

# Extraterritorial Act versus the Indigenous People Protection: An Analysis of the European Union Deforestation-Free Regulation

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## Abstract

At first glance, indigenous people and international trade appear to be two separate issues. However, this perception does not apply in the case of European Regulation 2023/1115. This study aims to provide an understanding of how Indonesia should respond to the EU DFR, which has affected Indonesia's national interests in protecting indigenous people. This study applied a normative method through doctrinal and conceptual approaches to achieve the objective. The study covers two main discussions. The first explains how due diligence under the EU DFR has indirectly pushed Indonesia to become an EU trading partner and provide more excellent protection for local indigenous people to gain access to the Union's market for its agricultural products. The second discussion explains how Indonesia should respond to this regulation by considering protecting its indigenous people and ensuring the availability of market access for Indonesian companies and traders. The first discussion states that the EU DFR will prohibit the export and import of agricultural products if the trading partner's company does not provide adequate legal protection for its indigenous people. The second discussion suggests that Indonesia must better protect its indigenous people to secure market access to the European Union. However, if the EU regulator acts arbitrarily, Indonesia reserves the right to address these issues through the available means of trade dispute settlement under international law.

**Keywords:** deforestation, indigenous people, World Trade Organization.

## A. Introduction

Protecting indigenous people has always been a part of Indonesia's mission to protect the entire nation. Article 18B, paragraph 2 of the Indonesian Constitution, *inter alia*, states that the state recognizes indigenous people and their traditional rights.<sup>1</sup> However, widespread violations of indigenous people's rights in Indonesia

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<sup>1</sup> Muh Zulkifli Muhdar and Jasmaniar Jasmaniar, "Hak Masyarakat Adat: Studi Perbandingan Deklarasi PBB Tentang Hak-Hak Masyarakat Adat Dan Pasal 18 B Ayat 2 UUD NRI Tahun 1945," *Indonesian Journal of Criminal Law* 3, no. 2 (September 20, 2021): 119–34.

have occurred on a large scale, including the arbitrary deprivation of the indigenous people's rights over their forest without their consent and the discriminative treatment by the public apparatus by not providing adequate compensation during the takeover process.<sup>2</sup> Septya and Fatma explain that the massive deforestation activities in Indonesia are interrelated with the actual protection that the indigenous people deserve.<sup>3</sup> Referring to the mandate of Article 18B paragraph 2, there is a significant gap between the protection the indigenous people deserve to live in and around their forest and the treatment they receive from the law enforcers and cooperation.<sup>4</sup>

The protection of indigenous people has traditionally been a domestic legal issue. However, applying an extraterritorial regulation of another state indirectly puts peer pressure on this national issue.<sup>5</sup> On May 31, 2023, the European Union (EU) issued Regulation Number 2023/1115, also known as the EU Deforestation-Free Regulation (EU DFR).<sup>6</sup> This regulation prohibits the placement of products consisting of wood, cattle, cocoa, coffee, rubber, palm oil, and soya in the EU market or for export from the EU market unless they are free from deforestation.<sup>7</sup> The EU DFR generally imposes a due diligence requirement on EU operators, natural or legal persons importing or exporting goods from the EU market, which should.<sup>8</sup> Since the non-compliance of a third country in protecting its indigenous people's rights may cause the EU to ban its import from or export to the country, implementing this regulation will put pressure on countries engaged in trade relations with the European Union.

Adopting and implementing the EU DFR is one of the EU's methods to uphold its commitment, or its Nationally Determined Contribution (NDC), under the Paris Agreement.<sup>9</sup> The EU's NDC is implemented through its policy package known as the Fit for 55, which targets the reduction of the Union's carbon emission by at least 55%

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<sup>2</sup> Septya and Fatma, "Kedudukan Dan Perlindungan Masyarakat Adat Dalam Mendiami Hutan Adat", *Legislatif* 4, no. 1 (2020): 79–91.

<sup>3</sup> Septya and Fatma.

<sup>4</sup> Dinah Shelton, *International Environmental Law: 3rd Edition* (BRILL, 2021).

<sup>5</sup> Nico Krisch, "Jurisdiction Unbound: (Extra)Territorial Regulation as Global Governance," *European Journal of International Law* 33, no. 2 (May 1, 2022): 481–514, <https://doi.org/10.1093/ejil/chac028>.

<sup>6</sup> "EU Paves Way for Landmark Deforestation-Free Products Regulation | News | SDG Knowledge Hub | IISD," accessed on July 10, 2023, <https://sdg.iisd.org/news/eu-paves-way-for-landmark-deforestation-free-products-regulation/>.

<sup>7</sup> European Parliament, "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>.

<sup>8</sup> Laila Berning and Metodii Sotirov, "Hardening Corporate Accountability in Commodity Supply Chains under the European Union Deforestation Regulation," *Regulation & Governance* n/a, no. n/a (2023), <https://doi.org/10.1111/rego.12540>.

<sup>9</sup> The European Commission, "Paris Agreement," 2023, accessed on July 10, 2023, [https://climate.ec.europa.eu/eu-action/international-action-climate-change/climate-negotiations/paris-agreement\\_en](https://climate.ec.europa.eu/eu-action/international-action-climate-change/climate-negotiations/paris-agreement_en).

by 2030 from 1990 levels.<sup>10</sup> The EU DFR is not part of the Fit for 55, yet it is part of the European Green Deal, a more extensive policy package supporting the Fit for 55 and aiming to achieve net zero emissions of greenhouse gases by 2050.<sup>11</sup>

In addition to implementing the Paris Agreement, the EU DFR is a regulation adopted to implement the Reducing Emission from Deforestation and Forest Degradation set forth under the United Nations Framework Convention on Climate Change (UNFCCC).<sup>12</sup> This commitment is implemented to enforce the UNFCCC obligations to its member states to combat climate change, which is also driven by deforestation and forest degradation.<sup>13</sup> Furthermore, the EU DFR is also a unilateral act that implements Article 5 paragraph (2) of the Paris Agreement, which requires its members to combat deforestation and forest degradation.<sup>14</sup>

The problem that may arise once this regulation comes into force (18 months from June 2023) is that Indonesia's palm oil, wood, and coffee producers' market access to the European Union could be blocked due to Indonesia's lack of action in giving appropriate protection to its indigenous people. The EU is Indonesia's third largest trade partner and, as such, makes a significant contribution to Indonesia's income.<sup>15</sup> Indonesia's dependence on the EU has, of course, forced them to comply with this regulation and cooperate with the Union on the implementation of this regulation. Therefore, the existence of the EU DFR and its due diligence arrangement is a multi-dimensional issue, and both issues should be responded to through the implementation of Indonesian national law and the rules of international law *in concreto* international trade law and international environmental law.

