goals: A Review of Vegetable Oil Industry Management*, where diplomats are assigned political and economic roles to create positive narratives of Indonesian palm oil.¹⁰⁸ It also aims to neutralize and build the counter-narrative to the public discourse on palm oil which revolves around deforestation, emphasizing the industry's strategic contribution to the national economy by reserving foreign exchange and alleviating poverty by providing jobs to the locals.¹⁰⁹

In securing its interest, the Indonesian government needed to intervene by correcting the market through supply and demand balancing.¹¹⁰ Through a public-private partnership,

¹⁰³ GAPKI, "Foreign Perspective Not Objective on Deforestation." *op. cit.*

¹⁰⁴ *Ibid.*

¹⁰⁵ Interview with Arif Havas Oegroseno on August 12, 2021

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*

¹⁰⁸ Center for Multilateral Policy Development and Studies, *Peran Diplomasi dalam Mendukung Tujuan Pembangunan Berkelanjutan: Tinjauan terhadap Pengelolaan Industri Minyak Nabati*. *op. cit.*

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

¹ Indonesia pushes the palm oil producers to get certified in line with implemented sustainable principles, regulations, and palm oil regimes, such as Roundtable Sustainable Palm Oil (RSPO) and Indonesian Sustainable Palm Oil (ISPO). This effort also includes getting certification from palm oil regimes such as International Sustainability Carbon Certification (ISCC). Moreover, the Ministry of Foreign Affairs formulated the strategy constituted to secure its interest. The counter-narratives includes: (1) that palm oil productivity is 8-10 times higher and that land use for palm oil plantation is smaller as opposed to other vegetable oils; and (2) that ILUC methodology is unconvincing, attempted at phasing out palm oil and benefitting other vegetable oils.¹¹¹

However, it is important to note that Indonesia is struggling to frame its palm oil diplomacy narratives, which was formulated in a meeting conducted by the Ministry of Foreign Affairs on August 9, 2019, due to the black campaign against Indonesian palm oil in the international market. This political meeting results in two recommendations: (1) improving strategic communications in order to mitigate, if not neutralize, the black campaign against Indonesian palm oil through social media; (2) pushing the market access by maintaining the bilateral cooperation with which Indonesia has strategic relations, by establishing International Palm Oil Promotion Center, and by utilizing the general system of preferences.¹¹²

The role of big media and social media, both in Europe, such as *The Guardian* and *Reuters*, and in Indonesia, is equally critical to spreading the narratives of palm oil. Nestlé and Sinar Mas, companies operating in Indonesia, responded to the black campaign through a traditional approach, i.e., corporate communication by which public statement is made. Indonesia realized that strategy was not effective. Instead, it reiterated the role of social media in socializing positive perceptions of palm oil to the European communities.¹¹³ Nevertheless, an environment-focused NGO maintains that the Indonesian government is doing a public relations stunt, asserting that there would be a costly public relations war.¹¹⁴

Aside from establishing Oil Palm Plantations Fund Management Agency in 2015 to ensure the sector's development and sustainability, Joko Widodo appointed Mahendra Siregar, Deputy Foreign Minister of Indonesia and former ambassador to the US, to coordinate the government's strategic move in securing its interest in palm-oil-related economic revenue and diplomacy. However, a study researching the narrative of Indonesian palm oil argues that the inclusion of palm oil as a priority in Indonesia's diplomatic agenda is political, rather than a natural economic consequence of the increasing importance of the palm oil industry.¹¹⁵ It also argues that the decision was triggered by international political-economic dynamics in which international actors such as the EU and the US have put pressure on Indonesia.¹¹⁶ As a result, Indonesian palm oil companies used discursive approaches to frame the palm oil growth as a shared interest of the public, hence the national interest.¹¹⁷ That suggests that economic interest put forward by the government is being defended through multiapproach ways.

¹¹¹ *Ibid.*

¹¹² Center for Multilateral Policy Development and Studies, *Laporan Kinerja Pusat P2K Multilateral. op. cit.*

¹¹³ Center for Multilateral Policy Development and Studies, *Peran Diplomasi dalam Mendukung Tujuan Pembangunan Berkelanjutan: Tinjauan terhadap Pengelolaan Industry Minyak Nabati. op. cit.*

¹¹⁴ Hans Nicholas Jong, "'We attack,' Indonesia declares in joint bid with Malaysia to shield palm oil," *Mongabay*, March 2 2021, at <https://news.mongabay.com/2021/03/indonesia-malaysia-team-palm-oil-black-campaign-european-union/>.

