

Research Article

When The Deforestation Meets The Free Trade: A Critical Analysis of The European Union Deforestation Free Regulation (EU DFR)

Putu George Matthew Simbolon¹

¹ *International Trade Law Program, Universitas Indonesia
c.simbolon9@gmail.com*

Received 9 October 2023; Revised 5 October 2024; Accepted 18 October 2024; Published Online 1 November 2024

Abstract

This article is written to provide an understanding for World Trade Organization members as European Union trade partners to respond to the EU Deforestation Free Regulation. In achieving that purpose, this article implements the normative method through the implementation of a doctrinal, cases, and conceptual approach. There are three discussions presented in this article. The first discussion express that the EU might violate the rules on non-discrimination under Articles I:1 and III:4 GATT, and the prohibition on quantitative restriction under Article XI:1 GATT. The second discussion expresses that the EU may violate Articles 2.1 and 2.5 TBT Agreement which prohibits the implementation of a discriminative technical regulation and the implementation which reflects an unnecessary barrier to international trade. Last but not least, the third discussion states that the EU may justify this measure based on the public moral, and the protection of human, animal, and plant life and health. The third discussion also expresses the finding of this paper which is that international cooperation can be utilized as an instrument that may address the conflict of interests caused by the implementation of the WTO law and the international environmental law.

Keywords: Free trade, deforestation, technical barrier, non-discrimination, market access

Introduction

Trade and environment often intersect with one another. (Balogh & Jám bor, 2020) One of the prominent environmental issues related to international trade is the deforestation issue regardless they are constituted through different regimes. (Balogh & Jám bor, 2020) The conflict of interest arises due to one of the objectives of the World Trade Organization (WTO) Agreement which is to conduct a reciprocal and mutually advantageous international trade through the reduction of tariffs, reduction of non-tariff barriers, and the elimination of discriminatory treatment. (*WTO | Legal Texts - Marrakesh Agreement*, n.d.-a) Meanwhile, one of the objectives of the Paris Agreement 2015 is to take action to address climate change by respecting, promoting, and considering human rights, rights to health, rights of indigenous peoples, and local communities. (*The Paris Agreement | UNFCCC*, n.d.)

The tension between these legal regimes reflects the situation that Bossche and Zdouc expressed as the rules on the balance between trade liberalization and other societal values and interest. (Bossche & Zdouc, 2022) Even though the Paris Agreement 2015 is an international legal instrument, the implementation of its

obligation shall take into account social values in responding to climate change at a national level reflects the urgency to balance the obligation herein and the trade liberalization obligation under the WTO legal system. (Bossche & Zdouc, 2022) Therefore the tension between the WTO law and the international environmental law may reflect the concept explained above. The European Union (EU) is one of both WTO and Paris Agreement Member States that obliges to strike a balance between its obligations under these legal regimes.

The EU has adopted the Green Deal as a package of policy as it aims to achieve 100% Greenhouse Gas Reduction by 2050 or no net emissions of greenhouse gases in 2050. (Hainsch et al., 2022) This policy package has shown the EU's commitment to implementing the Common But Differentiated Responsibilities (CBDR) Principle under Article 2.2 Paris Agreement 2015. (Chen, 2021) The principle herein is also constituted under Article 3.1. United Nations Framework Convention on Climate Change (UNFCCC), and Article 10 of Kyoto Protocol 1997. (Chen, 2021) These two legal instruments are inseparable from the Paris Agreement 2015 since this agreement is meant to implement the UNFCCC and its protocol. (Bose et al., 2022)

The regulation under the EU Green Deal adopted to overcome the deforestation issue is the EU Deforestation Free Regulation (EU DFR) also known as Regulation 2023/1115. (Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the Making Available on the Union Market and the Export from the Union of Certain Commodities and Products Associated with Deforestation and Forest Degradation and Repealing Regulation (EU) No 995/2010 (Text with EEA Relevance), 2023) This regulation constitutes how EU's producing company (also known as the Operator) and EU traders shall conduct due diligence on the trade of palm oil, cocoa, cattle, coffee, wood, and soybean under the precautionary approach. (*Do Your Goods Comply with the Mandatory Due Diligence Obligations in the New EU Deforestation Regulation 2023/1115?* 2023) The EU DFR consists of stipulations concerning the traceability of origin of the covered products and commodities, to ensure that those goods are produced not from deforestation. (Hargita et al., 2020) By understanding the basic approach implemented through this regulation, it can be understood that it implements the UNFCCC REDD+ (reducing emissions from deforestation and forest degradation) adopted in 2013. (Hargita et al., 2020)

Since this regulation is related to international trade (Bossche & Zdouc, 2022), the implementation of this regulation potentially violates the WTO Rules. (Balogh & Mizik, 2021) One of the basic WTO rules potentially violated due to the implementation of the EU DFR is the rules of non-discrimination which oblige WTO members to treat "like products" equally irrespective of their origin. (Koul, 2018) Another WTO rules potentially violated due to the regulation herein is the rule of market access which prohibits WTO members to impose non-tariff barriers on other members' goods. (Bossche & Zdouc, 2022) Therefore, the EU DFR indeed reflects what is called a "legal norm made of an open texture" which is revealed as a situation that was not foreseen by the lawmaker. (Radi, 2013) The lack of ability to predict a particular situation might cause a conflict of interest between parties implementing intersecting legal regimes at the same time. (Radi, 2013)