The importance of this study lies in its discussion of how Indonesia can improve the protection of its indigenous people while ensuring continued access to the EU market, as these two issues are interlinked and must be addressed simultaneously. Therefore, the study offers a two-point discussion. The first discussion analyzed how the due diligence regime under the EU DFR influences Indonesia's arrangement and practice in protecting its indigenous people, while the second discussion explored how the EU DFR should be responded to as a regulation that pushed Indonesia to provide better protection to its indigenous people and how Indonesia should respond to this regulation to guarantee the access of its producers to the European Union market.

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<sup>10</sup> The European Commission, "Paris Agreement,".

<sup>11</sup> The European Commission, "A European Green Deal," July 14, 2021, [https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal\\_en](https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal_en).

<sup>12</sup> Yvonne Hargita, Lukas Giessen, and Sven Günter, "Similarities and Differences between International REDD+ and Transnational Deforestation-Free Supply Chain Initiatives—A Review," *Sustainability* 12, no. 3 (January 2020): 896, <https://doi.org/10.3390/su12030896>.

<sup>13</sup> Hargita, Giessen, and Günter.

<sup>14</sup> "The Paris Agreement | UNFCCC," accessed on July 8, 2023, <https://unfccc.int/process-and-meetings/the-paris-agreement>.

<sup>15</sup> Kemlu RI, "Kedutaan Besar Republik Indonesia di Brussel merangkap Luksemburg & Uni Eropa Belgia," Kementerian Luar Negeri Republik Indonesia, accessed on July 24, 2023, <https://kemlu.go.id/brussels/id>.

The first previous study is from Jamin, Hermawan, and Mulyanto. Their study argues that although the Constitutional Court Decision Number 35/PUU-X/2012 ruled indigenous forest as a non-state forest, recognizing indigenous people in Indonesia is not without flaws.<sup>16</sup> The study compared the Waitangi Treaty between the New Zealand Government and its indigenous people, the Maori Community. This treaty constitutes how the Maoris contribute to New Zealand's economy by preserving their customary values concerning the environment and natural resources.<sup>17</sup> They argue that the model adopted in the Waitangi Treaty will be difficult to transpose in Indonesia since Indonesia consists of thousands of indigenous peoples. However, they agree with how this previous research expresses the importance of simultaneously achieving economic development and indigenous people recognition. Such affirmation is implemented by explaining how Indonesian exporters should comply with EU DFR in the first place.

The second study is about indigenous peoples by Zhunusova et al. Just like the previous study, they also discuss how the EU DFR may push EU trade partners to improve their protection of minority groups such as indigenous people and smallholders.<sup>18</sup> However, they focused their scope on protecting indigenous people, unlike the previous study, which focused on the minority groups mentioned in Article 30, paragraph 3 of EU DFR.<sup>19</sup>

The third study is from Astomo and Asrullah. They emphasize the importance of the Constitutional Court Decision Number 35/PUU-X/2012, which rules the indigenous forest as an area not under state control.<sup>20</sup> They also emphasize the rights of indigenous peoples to have their *adat* law recognized, to receive compensation due to their segregated area, and to utilize natural resources, especially cattle herding.<sup>21</sup> The EU DFR also recognizes these rights of indigenous people, which motivates the Union to regulate the trade of forestry products, including cattle, as forestry products. Following these previous research articles, this paper expresses that Indonesian exporters may victor the Constitutional Court Decision by producing their products in compliance with national forestry and environmental laws.

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<sup>16</sup> Mohamad Jamin, Sapto Hermawan, and Mulyanto Mulyanto, "A Discourse of the Indigenous Peoples' Rights and Their Contributions to the Indonesian Development: Lessons Learned from New Zealand," *PADJADJARAN JURNAL ILMU HUKUM (JOURNAL OF LAW)* 10, no. 3 (December 18, 2023): 346–66. <https://doi.org/10.22304/pjih.v10n3.a3>.

<sup>17</sup> Jamin, Hermawan, and Mulyanto.

<sup>18</sup> Eliza Zhunusova et al., "Potential Impacts of the Proposed EU Regulation on Deforestation-Free Supply Chains on Smallholders, Indigenous Peoples, and Local Communities in Producer Countries Outside the EU," *Forest Policy and Economics* 143 (October 1, 2022): 102817, <https://doi.org/10.1016/j.forpol.2022.102817>.

<sup>19</sup> Zhunusova et al.

<sup>20</sup> Putera Astomo and Asrullah Asrullah, "Legal Protection for The Indigenous Law Communities and Their Traditional Rights Based on the Verdict of the Constitutional Court," *PADJADJARAN JURNAL ILMU HUKUM (JOURNAL OF LAW)* 6, no. 1 (April 29, 2019): 90–108.

<sup>21</sup> Astomo and Asrullah.

## **B. The Due Diligence Arrangement under EU DFR and Its Influence on Indonesia in Protecting Its Indigenous People**

### **1. The EU DFR Obligations on EU Operators and Traders and the Extraterritorial Effect on Indonesia National Legislations**

The due diligence arrangement under the EU DFR is implemented to prevent forestry commodities from being commercialized in the EU if their production involves any deforestation, whether legal or illegal, under the laws of the country of production.<sup>22</sup> This statement is in line with Article 3 of EU DFR, which constitutes a deforestation-free and the rule of law as separate requirements that EU operators and country-of-origin producers should comply with simultaneously.<sup>23</sup> Furthermore, the approach implemented by the EU DFR can be perceived as an integrated method that addresses environmental management, environmental protection, and trade issues.<sup>24</sup>

Although qualified as an internal regulation, the EU DFR has an extraterritorial effect on the EU's trading partners. By identifying Article 3 letter (b) of this regulation, it can be understood that the EU DFR does not only stipulate a set of obligations for EU operators and traders (importers)<sup>25</sup> but also stipulates obligations for the exporters and/or producers in the country of production, to comply with their country's relevant legislation.<sup>26</sup> Van Damme explains that this relevant legislation includes the domestic regulations of the producers' country concerning land use rights, environmental protection, forest-related rules, human rights, and the principle of free, prior, and informed consent on the rights of indigenous people.<sup>27</sup> The arrangement under this article shows that the exporters in the country of production should also comply with their national legislations concerning land use, forestry, and, most importantly, the protection of indigenous people.