¹¹⁵ Choiruzzad, "Save palm oil, save the nation: palm oil companies and the shaping of Indonesia's national interest."

¹¹⁶ *Ibid.*; Zahwa Nadhira Zainul Majdi, "Indonesia's Palm Oil Diplomacy under Jokowi's Administration: an analysis of an emerging power's response to EU pressure" (MA Utrecht University, 2021).

¹¹⁷ Choiruzzad, "Save palm oil, save the nation: palm oil companies and the shaping of Indonesia's national interest." *Op cit.*

¹ In short, there are four approaches undertaken by Indonesia in securing its political-economic interest. The first approach is palm oil diplomacy, which Havas suggested is not practical nor rewarding. Research and strategic communication, by which scientific journals and publications and the use of social media intended to counter the black campaign against Indonesia, are also part of the government's strategy. Finally, the most crucial strategy, albeit perceived as the last resort, is the litigation approach, a foundation on which Indonesia as a developing country continues struggling to play by the rule of the game under the WTO laws.

8. Institutional Mechanism in the WTO on Palm Oil and Biodiesel Products

8.1 DS480

After the consultation failed to resolve the initial stage of the dispute, Indonesia requested Panel establishment as an ad hoc body to specifically adjudicate the process. According to the DSU, which regulates the dispute mechanism between developed and developing countries, the panelists, consisting of three individuals, shall include at least one panelist from a developing country. At the same time, a similar case also took place between Argentina and the EU, which made Indonesia wait for the result before formulating its strategic move.¹¹⁸

¹ Indonesia filed seven points to the WTO concerning the EU policy, which was deemed inconsistent with the WTO agreements. As reported in the WTO legal proceeding,¹¹⁹ Indonesia's claims are:

1. EU failed to determine production price to calculate the standard price;
2. EU was unable to decide on the regular price;
3. EU failed to calculate the profit empirically against the price as set by producers;
4. EU was inaccurate in calculating the export price of biodiesel from Indonesia, which independent buyers in the EU then sell;
5. EU imposed an anti-dumping tariff exceeding the actual dumping margin;
6. EU claimed to state a domestic market injury that was not based on an objective assessment; and
7. EU made a miscalculation in determining the additional tax imposed on one of the Indonesian biodiesel producers.

These claims were based on the WTO agreements such as the Anti-dumping agreement, Marrakesh agreement, and GATT 1994. According to the WTO Agreement, as the complaining party, Indonesia must provide the necessary proof, demonstrating that the issues raised to the dispute settlement were inconsistent with the covered agreements. As reflected in the WTO Panel Report, the underlying problem is that the price difference calculation conducted by the EU was about the CPO export price by the Indonesian authorities, which already included the additional export tax instead of the prices of respective companies. In addition, EBB responded to the differential export tax (DET) system in both Argentina and Indonesia, causing the price After a thorough negotiation and investigation process conducted by the Panel, the DSB issued its final report in October 2017, with the following pertinent results:

1. EU fails to calculate the production cost during the investigation process according to the product price in the respective company;

¹ ¹¹⁸ Similar shared-interest countries joining the dispute settlement process of DS480 as third parties include the US, Japan, Turkey, Singapore, India, China, Canada, Argentina, Australia, Norway, Russian Federation, Brazil and Ukraine. Third parties, however, should not be deemed as opposing neither the complainant nor defendant. Yet, some countries joining the dispute settlement process are also biofuel producing countries, such as the US, China, Argentina.

¹¹⁹ WTO, "European Union — Anti-dumping Measures on Biodiesel from Indonesia."

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2. EU fails to use the benchmark price stated with the price from which it is originated, which is Indonesia;
3. EU fails to determine the export price of PT. Musim Mas;
4. EU fails to determine that there is a significant price reduction regarding imports from Indonesia; and
5. EU is found to have imposed an anti-dumping tariff exceeding the prescribed limit.

Indonesia's landslide victory has renewed the hope of Indonesian biodiesel producers to export their products to the EU. With the expected market share increase in 2022, which would reach US\$ 1.7 billion, the Indonesian government's efforts in securing market access become more apparent.

8.2 DS593

Trade dispute on specific measures concerning palm oil and oil palm crop-based biofuels between Indonesia and the EU started with a consultation in December 2019. While the involved parties, Indonesia as the complainant and the EU as the defendant, have had similar trade disputes, several other countries have expressed interest in joining the litigation.¹²⁰

Indonesia claimed that the EU had subsidized domestic industry to which incentives other than general infrastructure were given, resulting in adverse effects on Indonesia's interest, including the black campaign, addressed toward the latter. Indonesia also raised the most favored nation and national treatment clauses as stipulated in the GATT 1994, Subsidies and Countervailing Measures (SCM), and Technical Barriers to Trade (TBT), with which the EU was inconsistent.