Understanding the fact that the EU DFR is adopted based on the Sustainable Development Principle (see. Paragraph (11) EU DFR Preamble) which is recognized under Paragraph 8 of the Paris Agreement 2015 Preamble and Paragraph 1 of the WTO Agreement Preamble (Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the Making Available on the Union Market and the Export from the Union of Certain Commodities and Products Associated with Deforestation and Forest Degradation and Repealing Regulation (EU) No 995/2010 (Text with EEA Relevance), 2023) (*WTO / Legal Texts - Marrakesh Agreement, n.d.-a*) (*The Paris Agreement / UNFCCC, n.d.*), this regulation should be able to simultaneously implement both international agreements in a non-contentious manner. However, the various interests of other WTO Members might cause the EU to violate the WTO Rules based on the nullification or impairment rules under Article XXIII General Agreement on Tariffs and Trade (GATT). (Hasan & Nasrin, 2021) The gap between the ideal situation (*das sollen*) and the actual situation (*das sein*) herein has indeed reflected what Konskenniemi called the inherent tension between apology and utopia in the practice of international law. (Argent, 2021b)

Before expressing how the research gap is solved, it is important to express that the EU DFR is related to the Agreement on Trade in Goods covered in Annex 1A of the WTO Agreement. (Simbolon & Damayanti, 2023)

Those agreements are the GATT and the Agreement on Technical Barriers to Trade (TBT Agreement). By taking into account that *nexus*, this article consists of three discussions mentioned herein. The first agreement seeks to understand whether the EU DFR violates the rules under GATT. Furthermore, the second discussion seeks to understand whether the EU DFR violates the rules under the TBT Agreement. Last but not least, the third discussion seeks to understand how the balance of interest may be achieved in the implementation of the EU DFR. Despite it explaining the examination of EU DFR vis-à-vis the WTO Rules and the international environmental law rules, the urgency of this article is to provide an understanding for other WTO members to determine the next step they should take as EU trade partners.

Literature Review

This section provides previous research and its distinction with the research presented in this article. The first research is a journal article titled "The Environmental Impacts of Agricultural Trade: Systematic Literature Review" written by Balogh and Jámbor. The urgency of this previous research is the fact that international trade might harm the environment such as pollution. (Balogh & Jámbor, 2020) On the other hand, this research also states that international trade might cause a positive impact on the environment such as efficient production, energy reduction, and access to new technologies. (Balogh & Jámbor, 2020) The main object of this following research is the trade in agriculture products (including palm oil, rubber, coffee, soybean, biofuel, and meat including cattle) and its environmental impact. (Balogh & Jámbor, 2020)

This research takes into account the climate issues consisting of Greenhouse Gas emissions, deforestation, and the land-use change induced by trade. (Balogh & Jámbor, 2020) This research states that the trade in agriculture neither brings any significant positive impact nor significant negative impact on the environment. (Balogh & Jámbor, 2020) This article also explains that the implementation of a free trade agreement might bring harm to one of its members while being beneficial to its other members. (Balogh & Jámbor, 2020) Instead of stating that it's the trade as a whole which brings a harmful impact to the environment, this previous research states that the production process consisting of land expansion is what brings harm to the environment. (Balogh & Jámbor, 2020) In expressing its solution, this research states that trade-related environmental regulation plays an important role in controlling environmental degradation and motivating sustainable technologies. (Balogh & Jámbor, 2020) This research also expresses that regulators shall exercise their roles to control the consumers' interests. (Balogh & Jámbor, 2020)

The second research is a journal article titled "Similarities and Differences between International REDD+ and Transnational Deforestation-Free Supply Chain Initiatives-A Review" by Hargita and Giessen. This research discusses the existence of the REDD+ adopted through the UNFCCC which is a public sector instrument and the Deforestation-Free Supply Chains (DFSC) by The Consumer Goods Forum (TCGF) which is a private sector instrument. (Hargita et al., 2020) The research herein is conducted to explain how the public-private partnership can be conducted to reduce forest conversion by providing a systematic framework. (Hargita et al., 2020) From this previous research, it can be understood that the public international scheme in responding to deforestation *in concreto* REDD+ is a mechanism that is generally prohibited under the rules of unfair trade. This is because the REDD+ is implemented through financial incentives to reduce deforestation relative to a calculated reference. (Hargita et al., 2020)

The outcome of this research indicates that the REDD+ and the DFSC's definitions of forest are different. (Hargita et al., 2020) Furthermore, while both frameworks are influenced by the opportunity cost, the REDD+ implemented through national legislation isn't able to follow the development of the DFSC codes. (Hargita et al., 2020) Last but not least, this research also shows its pragmatic perception by stating that the upcoming food crisis due to the high demand for food cannot be stopped by these two frameworks regardless of the efforts of their stakeholders to integrate the REDD+ and the DFSC. (Hargita et al., 2020) From the end of this

research, it can be fully understood that commercial agriculture is the driver of deforestation. (Hargita et al., 2020)

The third and last research implemented in this article is a journal article titled “The ‘Human Nature’ of International Investment Law” by Radi. This research primarily perceives the concept of conflict of interest between legal norms implementation as more reasonable than the conflict of norm concept. (Radi, 2013) This is because of a situation where one norm may have the same purpose as another, but the implementation of those norms represents a completely different legal interest. (Radi, 2013) This situation may occur due to a situation called the open texture as the inability of legislators to foresee what will occur in the future once a law is adopted and implemented. (Radi, 2013)

As an example, Radi presents that the implementation of the international human rights law and the international investment law might cause the so-called conflict of interest situation. (Radi, 2013) Furthermore, this research also states that such conflict of interest also reflects that the majority of investment arbitrators are more pro to the investors even though not all arbitrators are adopting such a stance. (Radi, 2013) This research has indeed shown the public to perceive intersecting legal norms more reasonably since it tends to convince its readers that the issue does not always lies within the rule, but sometimes it lies in the implementation including in a matter of dispute settlement.