The article notes that the EU does not provide a clear definition concerning the producers as mentioned in Article 3 of the regulation, which is supposed to be

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<sup>22</sup> Anouska Perram and Norman Jiwan, "Human Rights Violations Connected with Deforestation – Emerging and Diverging Approaches to Human Rights Due Diligence," *Business and Human Rights Journal* 8, no. 1 (February 2023): 110–14, <https://doi.org/10.1017/bhj.2022.38>.

<sup>23</sup> European Parliament, 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).

<sup>24</sup> Perram and Jiwan, "Human Rights Violations Connected with Deforestation – Emerging and Diverging Approaches to Human Rights Due Diligence."

<sup>25</sup> European Parliament, 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).

<sup>26</sup> European Parliament.

<sup>27</sup> Isabelle Van Damme, "EU Deforestation Regulation for Delivery in Jakarta," in *Focus Group Discussion on the European Union's Deforestation Regulation (EUDR) and Carbon Border Adjustment Mechanism (EU CBAM): Presented Papers*, vol. 01, 01 (Focus Group Discussion on the European Union's Deforestation Regulation (EUDR) and Carbon Border Adjustment Mechanism (EU CBAM), Jakarta: International Research Center on WTO and Anti-Trust Laws, 2023), 1–33.

defined in Article 2 of EU DFR regarding the terms and definitions. This is due to the fundamental nature of EU DFR as an internal regulation. However, Article 2 of the EU DFR defines operators as natural or legal persons who import products to the EU market, and it also defines exporters and producers. By referring to Article 3 paragraph (b), exporters and producers are identified as the natural or legal persons that produce, and export regulated products based on the legislation of their country.

This EU internal regulation is analyzed from the Indonesian perspective through this passage by referring to the Indonesian Law Number 41 of 1999 on Forestry (Forestry Law), the Law Number 39 of 2014 on Plantation (Plantation Law), and the Law Number 5 of 1960 on the Basic Agrarian (Basic Agrarian Law). Considering the EU DFR's objective, which is to combat deforestation and forest degradation while protecting indigenous people, this regulation is related to implementing the Forestry Law. Article 67 of this law recognizes the rights of indigenous people to fulfill their primary needs by exploiting the forest according to the law. Furthermore, Article 69 of the Forestry Law acknowledges the rights of forestry people (the indigenous people) to receive compensation based on the prevailing regulations. Knowing that this regulation is related to the production of forestry products,<sup>28</sup> primarily deriving from woods under Article 1 EU DFR, Indonesian exporters and/or producers should comply with Articles 67 and 69 of Forestry Law.

These articles emphasize the close connection between the production of the commodities under Article 1 EU DFR and the existence of indigenous peoples. In the case of Indonesia, the production of palm oil and wood products is closely related to the rights of indigenous peoples. This connection is presented in the examples of indigenous people cases around Indonesia. The conflicts between palm oil enterprises and indigenous peoples can be seen from the disputes between the Kinipan indigenous people and PT Sawit Mandiri Lestari in Central Kalimantan Regency, the Mpur Kebar, Moi, Iwaro, Moi, Iwaro, Mandobo, and Malind indigenous peoples and PT Bintuni Agro Prima Perkasa in Merauke Regency, and the Lubuk Kilangan indigenous people and PT Semen Padang in West Sumatra (Padang).<sup>29</sup> Meanwhile, the conflict of indigenous peoples with enterprises associated with wood production can be seen from a statement by Lembaga Tumbuh Alami NGO that states the Kerinci indigenous people are in conflict with the local enterprises in

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<sup>28</sup> Gauthier van Thuyne and Matthew Townsend, "EU Agrees on New Deforestation-Free Regulation," Allen Overy, January 18, 2023, <https://www.allenoverly.com/en-gb/global/news-and-insights/publications/eu-agrees-on-new-deforestation-free-regulation>.

<sup>29</sup> Rahmad Hendra, Rosa Agustina, and Ratih Lestari, "The Effects of Conflict and Palm Oil Investment Between Investors and Communities in Indonesia," *International Journal of Environmental, Sustainability, and Social Science* 4, no. 1 (January 31, 2023): 142–52, <https://doi.org/10.38142/ijesss.v4i1.491>.

the Hiang Customary Forest, Kerinci.<sup>30</sup> Furthermore, it is also apparent in the Dayak Iban indigenous people's conflict with the local enterprises on deforestation and wood production.<sup>31</sup>

In consolidating the quoted regulations and cases above, the following are the statistics of indigenous people conflict in Indonesia. These statistics from previous research articles discuss the number of disputes between indigenous peoples with palm oil enterprises gathered from 2019–2021 and classified per Indonesia regions.<sup>32</sup>

**Table I.** The List of Disputes between Indigenous People and Palm Oil Enterprise (2019–2021)

Area	Percentages
Sumatra	61%
Kalimantan	27%
Sulawesi	4%
Unmentioned Area	8%

Since the EU DFR also stipulates the production process of palm oil, Indonesian exporters and/or producers should consider the Plantation Law. Article 12 of the Law obliges the land use for plantation on an indigenous people-owned area to be executed based on the indigenous people's consent. This article also stated that land use for plantations should also be implemented by providing compensation for the indigenous people. Since Indonesian palm oil producers are prominently recognized as a business sector that conflicts with indigenous people,<sup>33</sup> these business actors should comply with Article 12 of the Plantation Law to secure their market access in Europe.

Finally, Article 3 of the EU DFR also indirectly obliges Indonesia's exporters and/or producers to recognize indigenous land rights as stipulated under Article 3 of the Basic Agrarian Law. This article obliges the state to recognize the rights of ancestral land (*hak ulayat*) if such land exists empirically and is in line with the national interest. This article notes that recognizing this right is problematic due to the declarative nature of the *ulayat* rights.