Indonesia also specifically cited Article 12 of TBT, which sets forth special and differential treatment (SDT) for developing countries, requiring developed countries, which is the EU, to take the interest of the developing country—including financial and trade needs—into account. In addition, the TBT agreement stipulated that the regulation and standards applied by developed countries shall not create unnecessary obstacles to exports of developing countries.

To comply with the dispute settlement procedure of the WTO, Indonesia needs to provide proof concerning the claims it made based on the covered agreements. However, the result of the second round of the dispute remains to be seen. Whether the EU deemed to be inconsistent with the covered agreements, or Indonesia would likely win again, as the Panel is expected to issue its final report before the second quarter of 2022.

8.3 Conflict Management and Cooperation: A Neoliberal Institutional View from Developing Country

At the very core of liberal principle, i.e., cooperation, its extension, neoliberal institutionalism seeks to unpack statist view of international relations, which is often self-driven by its national interest, through conflict management and cooperation that is administered by an international institution like the WTO that undertakes the global trade regime. Thus, the core tenet of neoliberal institutionalism acknowledged that world politics is a complex system in which vested interest among actors entangles.

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¹²⁰ Most of palm oil producing countries such as Argentina, Brazil, China, Malaysia and the US are joining the dispute settlement process along with other countries such as Australia, Canada, Colombia, Costa Rica, Ecuador, Guatemala, Honduras, India, Japan, Norway, Russian Federation, Singapore, South Korea, Thailand and Turkey, as third parties.

¹ Neoliberal institutionalism as a general doctrine, Keohane wrote, emphasizes that there is no harmony of interests.¹²¹ The WTO as an institution, in this context, serves the very purpose of Indonesia, which disagrees with most, if not all, of the EU's policy on palm oil, in securing its interest through conflict management and cooperation. The political philosophy put forward concerning the utilization of an institution, Keohane suggested, is that "unchecked power is dangerous, and that power-holders, therefore, need to be held in check."

In this sense, realism's economic power becomes the benchmark for quantifying political power in international trade. The WTO dispute settlement mechanism—which is associated with gain and loss, especially if the countries involved are between developed and developing nations—provides a check and balance mechanism wherein authority at the global scale is virtually nonexistent.

The legal-driven process, through which the DSB can put pressure on its members into conformity, including the EU, is what makes the WTO unique. In addition, the WTO paid particular attention to the power differences between developed, developing, and least developed countries by codifying global trade norms with the principles of free, non-discriminatory, and reciprocal 'quid pro quo' or fair based on its series of agreements.

Under the WTO's purpose and function as a negotiation forum for international trade, the fair-trade principles that consider developing countries' interests have been codified to the GATT 1994 and other agreements. The non-discriminatory principles concerning the national treatment and most favored nation, among other things, as in Article 3 of the GATT 1994, Article 3 of SCM Agreement; and SDT of developing country members as in Article 12 of TBT Agreement; and other general exceptions, have further driven Indonesia to engage in institutional mechanism and utilized the covered agreements based on its interest.

As a result, in 2021, the WTO court has become the busiest international body with 606 disputes since its establishment in 1995. However, only 350 cases have reached the final decision. Although Indonesia's trade policies have been disputed 15 times, the fact that Indonesia, as a developing country, also filed complaints 12 times is a sign that a legalistic approach still prevails. The role of Indonesia in the WTO is as a "global swing state"¹²² that can rearrange the international trade order signifies the power politics coupled with national interest by playing the rule of the game. Indonesia is a country that actively utilizes its developing country status to gain special rights in the WTO systems.¹²³

To address the late stage of development or late capitalism, which requires early protection to catch up with industrial states, Indonesia recognizes the role of DSU that regulates fair treatment for developing countries in the dispute settlement mechanism, which grants SDT to regulate international trade between developed and developing nations.

This concern has explicitly been regulated as in Article 4, Paragraph 10 DSU that states:

During consultations, Members should give special attention to the particular problems and interests of developing country Member.

Furthermore, Article 12, Paragraph 11, DSU stipulates:

Where one or more of the parties is a developing country Member, the Panel's report shall explicitly indicate the form in which account has been taken of relevant provisions on differential and more-favorable treatment for

¹ Keohane, "Twenty years of institutional liberalism." *op. cit.*

¹²² Jennifer Hillman, *Global Swing States and the Trade Order*, The German Marshall Fund of the United States (Washington DC: Center for a New America Security, 2012).