The first research explained in this passage is implemented to illustrate how the international trade law *in concreto* the WTO law and the international environmental law are influencing each other. Unlike the research therein, this article does not emphasize a law-making process as the main solution in solving the potential conflict due to the EU DFR implementation. Instead, it suggests that the actors involved with this deforestation issue shall cooperate amicably to prevent those upcoming conflicts. Furthermore, the second research is implemented to understand the reasoning behind the EU DFR adoption. The consumer demand described in this research has shown the fact that deforestation is not fully harmful to trade. To distinguish the following research from this article, the article herein systematically explains how states may cooperate to particularly respond to the deforestation issue in the matter of EU DFR. Last but not least, the third research will be implemented as the theoretical basis of this article. Unlike Radi’s research, this article explains how the WTO law and the international environmental law may conflict due to their intersecting implementation. Therefore, this article is unlike Radi’s research discussing the conflict of interests between international human rights law and international investment law.

Methods

The method implemented in this article is a normative method with a prescriptive nature. (Ammirudin & Asikin, 2018) The method herein is implemented by solving concrete issues by applying the law in books or legal norms. (Ammirudin & Asikin, 2018) Furthermore, it is also be implemented through various approaches such as the doctrinal or statutory approach, case approach, case-study approach, historical approach, comparative approach, and conceptual approach. (Ammirudin & Asikin, 2018) This article implements the doctrinal approach, the case approach, and the conceptual approach.

The doctrinal approach is implemented by applying the legal substances of the EU DFR, the WTO Agreement, and the international environmental law treaties consisting of the Paris Agreement 2015, the Kyoto Protocol 1997, and the UNFCCC. Furthermore, the case approach is implemented by transposing the finding of the panel and the Appellate Body in the *United States – Shrimp Case*, the *United States – Tuna Case*, the *United States – Gasoline Case*, and the *European Community Seal Case*. Last but not least, the conceptual approach is implemented by gathering and applying legal doctrines, legal theories, and legal principles from books and journal articles related to the issue of this article. This article is written by gathering primary sources consisting of international treaties, the EU regulation mentioned above, and the findings of the WTO Dispute Settlement

Body (DSB). It is also written by gathering secondary sources consisting of secondary data in the form of books and journal articles. (Khademi Adel et al., 2021)

Result and Analysis

A Critical Analysis of the EU Deforestation Free Regulation according to the General Agreement on Tariffs and Trade

GATT (also known as the GATT 1947) was an international economic agreement having an effect since 1948, regardless of its incomplete nature. (Mohapatra & Mishra, 2020) From 1948 to 1995, this international agreement is implemented to ensure that the regulatory restriction implemented by its contracting parties has a non-discriminatory nature and it distinguish the illegitimate non-tariffs barrier and tariffs barrier from the legitimate ones. (Beshkardana, 2021) This international agreement was solely implemented before the WTO establishment in 1994 or after the Uruguay Round which was conducted from 1986 to 1994. (Norouzi & Fani, 2022) In the present day, this international agreement is perceived as part of Annex 1A of the WTO Agreement concerning Trade in Goods, and it shall be read together with the WTO Agreement as a whole especially the legal text of GATT 1994 (*WTO / Legal Texts - Marrakesh Agreement*, n.d.-b) This agreement has its nexus with the EU DFR as explained herein.

This international agreement constitutes the principle of non-discrimination consisting of the Most Favoured Nations (MFN) Treatment Principle under Article I: 1, the National Treatment Principle under Article III: 4, the binding tariff principle under Article II: 1, the fair-trade principle under Article VI, and the prohibition on quantitative restriction under Article XI: 1. (Sood, 2018) Besides obliging the WTO members to reduce their trade barriers, GATT also provides the general exceptions which can overrule the main principles mentioned above under its Article XX. (Bossche & Zdouc, 2022) Those exceptions *inter alia* consist of the necessity to protect public morality, the necessity to protect human, animal, and plant life and health, and the necessity relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption. (Nevalainen, 2021)

Article 1 of the EU DFR *inter alia* states that this regulation rules the market access or the import or export of the relevant products listed in Annex I which contain, have been fed, or have been made from relevant commodities including cattle, cocoa, coffee, oil palm, rubber, soya, and wood to reduce the EU contribution to the deforestation and forest degradation, and to reduce EU contribution on the greenhouse gas emissions and the global biodiversity loss. (Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the Making Available on the Union Market and the Export from the Union of Certain Commodities and Products Associated with Deforestation and Forest Degradation and Repealing Regulation (EU) No 995/2010 (Text with EEA Relevance), 2023) Since this regulation regulates how the Union treats a forestry product, this measure has its direct connection with the MFN Treatment. (Lopez & Rojas, 2019) Bossche and Zdouc state that to ensure that a measure can be stated following the MFN Treatment, four questions must be answered. (Bossche & Zdouc, 2022) Those questions are: Whether the measure is covered by Article I: 1; whether that measure grants an advantage, whether the products concerned are like products; and whether the advantage at issue is accorded immediately and unconditionally to all like products concerned, irrespective of their origin or their destination. (Bossche & Zdouc, 2022)