Understanding that the three legislations mentioned above are strongly related to the legality of forestry and plantation producers, the existence of indigenous people is part of the forestry and plantation products supply chain. This point of view

<sup>30</sup> Kazuhiro Harada et al., "The Role of NGOs in Recognition and Sustainable Maintenance of Customary Forests within Indigenous Communities: The Case of Kerinci, Indonesia," *Land Use Policy* 113 (February 1, 2022): 105865, <https://doi.org/10.1016/j.landusepol.2021.105865>.

<sup>31</sup> Sandy Leo et al., "Indigenous Dayak Iban Customary Perspective on Sustainable Forest Management, West Kalimantan, Indonesia," *Biodiversitas* 23 (2022): 424–35, <https://doi.org/10.13057/biodiv/d230144>.

<sup>32</sup> Wieke Herningtyas, "Conflict of Palm Oil Companies with Indigenous People and Forest Surrounding Society," *BHUMI: Jurnal Agraria Dan Pertanahan* 7, no. 2 (December 12, 2021): 199–209, <https://doi.org/10.31292/bhumi.v7i2.504>.

<sup>33</sup> Colin Filer, Sango Mahanty, and Lesley Potter, "The FPIC Principle Meets Land Struggles in Cambodia, Indonesia and Papua New Guinea," *Land* 9, no. 3 (March 2020): 67, <https://doi.org/10.3390/land9030067>.

is adopted from the second previous research, stating that indigenous people often become smallholders who play a crucial role in conserving the forest.<sup>34</sup> Furthermore, Urzedo also expresses how indigenous peoples are part of a supply chain by stressing the enterprises' obligation to restore indigenous land while operating their businesses.<sup>35</sup> Lastly, this stance is adopted by referring to Hailes's explanation, which expresses that industries' consultation with indigenous people is one of the means to ensure that distributive justice is implemented in a supply chain.<sup>36</sup> This article furthermore expresses that the due diligence discussed in the discussion herein is the three steps processes consisting of information gathering, risk assessment, and risk mitigation under Article 8 EU DFR, and not the statement of the due diligence, which the producers of the goods should attach to their products when exporting its goods to EU's market.<sup>37</sup> Therefore, this discussion does not discuss the due diligence statement mentioned in Article 3 EU DFR along with the deforestation-free and the rule of law criteria.<sup>38</sup> This is because Article 3 EU DFR analysis should be applied on a case-by-case basis since it is entirely related to the producing country's national legislation.

## 2. The Due Diligence Obligations under EU DFR and the Risk-Based Approach under Indonesia Job Creation Law

Article 8 of EU DFR mentions that EU operators must fulfill three obligations. Those obligations consist of information gathering, risk assessment, and risk mitigation.<sup>39</sup> Information gathering is collecting information, data, and documents needed to fulfill the requirement under Article 9.<sup>40</sup> Meanwhile, Articles 10 and 11 of EU DFR constitute risk assessment and risk mitigation.<sup>41</sup> These three articles are explained herein.

Article 9 of EU DFR *inter alia* states that information that should be gathered by the operator to place the covered products or commodities in the EU market or to export them from the EU market are the product descriptions, the quantity of that

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<sup>34</sup> Zhunusova et al., "Potential Impacts of the Proposed EU Regulation on Deforestation-Free Supply Chains on Smallholders, Indigenous Peoples, and Local Communities in Producer Countries Outside the EU."

<sup>35</sup> Danilo Urzedo et al., "Indigenous Environmental Justice through Coproduction of Mining Restoration Supply Chains in Australia," *Restoration Ecology* 30, no. S1 (2022): e13748, <https://doi.org/10.1111/rec.13748>.

<sup>36</sup> Oliver Hailes, "Lithium in International Law: Trade, Investment, and the Pursuit of Supply Chain Justice," *Journal of International Economic Law* 25, no. 1 (March 1, 2022): 148–70, <https://doi.org/10.1093/jiel/jgac002>.

<sup>37</sup> Thuyne and Townsend, "EU Agrees on New Deforestation-Free Regulation."

<sup>38</sup> European Parliament, 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).

<sup>39</sup> European Parliament.

<sup>40</sup> European Parliament, 111.

<sup>41</sup> European Parliament, 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).

product, country of production, and where relevant, parts thereof, the geolocation, and the supplier's identity. Since the parameters for conducting the risk assessment under Article 10 is a non-exhaustive list and the following article focuses on the protection of indigenous people, this discussion only describes the parameters having a nexus with the protection of indigenous people.<sup>42</sup> Paragraph 2. (c)-(e) of this article states that the operator should conduct an assessment by taking into account the presence of indigenous people in the country of production or parts thereof, the consultation and cooperation in good faith with that indigenous people, the existence of duly reasoned claims by indigenous peoples based on objective and verifiable information regarding the use or ownership of the area used to produce the relevant commodity.<sup>43</sup> Last, the risk mitigation regulated under Article 11 Paragraph 1 of EU DFR is a mechanism or procedure that EU operators should adopt. It may include additional information gathering, independent surveys or audits, and other measures on information requirements under Article 9 required to mitigate the placement or export of the covered products.<sup>44</sup>

According to the explanations above, the EU DFR closely resembles Indonesia's Job Creation Law. The Job Creation Law also adopts the risk-based approach under Article 7. This article *inter alia* states that the determination of the level of risk in business sectors is conducted by assessing the hazard level and the potential for danger, as well as by evaluating the health, safety, environment, and resource utilization and management. From this arrangement, the article found that both the EU DFR and the Job Creation Law implement the risk-based approach by considering environmental and natural resource utilization and management, including aspects of forest and plantation, as explained above. Furthermore, EU DFR also aligns with Indonesia's environmental legislation, Law Number 32 of 2009 on the Environment Protection and Management (Environment Law). The compliance on EU DFR will align with the principle of sustainability under Article 2 Letter B of the Environmental Law. This principle obliges everyone (including exporters and producers) to sustain and repair the environment for the upcoming generation. Furthermore, such compliance will also implement Article 3 of the Environment Law *inter alia*, stating that the objectives of environmental management are to ensure human health and safety, to ensure the existence of living things and ecosystem sustainability, and to achieve the environment balance and harmonization.