¹²³ *Ibid.*

developing country Members that form part of the covered agreements which have been raised by the developing country Member in the course of the dispute settlement procedures.

¹ In fact, 'developing country' has been mentioned 19 times in the DSU legal text document. It implies that developing countries have the right to defend their interest in the negotiation forum, including the judicial process, as a dispute occurs between developed and developing nations. In implementing the Panel decision, developing countries are also granted rights to postpone the recommendations, meaning that compliance with the WTO regulations for developing countries is not as strict as the developed nations. Subsequently, this could affect the compliance behavior of the state in conforming to the Panel recommendation.

Aside from granting special rights, SDT is also given to other procedures, such as requesting developing country's interest representation in the form of panelist members in the appointed Panel. The non-discriminatory and reciprocal international trade norms are reflected in the principles of MFN and NT. MFN requires the country to apply the same tariff regardless of the origin of the country of that particular product. NT per se shall be applied when a foreign product enters an individual (domestic) market and shall not be treated less favorably than the domestic products.¹²⁴

The institutionalization of these non-discriminatory trade principles in the WTO agreement is designed to ensure legal certainty and capacity to regulate international trade flows as smoothly and freely as possible. Indonesia realizes this is vital to resolving the trade dispute through the DSB with a determined procedure by respecting the global rules-based trade regime.

According to an official from the Indonesian Trade Ministry, having the ability to submit concerns to the WTO allows the government to reinforce the importance of WTO in accommodating and managing Indonesia's political-economic interest under the global trade regime.¹²⁵ Furthermore, the expectation of gaining benefits as a member of the WTO that could exert influence on other states' behavior—by which the dispute settlement body's authority could enforce its legal outcome—has enabled Indonesia to exercise a rules-based and liberal international order.

Nevertheless, as claimed in the investigation report, the EU's tendency to protect domestic biofuel products has shown mercantilist rhetoric in its anti-dumping policy. Besides, according to the DSB Panel report of DS480, the EU's claim that Indonesian biodiesel products had injured the domestic market materially was not based on an objective assessment. As a result, the WTO decided to favor the Indonesian government in 2018.

9. Conclusion

As a resource-abundant and leading palm oil-producing country, Indonesia's economic structure underlies the government's effort to preserve its resource nationalism in its trade policy. Constitutional justification on the economic motives that contribute to social and economic welfare has prevailed the state's role in defending its political-economic interest, to the extent of utilizing its developing country status, which gains special and differential treatment rights, as stipulated in the WTO system.

As suggested above, the Indonesian governments, through many agencies and across different ministries as well as palm oil associations, have strongly opposed the EU policies, which are claimed to have been discriminative and double standards. Indonesia's dilemma is,

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¹ Hoekman and Mavroidis, *The World Trade Organization: Law, economics, and politics*. *op. cit.*

¹²⁵ An interview with an Indonesian Ministry of Trade official on August 21, 2021.

¹ at the same time, a homework that public-private partnerships must address in multiapproach ways to face unfair trading practices while working on its sustainable palm oil production by getting certifications to avoid the black campaign.

As palm oil diplomacy and the role of diplomats in making sure the national interest is delivered are equally important, Indonesia is also working on strategic communications and research projects that would counter the black campaign directed to Indonesian palm oil. Finally, if all approaches failed, the last resort would be to focus on the litigation approach, on which Indonesia hopes to win the case.

With the first round of trade dispute (DS480) concerning anti-dumping measures applied by the EU to Indonesia has ended with Indonesia's victory, the second round of the trade dispute (DS593) is still underway, with the result remaining to be seen. As this article argues, Indonesia's commitment to undertaking institutional mechanisms through the WTO as part of its strategic motives to secure domestic political-economic interest is aligned with the neoliberal institutionalist prescriptions. While there is no harmony of interest as national interest drives international politics, the WTO is perceived as the enabler factor for Indonesia to maximize its interest further.

Moreover, the discourse on trade disputes between developing and developed countries, characterized by hierarchical economic power, has prompted the Indonesian government to formulate strategic steps in international trade negotiations through the WTO's dispute resolution mechanism. In resolving the trade dispute, Indonesia is aware of the importance of an institution that can accommodate developing countries' interests, as stipulated in the DSU. The ways in which Indonesia pursues institutional mechanism under the international trade framework demonstrate Indonesia's commitment to the liberal order, as opposed to anarchical international order, which realists and mercantilists would argue.

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