In analyzing the first element, it can be understood that the EU DFR is a measure covered by Article I: 1 GATT. This is because the EU DFR is issued as measures constituting the deforestation supply chain involving the Union's traders and operators (individuals or legal persons importing or producing the product). To know whether the EU DFR grants an immediate and unconditional advantage to all the products covered under this regulation or measure, one may only know once this regulation is effectively applicable. Article 38 of the EU

DFR states that this regulation is effectively applicable 18 months after it enters into force, and it will be applicable for the Union's Micro and Small Enterprises 24 months after it entered into force date (May 31st, 2023). By referring to Article 1 of the EU DFR and Annex 1 of the regulation which describes the list of products covered under this regulation and its four digits Harmonized System Codes, the third question concerning whether the products concerned are like products is hereby positively answered. (Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the Making Available on the Union Market and the Export from the Union of Certain Commodities and Products Associated with Deforestation and Forest Degradation and Repealing Regulation (EU) No 995/2010 (Text with EEA Relevance), 2023)

Besides it might violate the MFN Treatment, and this regulation potentially violates the National Treatment obligation. Article III: 4 GATT *inter alia* obliges WTO members to treat their imported products from other members no less favorably than that accorded to like products of national origin. (Nwoke, 2020) The EU Commission Working Document Impact Assessment for the EU DFR states that the EU DFR is potentially implemented through mitigation measures by replacing palm oil (one of the covered commodities) with other vegetable oils that are not covered under this measure if the importation of palm oil consists an element of deforestation and forest degradation. (The European Commission, 2021) The risk mitigation process explained above might impose a discriminative practice in the form of the violation of national treatment. This is because the replacement of palm oil with rapeseed oil will impair the EU trade relations with its palm oil-producing partners such as Indonesia and Malaysia. (Hutt, 2022)

The EU DFR might also reflect the imposition of quantitative restrictions prohibited under the WTO rules on market access. (Maciel & Bock, 2020) Article 3 of the EU DFR states that the relevant commodities and products shall not to placed, made available on the EU market, or exported unless they are deforestation-free, they have been produced following the relevant legislation of the producing country, and they are covered by a due diligence statement. (Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the Making Available on the Union Market and the Export from the Union of Certain Commodities and Products Associated with Deforestation and Forest Degradation and Repealing Regulation (EU) No 995/2010 (Text with EEA Relevance), 2023) This kind of measure is strictly prohibited under Article XI: 1 GATT stating that no prohibitions or restrictions through quotas or other measures (including import or export ban) shall be maintained by WTO members on the importation of any product of other members. (Dewi & Azzahra, 2022) Therefore, not only that the EU DFR potentially violates the rules on non-discrimination, but it also potentially violates the rules on non-discrimination.

A Critical Analysis of the EU Deforestation Free Regulation according to the Agreement on Technical Barriers to Trade

The TBT Agreement is an international agreement responding to two policy considerations. (Koul, 2018) The first consideration is technical regulations and standards consisting of packaging marketing, labeling requirements, and procedures for testing and certifying compliance with those regulations and standards which should not create unnecessary barriers to international trade. (Koul, 2018) The second consideration is the obligation of the WTO members to protect their national security, prevent deceptive practices, and protect human health or safety, animal or plant life or health, and the environment. (Koul, 2018) This agreement constitutes how the implementation of technical regulations, standards, and procedures for conformity assessment shall be applied in a non-discriminative manner. (Koul, 2018) The relation between this agreement and the EU DFR is explained herein.

There are three elements in the EU DFR which relates to the TBT Agreement obligations. Those elements are mentioned herein: 1.) The statement and the obligation of due diligence under Articles 3 and 4 EU DFR; 2.) The three steps procedures consisting information gathering, risk assessment, and risk mitigation under Articles 9, 10, and 11 EU DFR; and 3.) The country benchmarking under Article 29 of the EU DFR. (Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the Making Available on the

Union Market and the Export from the Union of Certain Commodities and Products Associated with Deforestation and Forest Degradation and Repealing Regulation (EU) No 995/2010 (Text with EEA Relevance), 2023) This article emphasizes the fact that the EU DFR is a technical regulation mentioned and defined in Annexes 1.1. of the TBT Agreement. (*WTO | Legal Texts - Marrakesh Agreement*, n.d.-c) It *inter alia* states that a technical regulation is a document that constitutes product characteristics or their related processes and production methods, which may also include symbols, packaging, marking, or labeling requirements which are applied to a product, process, or production method. (*WTO | Legal Texts - Marrakesh Agreement*, n.d.-c)

The obligation of due diligence under Article 4.1. of the EU DFR is delegated to the regulation's operator. This process shall be conducted through information gathering under Article 8 of the regulation. Article 2.15 EU DFR states that an operator is a natural or legal person who places relevant products on the market or who exports them in the course of commercial activity. Besides obliging the due diligence by the operator, Article 3 of this regulation also obliges the producing country's producers or traders to attach their due diligence statement. (Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the Making Available on the Union Market and the Export from the Union of Certain Commodities and Products Associated with Deforestation and Forest Degradation and Repealing Regulation (EU) No 995/2010 (Text with EEA Relevance), 2023)