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<sup>42</sup> The European Council, "Council Adopts New Rules to Cut Deforestation Worldwide," May 16, 2023, <https://www.consilium.europa.eu/en/press/press-releases/2023/05/16/council-adopts-new-rules-to-cut-deforestation-worldwide/>.

<sup>43</sup> Thuyne and Townsend, "EU Agrees on New Deforestation-Free Regulation."

<sup>44</sup> European Parliament, 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).

Therefore, EU DFR can be perceived as a norm recognizing the sovereignty of indigenous people within the state where the people are located.<sup>45</sup> According to Wiessner, indigenous sovereignty can *inter alia* be defined as a situation where indigenous people can have a safe space, live a life with a difference, and have their rights to free, prior, and informed consent ensured.<sup>46</sup> Furthermore, Lenzerini states that indigenous sovereignty consists of the right to ownership over traditional law, the right to preserve its identity and culture, the right to participate in the decision-making process, and the right to self-governance through customary laws.<sup>47</sup> To distinct the Westphalia Sovereignty Concept<sup>48</sup>, this discussion also applies Behrendt's opinion, stating that the indigenous sovereignty should not be seen as anti-state to the extent of complete annihilation of the concept of state.<sup>49</sup>

### 3. Indigenous People under International Law and Indonesia's Urgency to Reform its Domestic Law Due to EU DFR

Therefore, the recognition constituted under the EU DFR aligns with the principles existing under the United Nations Declaration on the Rights of Indigenous People (UNDRIP).<sup>50</sup> This instrument was adopted under the United Nations General Assembly Resolution 61/295 in 2007.<sup>51</sup> Unlike the Western human rights paradigm that recognizes human dignity as an individual, UNDRIP acknowledges the human rights of people and how these people may interact with various international law subjects.<sup>52</sup> The recognition given by international law to UNDRIP has practically caused international organizations such as the International Labor Organization, the Food and Agriculture Organization, the International Monetary Fund, the World Bank, and even the WTO itself to recognize indigenous people as an international law subject.<sup>53</sup>

The passage explained above shows why the EU adheres to protecting indigenous people as one of the parameters for EU operators in conducting risk assessments as part of the due diligence process. This notion is in line with paragraph 29 of the EU DFR Preamble, which states that EU DFR is adopted as a mandate for

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<sup>45</sup> Rashwet Shrinkhal, "'Indigenous Sovereignty' and Right to Self-Determination in International Law: A Critical Appraisal," *AlterNative: An International Journal of Indigenous Peoples* 17, no. 1 (March 1, 2021): 71–82, <https://doi.org/10.1177/1177180121994681>.

<sup>46</sup> Shrinkhal.

<sup>47</sup> Shrinkhal.

<sup>48</sup> Pierre d'Argent, *International Law Textbook: Setting the International Stage* (Louvain: UC Louvain & edX, 2021).

<sup>49</sup> Shrinkhal, "'Indigenous Sovereignty' and Right to Self-Determination in International Law."

<sup>50</sup> Linda Etchart, "Indigenous Peoples and International Law in the Ecuadorian Amazon," *Laws* 11, no. 4 (August 2022): 55, <https://doi.org/10.3390/laws11040055>.

<sup>51</sup> Kristen Carpenter and Alexey Tsykarev, "Indigenous Peoples and Diplomacy on the World Stage" 115 (January 2021): 118–22, <https://doi.org/10.1017/aju.2021.7>.

<sup>52</sup> Carpenter and Tsykarev.

<sup>53</sup> Priscilla Claeys and Marc Edelman, "The United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas," *The Journal of Peasant Studies* 47, no. 1 (January 2, 2020): 1–68, <https://doi.org/10.1080/03066150.2019.1672665>.

the European Commission to continue its partnership with producer countries and its cooperation with international organizations and bodies, as well as with the relevant stakeholders including producers, by actively participating in various dialogues.<sup>54</sup> One of the dialogues in that paragraph concerns the acknowledgment and role-strengthening of indigenous people, smallholders, and micro, small, and medium-sized enterprises.<sup>55</sup> Besides, through dialogues, the European Commission is also mandated to fully recognize the role and rights of indigenous people according to the principle of free, prior, and informed consent (FPIC).<sup>56</sup>

FPIC is a concept applied to ensure the indigenous people's rights to self-determination in the context of the decision-making of a state or corporation threatening the removal of indigenous communities from their land.<sup>57</sup> The FPIC concept aligns with the self-determination rights constituted under Article 55 of the Charter of the United Nations, Article 1 of the International Covenant on Civil and Political Rights, and Article 1 of the International Covenant on Economic, Social, and Cultural Rights.<sup>58</sup> Under the UNDRIP itself, FPIC is constituted under Article 16, concerning the relocation of indigenous people from their land; Article 19, concerning the adoption of (positive) law; Article 29, concerning the disposal of hazardous material in indigenous people's areas, Article 30 concerning military activities in the indigenous people's territory, and Article 32 regarding land and natural resources broader issues.<sup>59</sup>

Although EU DFR is an internal regulation that should be fully complied with by EU operators and traders, Article 10 of this regulation clearly expresses that this regulation has an extraterritorial nature. Such an extraterritorial nature can be noticed by understanding that a producer from the producing country may not export its goods to the EU's market through an operator if it does not provide adequate protection to its indigenous people. Such protection can be considered sufficient if the producing state, in this case, Indonesia, recognizes the presence of its indigenous people within the producing area, cooperates with those people in good faith, and provides compensation for them if the production process requires the indigenous people to waive their *ulayat* land rights (also known as "*hak ulayat*" in the Indonesian language).

Therefore, the EU DFR can be qualified as an extraterritorial measure related to international trade as it is mentioned under Article I:1 of the 1994 General

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<sup>54</sup> European Parliament, 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).

<sup>55</sup> European Parliament.

<sup>56</sup> European Parliament.

<sup>57</sup> Dalton R. George, Todd Kuiken, and Jason A. Delborne, "Articulating 'Free, Prior and Informed Consent' (FPIC) for Engineered Gene Drives," *Proceedings of the Royal Society B: Biological Sciences* 286, no. 1917 (December 18, 2019): 20191484, <https://doi.org/10.1098/rspb.2019.1484>.

<sup>58</sup> George, Kuiken, and Delborne.

<sup>59</sup> George, Kuiken, and Delborne.

Agreement on Tariffs and Trade (GATT 1994).<sup>60</sup> In providing an analysis on the other side of the house, this discussion expresses the EU DFR should not be applied in a discriminative manner *vis-à-vis* the Union's similar products, and it should not be applied discriminatively *vis-à-vis* products originating from a third WTO member (third country).<sup>61</sup> Implementing this regulation in a discriminative manner may cause the EU to violate the stipulations under Article I:1 concerning the Most Favored Nations (MFN) Treatment and Article III: 4 on the National Treatment.<sup>62</sup> Details concerning the potential violation of the WTO law are discussed in detail in the second discussion of this article.

Although EU DFR is a unilateral act contrary to the non-discriminative rules under the WTO, this article emphasizes how this measure may, to a certain degree, stimulate Indonesia to do better. In other words, this article stresses that the EU DFR, on the one hand, pushes Indonesia to provide better protection for its indigenous people while ensuring market access to its exporters and producers. Therefore, this article would like to clarify that the issues of indigenous people's protection and international trade are interdependent, although they are generally perceived as separate topics.<sup>63</sup> Such a strong connection exists due to Indonesia's significant homework to reconcile the conflict of interests between its enterprises and the indigenous people concerning land use for production purposes.

As a state recognizing the rights of its indigenous people, Indonesia has the following regulations and Constitutional Court Arrest, which are meant to protect this vulnerable community. Those regulations are the Basic Agrarian Law (BAL), Law Number 39 of 1999 concerning Human Rights (Human Rights Law), the Forestry Law, and the Plantation Law. Article 3 of the Basic Agrarian Law states that the state should recognize the indigenous people's land rights (*hak ulayat*) as long as they exist *de facto*.<sup>64</sup> This article also states that implementing these rights should not contradict regulations and higher legal norms.<sup>65</sup> Pudjosewojo states that these land rights have a declarative nature due to their spontaneous existence. These land rights are not established based on the authority of a state organ having a constitutive nature.<sup>66</sup>

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<sup>60</sup> Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization: Text, Cases, and Materials*, Fifth Edition (Cambridge: Cambridge University Press, 2022).

<sup>61</sup> Padideh Ala'i Beshkardana Katayoon, "The Limits of Transparency: China, the United States and the World Trade Organization," in *Cultures of Transparency* (Routledge, 2021).

<sup>62</sup> Autar Krishen Koul, *Guide to the WTO and GATT Economics, Law and Politics*, 6th Edition (New Delhi: Springer, 2018).

<sup>63</sup> John Borrows and Risa Schwartz, *Indigenous Peoples and International Trade: Building Equitable and Inclusive International Trade and Investment Agreements* (Cambridge University Press, 2020).

<sup>64</sup> Verlia Kristiani, "Hukum Yang Berkeadilan Bagi Hak Ulayat Masyarakat Hukum Adat (Kajian Dan Implementasi)," *ADIL: Jurnal Hukum* 11, no. 1 (August 24, 2020): 144–62, <https://doi.org/10.33476/ajl.v11i1.1449>.

<sup>65</sup> Kristiani.

<sup>66</sup> Kristiani.

The declarative nature of the indigenous land has caused the indigenous land to be easily deprived by issuing a decree related to a cooperation permit.<sup>67</sup> The non-existence of a decree as the basis for determining indigenous land has also made this vulnerable community land easily deprived by public apparatus or state companies based on the national interest.<sup>68</sup> This human rights violation mainly occurs within the forest of the indigenous people (*hutan adat*).<sup>69</sup> Therefore, repentance of human rights or constitutional rights violations can be interpreted as deforestations or forest degradations violating the indigenous people's rights taken into account under Article 10 of the EU DFR.

The violation of the indigenous people's rights may cause Indonesia to be qualified as a high-risk country according to Article 29 EU DFR. Since agriculture products enterprises mainly conduct this violation, they may have their market access to the EU blocked instead of gaining profits from selling their goods to the market. Therefore, the Indonesian government should prevent this serious issue by having a strong political will to reconcile the conflict of interest between the enterprises and the indigenous people instead of participating in violating indigenous rights.<sup>70</sup>

This article notes that Indonesia has already implemented several regulations concerning the recognition of indigenous land and indigenous forests, which the government should implement in good faith. The first regulation is the Minister of Forestry Regulation Number 9 of 2021 concerning Social Forest Management. This regulation revoked the Minister of Forestry Regulation Number P.17 of 2020 concerning Indigenous Forest and Entitled Forest. Articles 65-70 of this regulation stipulate the determination of Indigenous Forest based on the application filed by the indigenous people's representative. Article 92 of this regulation constitutes the indigenous peoples' right to utilize their forest resources and any environmental services based on the applicable regulations. Furthermore, Article 94 paragraph (1) of this regulation obliges the indigenous peoples to sustain their forest according to the local wisdom and protect the forest from damage. Paragraph (2) of this article *inter alia* prohibits the indigenous peoples from planting palm oil in their forest and diverting the function of their conservative forest.

By referring to Article 1 number 8 of this regulation, this regulation adopted the Constitutional Court Verdict Number 35/PUU-IX/2012, which states that indigenous forest is not a state forest. This constitutional court verdict negatively revised the formulation under Article 1 of the Forestry Law *inter alia* stating that the indigenous

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<sup>67</sup> Adonia Ivonne Laturette, "Penyelesaian Sengketa Hak Ulayat Pada Kawasan Hutan," *SASI* 27, no. 1 (April 13, 2021): 102–12, <https://doi.org/10.47268/sasi.v27i1.504>.

<sup>68</sup> Laturette.

<sup>69</sup> Hartanto Cunduk Wasiati, "PERIZINAN SEBAGAI INSTRUMEN PEMANFAATAN HUTAN MASYARAKAT HUKUM ADAT," *Jurnal Meta-Yuridis* 3, no. 1 (April 1, 2020): 87–109, <https://doi.org/10.26877/m-y.v3i1.5755>.