To understand whether this due diligence is a necessary barrier or applied arbitrarily, this discussion expresses the obligation of information gathering under Article 9 EU DFR. Paragraph 1 of this article states that operators shall collect information, documents, and data which demonstrate that the relevant products comply with the requirements mentioned in Article 3. This information-gathering process shall be conducted before the import or export of the relevant products. From Article 10.1. EU DFR, it can be understood that the gathered information will be used by the operator to conduct a risk assessment to determine whether such a product can be placed in the market or exported. No products shall be placed on the market or exported from the market, except where the risk assessment reveals that the relevant products complied with the requirements in Article 3. (Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the Making Available on the Union Market and the Export from the Union of Certain Commodities and Products Associated with Deforestation and Forest Degradation and Repealing Regulation (EU) No 995/2010 (Text with EEA Relevance), 2023)

Article 10 of the EU DFR states that several elements of the producing country shall be taken into account by the operators in conducting the assessment process. Those elements *inter alia* consist of the presence of forest, the presence of indigenous people and the settlement process with them, information concerning deforestation and forest degradation, violations of international human rights, the supply chain complexity and the stage processing of the relevant products, and any relevant information which indicates the non-compliance of the products. Article 11.1 of the EU DFR furthermore states that the operators shall adopt their risk mitigation procedures and measures that are adequate to achieve no or only a negligible risk in a case where one of those two situations do not occur. Those procedures are conducted by requesting additional information, data, or documents, carrying out independent surveys or audits, and taking other measures. Paragraph 2 of Article 11 EU DFR furthermore states that the operators shall also adopt their policies, controls, and procedures to conduct their risk mitigation process. (Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the Making Available on the Union Market and the Export from the Union of Certain Commodities and Products Associated with Deforestation and Forest Degradation and Repealing Regulation (EU) No 995/2010 (Text with EEA Relevance), 2023)

By taking into account the environment, indigenous people, and human rights protection, the EU DFR can be considered a necessary technical regulation to fulfill the legitimate objective in the form of environmental protection. This statement is in line with Article 2.2 TBT Agreement. (*WTO | Legal Texts - Marrakesh Agreement*, n.d.-c) The combat on climate change as a basis to invoke a technical regulation is also constituted under Article 2.5 TBT Agreement. It states that the preparation, adoption, or application of a technical

regulation in achieving its objectives shall be rebuttable presumed not to create an unnecessary obstacle to international trade. (*WTO / Legal Texts - Marrakesh Agreement*, n.d.-c) This article states that despite the preparation, adoption, and application of the EU DFR being in line with its legitimate objective which is to overcome deforestation which plays an important part in carbon reduction, EU DFR may still be perceived as an unnecessary obstacle to the international trade unless EU may justify its basis and means in invoking this trade barrier.

The EU DFR also potentially violates Article 2.1 TBT Agreement which obliges WTO members to apply their technical barrier in a non-discriminative manner. (*WTO / Legal Texts - Marrakesh Agreement*, n.d.-c) Article 29.1 EU DFR states that countries having a trade relationship with the Union will be benchmarked as a country with a high risk, low risk, and standard risk which do not fall in either the category of high risk or low risk. (Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the Making Available on the Union Market and the Export from the Union of Certain Commodities and Products Associated with Deforestation and Forest Degradation and Repealing Regulation (EU) No 995/2010 (Text with EEA Relevance), 2023) Once this benchmarking rules is effectively applicable, the EU DFR may also be considered as a discriminative technical regulation prohibited under Article 2.1. TBT Agreement. According to the latest meeting concerning the EU DFR, the EU Commission is currently representing the Union to consult with the Union's trade partner to maintain their cooperation despite the invocation of this country benchmarking. (*Relay 17th Meeting of the Multi-Stakeholder Platform on Protecting and Restoring the World's Forest (EUDR)*, 2023)

Potential EU Defence in Invoking the EU DFR and How EU Trade Partners shall respond to This EU Unilateral Action in An Amicable Manner

The implementation of the WTO Rules might not always be in harmony with the national interest of its members and the obligation of that members to comply with other obligations constituted under international environmental law. This premise is in line with Bossche and Zdouc's opinion by stating that Article XX GATT is one of the WTO Rules which is meant to balance the free trade obligations with the societal and other interests owned by every WTO member. (Bossche & Zdouc, 2022) From this article, it can be understood that the EU shall not invoke measures arbitrarily or unjustifiably, or measures that constitute disguised restrictions on international trade. The EU however has its right not to be prevented by other WTO members to adopt or enforce any measures which *inter alia* necessary to protect public morals (Article XX(a) GATT), and necessary to protect human, animal, or plant life or health (Article XX(b) GATT). (*WTO / Legal Texts - Marrakesh Agreement*, n.d.-b) The Appellate Body on the *US Gasoline* states that the implementation of this article shall be conducted through a two-tier test by expressing one of the provisional justifications (in this case letter (g) concerning the conservation of exhaustible resources) and then it shall be followed by expressing further appraisal under the introductory clause of Article XX GATT. (*WTO / Dispute Settlement - the Disputes - DS2*, n.d.)