<sup>70</sup> Redaksi, "Pakar Hukum Agraria DR Aartje Tehupeiory: Negara Harus Hadir Guna Melindungi Hak Adat," *Poros Nusantara*, November 19, 2021, sec. Nasional, <https://porosnusantara.co.id/2021/11/pakar-hukum-agraria-dr-aartje-tehupeiory-negara-harus-hadir-guna-melindungi-hak-adat/>.

forest is a state forest. This regulation has, therefore considered the *erga omnes* nature of the constitutional court verdict, which entitles the role of the Constitutional Court as a negative legislator.

Further recognition of indigenous peoples is also regulated under the Minister of Agrarian Regulation Number 14 of 2024 concerning the Land Administration Operations and the Registration of Indigenous People *Ulayat* Land. Article 4 of this regulation states that indigenous people's land can be administered through inventory and identification, measurement and mapping, and the recording on the *Ulayat* Land Registration. Furthermore, Articles 23-27 of this regulation also provide legal certainties for indigenous peoples by regulating the entitlement of ownership rights on indigenous people's land. This new feature protects the indigenous people's fundamental rights since the ownership rights are the strongest, most whole, and hereditary rights according to Article 20 of BAL.

By implementing those regulations in good faith, Indonesia may implement the FPIC Principle and prevailing human rights treaties, as explained above. Before explaining what to add to provide better protection for Indonesian indigenous peoples, this article implements the Government Regulation Number 43 of 2021 concerning the Settlement of Spatial, Forest Area, Permit, and Land Rights Discrepancies. This regulation obliges central and regional governments to adopt a Spatial Plan to settle conflicts due to overlapping claims on lands and forest areas. Such settlement should also be conducted based on the prevailing regulations. Despite the noble mandate of this regulation, it is essential to note that Indonesia has no regulation concerning the implementation of FPIC through appropriate compensation for the indigenous people's land. This article, therefore, recommends that the Indonesian Minister of Forest and Minister of Agrarian adopt regulations concerning the obligation of enterprises (exporters and producers of forestry products) to compensate the indigenous peoples' deprived rights.

### **C. Indonesia's Response to EU DFR in achieving the feasible protection for its indigenous people and ensuring market access for its producers and traders in the European Union Market**

#### **1. Law Reforms and International Cooperation according to WTO Jurisprudences Concerning Environmental Disputes**

This article opined that Indonesia should adopt its indigenous people Bill forthwith (*Rancangan Undang-Undang Masyarakat Adat*).<sup>71</sup> Article 6 of this bill regulates the recognition of the indigenous people, which is granted after passing multiple stages of identification, verification, validation, and the decree adoption. Article 7 of this

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<sup>71</sup> Fatimah Fatimah and Febryansyah Nataly, "Strategi Komunikasi Aliansi Masyarakat Adat Nusantara (Aman ) Dalam Memperjuangkan RUU Masyarakat Hukum Adat," *Jurnal Ilmiah Komunikasi (JIKOM) STIKOM IMA* 14, no. 03 (November 22, 2022): 116–24, <https://doi.org/10.38041/jikom1.v14i03.254>.

bill stated that an *ad-hoc* committee will be established to exercise this mandate.<sup>72</sup> This regulation could provide Indonesia a stronger legal base that protects the indigenous people since the existence of this vulnerable community will be protected by the decree having a legal weight equivalent to company permits and land certificates.

This study also suggests that Indonesia should effectively implement its tertiary regulations, which may reconcile agriculture conflicts or human rights violations. The tertiary regulation referred to in this paragraph is Presidential Regulation Number 47 of 2020 concerning the Ministry of Agriculture (Presidential Regulation Number 47/2020) and Presidential Regulation Number 48 of 2020 concerning the National Land Bureau (Presidential Regulation Number 48/2020). Article 5. a. of Presidential Regulation Number 47/2020, in conjunction with Article 3. g. of Presidential Regulation Number 48/2020, states that the Ministry of Agriculture or the Head of the National Land Bureau has the authority to adopt the policy in solving land disputes. Article 29 of Presidential Regulation Number 47/2020 states that this organ has the authority to solve land disputes and conflicts through its Land Conflict Directorate. Therefore, not only is the legislator obliged to have such strong political will, but the executives should also have the same will to solve this serious issue.

Besides providing suggestions regarding how Indonesia's domestic law should be reformed to provide better protection for its indigenous people, this article also suggests how Indonesia should address its consent to apply EU DFR according to the rules of international law. Article 30 EU DFR *inter alia* states the European Commission to cooperate with third countries or other WTO members, which should focus on the attention to the needs of indigenous peoples, local communities, and smallholders.<sup>73</sup> From this stipulation, Indonesia should cooperate with the EU through its commission to ensure that it won't be classified as a high-risk country and to secure its producers' and traders' market access.<sup>74</sup> Through the international cooperation mechanism, Indonesia may address the implementation of this regulation amicably with the EU. This negotiation should be conducted *prima facie*, especially since Indonesia and the EU currently implement the Forest Law Enforcement, Governance, and Trade Voluntary Partnership Agreement (FLEGT VPA) on the trade of woods.<sup>75</sup>

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<sup>72</sup> Fatimah and Nataly.

<sup>73</sup> European Parliament, 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).

<sup>74</sup> Andrew F. Cooper, "The Disintermediation Dilemma and Its Impact on Diplomacy: A Research Agenda for Turbulent Times," *Diplomacy & Statecraft* 30, no. 4 (October 2, 2019): 799–807, <https://doi.org/10.1080/09592296.2019.1673556>.

<sup>75</sup> M. Bunchy and M. Hobley, "FLEGT and Livelihoods. | CABI Reviews," *CABI Reviews*, May 29, 2019, <https://doi.org/10.1079/PAVSNNR201813057>.

Before explaining the related WTO cases, this article notes that the EU DFR is an environmental unilateral act with an extraterritorial nature.<sup>76</sup> In commenting on this practice, Asselt stated that although this practice is conducted to enforce a top-down Multilateral Environmental Agreement, the Paris Agreement, this measure may constitute discriminative trade practice.<sup>77</sup> To solve this discriminative trade practice, the WTO precedents recommend that the members adopt international cooperation in implementing their extraterritorial environmental act.<sup>78</sup> If such a partnership is not implemented, international trade may only be conducted between states with similar environmental measures, thereby jeopardizing the multilateral trade system.<sup>79</sup> In other words, the practical implications of the EU DFR are that Indonesia should try its best to cooperate with the EU to secure its market access, and such cooperation should also be followed by its internal law reform.