The public moral exception can be implemented in defending the application of the EU DFR since this regulation applies to human rights protection as one of the bases to conduct the risk assessment. Furthermore, the protection of indigenous people's rights is another reason why this regulation is justified under the public moral clause. Human, animal, or plant life and health protection is justifiable since this regulation is implemented to combat deforestation and forest degradation which may threaten the forest biodiversity. The EU DFR therefore not only in line with the Paris Agreement 2015 and other climate change treaties, but it is also in line with the United Nations Convention on Biological Diversity. Two of the purposes of this convention are to anticipate, prevent and attack the causes of significant reduction or loss of biological diversity, and to conserve and sustainably use biological diversity for the benefit of present and future generations. (United Nations, 2022)

The implementation of Article XX GATT is prominently conducted through the WTO dispute settlement body. Therefore, this article justifies the basis of public morals, public health, and public safety according to the WTO law cases herein, before explaining the best solution in responding to the EU DFR. The EU invoked the public morals justification in the *DS 400 – EC Seal Products* by stating that the measures invoked in banning the importation of seal products were adopted to protect their Inuit or indigenous communities. (Babu, 2018) Both the panel and Appellate Body of this case however state those measures are not justifiable to be invoked under the public moral basis. (*WTO / Dispute Settlement - the Disputes - DS400*, n.d.) Since the defense based on the public moral clause has a high threshold (Babu, 2018), the EU may also invoke its defense under the public health and the public safety clause under the *DS 58 - US Shrimp* and *DS 381 – US Tuna* explained herein.

In the *US Shrimp* panel, the United States expressed that it banned the importation of shrimp from India, Malaysia, Pakistan, and Thailand to conduct its obligation under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) to protect green turtle under jeopardy due to the international trade. (*WTO / Dispute Settlement - the Disputes - DS58*, n.d., p. 58) Both the panel and the Appellate Body of this case rejected the United States' defense not because it implemented its obligation under CITES, but because the United States did not try its best to cooperate with the complainant states before the settlement of this dispute since both CITES and WTO Agreement obliges international cooperations. (*WTO / Dispute Settlement - the Disputes - DS58*, n.d., p. 58) Meanwhile, from the case of *US Tuna*, it can be understood that the technical regulations invoked by the United States on Tuna importation are justifiable based on the TBT Agreement. (*WTO / Dispute Settlement - DS381*, n.d.) That technical regulation applied the per set method which may describe the safety of dolphins in tuna fishing. The pre-set method is a risk-based approach applicable to the importation of fish to protect dolphins as an endangered species. (*WTO / Dispute Settlement - DS381*, n.d., p. 381)

Those cases and the previous discussions have explained that the EU has a 50-50 chance of violating the WTO rules in implementing the EU DFR. This number is presented since the EU DFR can be perceived as a justifiable technical barrier based on the finding on the *US Tuna*. But it may also be perceived as an arbitrary manner or not necessary to protect the public moral in the form of human rights and indigenous people's rights based on the finding on the *EC Seal*. By referring to the *US Shrimp* case, this article suggested that the EU shall conduct international cooperation with its trade partners to ensure that the EU DFR is implemented in good faith. These statements are in line with Pound's doctrine concerning the law as a tool of social engineering. He states that the purpose of the law is to achieve balance by reconciling the conflict of interests on matters which can be compared. (Gochhayat, 2010)

The tension that occurs due to the implementation of the WTO law and the environmental law can be perceived as a conflict of interest due to the open texture of those legal norms. This conflict of interests shall be responded to by implementing the social engineering concept by Pound. The social engineering concept does not necessarily have to be implemented through the dispute settlement mechanism or litigations. This statement is based on Kusumaatmadja's point of view in modifying Pound's doctrine by stating that one of the means to implement the law (including international law) is by utilizing it for community renewal. (Herlindah & Darmawan, 2022)

Article 30.1 EU DFR obliges the European Commission on the behalf of EU to cooperate with producer countries having a concern with this regulation. From this article, it can also be understood that high-risk countries according to Article 29 may provide this cooperation as a mechanism to prevent a dispute through WTO under the essence of addressing the root cause of deforestation and forest degradation. (Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the Making Available on the Union Market and the Export from the Union of Certain Commodities and Products Associated with Deforestation and Forest Degradation and Repealing Regulation (EU) No 995/2010 (Text with EEA Relevance), 2023) Based on the meeting on June 30th 2023, the European Commission has provided the working group on the traceability and the working group of smallholders which can be joined by the producer countries to

implement Article 30 EU DFR. (*Relay 17th Meeting of the Multi-Stakeholder Platform on Protecting and Restoring the World's Forest (EUDR)*, 2023) Therefore, a country potentially identified as high risk such as Indonesia, Malaysia, Brazil, and Ivory Coast shall participate in this working group instead of addressing this issue to the WTO dispute settlement body *prima facie*.

The advice offered above is in line with Argent's opinion stating that international law shall be perceived as a hope to create peace. (Argent, 2021c) One of the ways to achieve peace is through international cooperation. (Argent, 2021a) Therefore, a settlement of a dispute through the WTO is not the most effective means to address this deforestation. This premise is carefully addressed based on stipulations under Article 3(a), (b), and (c) EU DFR. *First*, the EU only imposes both export and import ban on covered products exported to a third country or imported from a third country if they are deforestation-free. This notion has a noble cause in addressing deforestation as one of the most threatening phenomena which contribute to climate change which may threaten the life of future generations. *Second*, the EU imposes an export or import ban on covered products that do not comply with the relevant legislation of the country of production. This stipulation directly affects the third countries' producers and traders to comply with their regulation which is in line with the rule of law principle. *Third*, this export and import ban measure will only be invoked on the covered products which are not covered by a due diligence statement. As explained in the second discussion, this due diligence statement obligation will only violate the WTO rules if it is arbitrarily applied or if it is applied in a discriminative manner.

However, if the EU does not implement this regulation in good faith, EU trade partners may of course address this issue to the WTO Dispute Settlement Body (DSB). This article thereby perceives DSB as the alternative in addressing this issue. This notion is addressed based on the fact that Article 30 EU DFR can be perceived as a *de jure* good faith of the Union to maintain its cooperation with its trade partners. But to know whether this stipulation reflects a *de facto* good faith, one shall observe whether the implementation of the EU DFR is applied in a non-discriminative and transparent manner or not.

Conclusion

This article expressed that the EU DFR may potentially violate the WTO rules constituted under GATT and the TBT Agreement. However, the EU DFR shall not be perceived as an issue that shall be addressed through the WTO dispute settlement system in the first place. This statement is based on the fact that the European Commission is mandated to facilitate a discussion forum in the form of working groups that can be joined by its trade partners or other WTO members. Therefore, this article finds the notion that the conflict of interest due to the implementation of the WTO law and the international environmental law can be addressed not only by the dispute settlement system but also through amicable international cooperation having an objective in the form of community renewal.

Acknowledgments

The author would like to thank Mr. Erry Bundjamin, the founding partner of Bundjamin & Partners Law Office as the advisor of this research article. Furthermore, the author also thanked Mr. Adhindra Kurnianto Anggoro, a partner in the firm, as the legal writing mentor of the author. These acknowledgments are given to both mentors as the junior associate lawyer in Bundjamin & Partners Law Office, an Indonesian premier firm in the area of international trade law practice. This article was not written based on any works conducted by the firm in providing advice for its clients or in representing its clients in ongoing cases.

References

- Ammirudin, & Asikin, Z. (2018). *Pengantar Metode Penelitian Hukum*. Raja Grafindo Persada.
- Argent, P. d'. (2021a). International Law Textbook: Claiming Responsibility. UC Louvain & edX.
- Argent, P. d'. (2021b). International Law Textbook: Making International Law Part I. UC Louvain & edX.
- Argent, P. d'. (2021c). International Law: Upholding Peace. UC Louvain & edX.
- Babu, R. (2018). WTO and The Protection of Public Morals (SSRN Scholarly Paper 3256707).
<https://papers.ssrn.com/abstract=3256707>
- Balogh, J. M., & Jámbor, A. (2020). The Environmental Impacts of Agricultural Trade: A Systematic Literature Review. *Sustainability*, 12(3), 1152. <https://doi.org/10.3390/su12031152>
- Balogh, J. M., & Mizik, T. (2021). Trade–Climate Nexus: A Systematic Review of The Literature. *Economies*, 9(3), Article 3. <https://doi.org/10.3390/economies9030099>
- Beshkardana, P. A., Katayoon. (2021). The Limits of Transparency: China, The United States, and The World Trade Organization. In *Cultures of Transparency*. Routledge.
- Bose, B. P., Dhar, M., & Ghosh, D. (2022). Stockholm Conference to Kyoto Protocol – A Review of Climate Change Mitigation Initiatives. *International Journal of Earth Sciences Knowledge and Applications*, 4(2), Article 2.
- Bossche, P. V. den, & Zdouc, W. (2022). *The Law and Policy of The World Trade Organization: Text, Cases, and Materials (Fifth Edition)*. Cambridge University Press.
- Chen, Y. (2021). Reconciling Common but Differentiated Responsibilities Principle and No More Favorable Treatment Principle in Regulating Greenhouse Gas Emissions from International Shipping. *Marine Policy*, 123, 104317. <https://doi.org/10.1016/j.marpol.2020.104317>
- Dewi, Y., & Azzahra, M. J. (2022). Re-examining Indonesia's Nickel Export Ban: Does It Violate The Prohibition to Quantitative Restriction? *Padjadjaran Journal of International Law*, 6(2), Article 2. <https://doi.org/10.23920/pjil.v6i2.797>
- Do Your Goods Comply with The Mandatory Due Diligence Obligations in The New EU Deforestation Regulation 2023/1115? (2023, June 20). <https://www.twobirds.com/en/insights/2023/global/do-your-goods-comply-with-the-mandatory-due-diligence-obligations>
- Regulation (EU) 2023/1115 of The European Parliament and of The Council of 31 May 2023 on The Making Available on The Union Market and The Export from The Union of Certain Commodities and Products Associated with Deforestation and Forest Degradation and Repealing Regulation (EU) No 995/2010 (Text with EEA relevance), 150 OJ L (2023). <http://data.europa.eu/eli/reg/2023/1115/oj/eng>
- Gochhayat, S. A. (2010). "Social Engineering by Roscoe Pound": Issues in Legal and Political Philosophy (SSRN Scholarly Paper 1742165). <https://doi.org/10.2139/ssrn.1742165>
- Hainsch, K., Löffler, K., Burandt, T., Auer, H., Crespo Del Granado, P., Piscicella, P., & Zwickl-Bernhard, S. (2022). Energy Transition Scenarios: What Policies, Societal Attitudes, and Technology Developments Will Realize The EU Green Deal? *Energy*, 239, 122067. <https://doi.org/10.1016/j.energy.2021.122067>
- Hargita, Y., Giessen, L., & Günter, S. (2020). Similarities and Differences between International REDD+ and Transnational Deforestation-Free Supply Chain Initiatives—A Review. *Sustainability*, 12(3), Article 3. <https://doi.org/10.3390/su12030896>
- Hasan, A. K. M. R., & Nasrin, K. (2021). Reforming The Dispute Settlement Mechanism of WTO: Challenges and Prospects (SSRN Scholarly Paper 4175796). <https://papers.ssrn.com/abstract=4175796>
- Herlindah, & Darmawan, Y. (2022). Development Legal Theory and Progressive Legal Theory: A Review, In *Indonesia's Contemporary Legal Reform*. *Peradaban Journal of Law and Society*, 1(1), Article 1. <https://doi.org/10.59001/pjls.v1i1.22>
- Hutt, D. (2022, July 22). What are The EU's Options in The palm Oil Standoff? – DW – 07/22/2022. *Dw.Com*. <https://www.dw.com/en/what-are-eus-options-in-palm-oil-row-with-malaysia-and-indonesia/a-62564129>
- Khademi Adel, T., Modir, M., & Ravanshadnia, M. (2021). An analytical review of construction law research. *Engineering, Construction, and Architectural Management*, 29(5), 1931–1945. <https://doi.org/10.1108/ECAM-05-2020-0306>

- Koul, A. K. (2018). *Guide to the WTO and GATT Economics, Law and Politics* (6th Edition). Springer.
- Lopez, J. G. V., & Rojas, J. J. B. (2019). Virtual Protectionism: Overview of MFN Tariffs and Bound Tariffs in South America. *Journal of International Studies*, 12(4), 63–78.
- Maciel, C., & Bock, B. (2020). Animal Welfare Measures and The WTO Post-EC - Seal Products Case: A renewed Debate and Research Agenda. *The Economics of Farm Animal Welfare: Theory, Evidence and Policy*, 156–172. <https://doi.org/10.1079/9781786392312.0156>
- Mohapatra, C. K., & Mishra, A. (2020). World Trade Organization: An Overview. *PalArch's Journal of Archaeology of Egypt / Egyptology*, 17(6), Article 6.
- Nevalainen, A. (2021). EU's Carbon Border Adjustment Mechanism – Its Purpose and Effects on Carbon Leakage. <https://aaltodoc.aalto.fi/443/handle/123456789/107496>
- Norouzi, N., & Fani, M. (2022). Globalization and The Oil Market: An Overview on Considering Petroleum as A Trade Commodity. *Journal of Energy Management and Technology*, 6(1), 54–62. <https://doi.org/10.22109/jemt.2021.276311.1285>
- Nwoke, U. (2020). Imposition of Trade Tariffs by the USA on China: Implications for the WTO and International Trade Law. *Journal of International Trade Law and Policy*, 19(2), 69–84. <https://doi.org/10.1108/JITLP-01-2019-0003>
- Radi, Y. (2013). The “Human Nature” of International Investment Law (SSRN Scholarly Paper 2278857). <https://papers.ssrn.com/abstract=2278857>
- Relay 17th Meeting of The Multi-stakeholder Platform on Protecting and Restoring the World's Forest (EUDR). (2023). *Direktorat Perundingan Organisasi Perdagangan Dunia Kementerian Perdagangan Republik Indonesia*.
- Simbolon, P. G. M., & Damayanti, A. (2023). Indonesian Trade Policy in Adjusting the 2020 WTO's Trade Policy Review. *Jurnal Hubungan Internasional*, 12(1), 76–87. <https://doi.org/10.18196/jhi.v12i1.18038>
- Sood, M. (2018). *Hukum Perdagangan Internasional*. Raja Grafindo Persada.
- The European Commission. (2021, November 19). Commission Staff Working Document Impact Assessment Report minimizing the risk of deforestation and forest degradation associated with products placed on the EU market Accompanying the document Proposal for a Regulation of The European Parliament and of The Council on the making available on the Union market as well as export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010—Publications Office of the EU. <https://op.europa.eu/en/publication-detail/-/publication/43c4301d-4943-11ec-91ac-01aa75ed71a1/language-en>
- The Paris Agreement | UNFCCC. (n.d.). Retrieved July 8, 2023, from <https://unfccc.int/process-and-meetings/the-paris-agreement>
- United Nations. (2022, December 16). The Convention on Biological Diversity. Secretariat of the Convention on Biological Diversity. <https://www.cbd.int/convention/>
- WTO | dispute settlement - DS381: United States — Measures Concerning the Importation, Marketing, and Sale of Tuna and Tuna Products. (n.d.). Retrieved July 11, 2023, from https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds381_e.htm
- WTO | dispute settlement—The disputes—DS2. (n.d.). Retrieved July 11, 2023, from https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds2_e.htm
- WTO | dispute settlement—The disputes—DS58. (n.d.). Retrieved July 11, 2023, from https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds58_e.htm
- WTO | dispute settlement—The disputes—DS400. (n.d.). Retrieved July 11, 2023, from https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds400_e.htm
- WTO | legal texts—Marrakesh agreement. (n.d.-a). Retrieved July 8, 2023, from https://www.wto.org/english/docs_e/legal_e/04-wto_e.htm
- WTO | legal texts—Marrakesh agreement. (n.d.-b). Retrieved July 9, 2023, from https://www.wto.org/english/docs_e/legal_e/06-gatt_e.htm
- WTO | legal texts—Marrakesh Agreement. (n.d.-c). Retrieved July 10, 2023, from https://www.wto.org/english/docs_e/legal_e/17-tbt_e.htm

Authors Biography

Putu George Matthew Simbolon is a junior associate lawyer at Bundjamin & Partners Law Office. He practices trade remedies and other related WTO legal issues. He is also an active graduate student at the Universitas Indonesia Faculty of Law. During his undergraduate study at Universitas Kristen Indonesia, Matthew won many national and international competitions in legal writing, including the ALSA Local Chapter Universitas Gadjah Mada Legal Opinion Competition 2020 concerning international trade law. Matthew can be contacted via: c.simbolon9@gmail.com.