The first case to be examined in this discussion is the WTO *US – Shrimp* case. This dispute was caused by the United States prohibiting the import of shrimp from India, Malaysia, Pakistan, and Thailand since their catching methods of those shrimp had caused the extinction of green turtles.<sup>80</sup> The green turtle is an animal protected under the Annex I Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).<sup>81</sup> The complaining members stated that the United States measure does not align with the WTO rules on non-discrimination and prohibition on quantitative restriction.<sup>82</sup>

The panel and the Appellate Body examining this case analyzed that both the WTO Agreement and CITES are international law rules encouraging their members to conduct international cooperation in solving their issues.<sup>83</sup> Although the United States Public Law stipulates the government's obligation to conduct cooperation, the fact that the United States did not implement such a measure had caused itself to fail in fulfilling the obligation under both the WTO Agreement and CITES.<sup>84</sup> The panel

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<sup>76</sup> Giulia Claudia Leonelli, "Environmental Unilateralism and the Chapeau of Article XX GATT: The 'Line of Equilibrium' and the Question of 'Differently Situated' Countries," *Journal of World Trade* 57, no. 5 (October 1, 2023), <https://kluwerlawonline.com/api/Product/CitationPDFURL?file=Journals\TRAD\TRAD2023030.pdf>.

<sup>77</sup> Harro van Asselt, "C43Trade," in *The Oxford Handbook of International Environmental Law*, ed. Lavanya Rajamani and Jacqueline Peel (Oxford University Press, 2021), 0, <https://doi.org/10.1093/law/9780198849155.003.0043>.

<sup>78</sup> Vinitika Vij, "Changing Realities: Evolution and Extraterritoriality within Article XX(G) of GATT for Global Environmental Concerns," *Trade, Law and Development* 14, no. 02 (2022): 195–238.

<sup>79</sup> Elisa Baroncini and Claire Brunel, "A WTO Safe Harbour for the Dolphins: The Second Compliance Proceedings in the US–Tuna II (Mexico) Case," *World Trade Review* 19, no. 2 (April 2020): 196–215, <https://doi.org/10.1017/S1474745620000038>.

<sup>80</sup> World Trade Organization, "WTO | Dispute Settlement - the Disputes - DS58 - United States — Import Prohibition of Certain Shrimp and Shrimp Products," 2023, [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds58\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds58_e.htm).

<sup>81</sup> World Trade Organization.

<sup>82</sup> World Trade Organization.

<sup>83</sup> World Trade Organization.

<sup>84</sup> World Trade Organization.

and the Appellate Body stated that the United States should bring their measures in conformity with the WTO Agreement.

The second case examined in this discussion is the *US – Tuna* case ruled by the GATT panel and the WTO. In the first chapter of the case governed by the GATT panel, the United States banned the import of yellowfin tuna products from Mexico to protect dolphin migration. This import ban is also implemented on imports from intermediary countries.<sup>85</sup> Although the United States action is justified based on Article XX paragraphs (b) and (g) GATT concerning the general exceptions, the GATT panel viewed that this import prohibition had to be revoked.<sup>86</sup> The panel opined that unilateral environmental measures threaten the multilateral trade system since trades may only be conducted between members with similar environmental measures.<sup>87</sup> The GATT panel then offered bilateral cooperation between the United States and Mexico as an alternative to this unilateral act.<sup>88</sup> Despite this, the United States decided not to adopt the panel ruling.<sup>89</sup>

In the second chapter of the case, which occurred in the 2010s, more than a decade after the WTO was established, Mexico challenged United States measures, constituting the production process of tuna and tuna products.<sup>90</sup> Both the panel and the Appellate Body of this dispute justified the disputed measure under Article XX paragraph (g) GATT and Article 2.1 GATT.<sup>91</sup> The tuna certification measures were justified as a resource conservation measure and a non-discriminative technical regulation.<sup>92</sup> The panel of this case stated that since the United States had been actively conducting diplomacy in promoting its environmental measures through various regional maritime organizations (RMFOs), this technical regulation was justified under the WTO perspective.<sup>93</sup>

The last case presented in this article is the *US – Gasoline* case, which disputed the Clean Air Act challenged by Brazil and Venezuela.<sup>94</sup> This federal act prohibited the import of reformulated gasoline from Brazil and Venezuela due to the importers'

<sup>85</sup> World Trade Organization, "GD/239 | GATT Disputes Database (WTO) - United States - Restrictions on Imports of Tuna," World Trade Organization: GATT Disputes, 2023, <https://gatt-disputes.wto.org/index.php/dispute/gd-239>.

<sup>86</sup> Baroncini and Brunel, "A WTO Safe Harbour for the Dolphins."

<sup>87</sup> Van Asselt, "C43Trade."

<sup>88</sup> Sheikh Inam UI Mansoor and Menuu Chopra, "Article XX Of GATT: Territoriality Of Unilateral Trade Measure And Sustainable Development," *Ilkogretim Online - Elementary Education Online* 19, no. 04 (2020): 7784–92.

<sup>89</sup> World Trade Organization, "GD/239 | GATT Disputes Database (WTO) - United States - Restrictions on Imports of Tuna."

<sup>90</sup> "WTO | Dispute Settlement - DS381: United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products," accessed on July 11, 2023, [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds381\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds381_e.htm).

<sup>91</sup> "WTO | Dispute Settlement - DS381."

<sup>92</sup> Joana Stelzer, Everton das Neves Goncalves, and Keite Wieira, "WTO Understanding on Certification Dolphin Safe in Tuna Fishing: The US Tuna II Case," *Veredas Do Direito* 16 (2019): 245.

<sup>93</sup> Stelzer, das Neves Goncalves, and Wieira.

<sup>94</sup> World Trade Organization, "WTO | Dispute Settlement - the Disputes - DS2 - United States — Standards for Reformulated and Conventional Gasoline," 2023, [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds2\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds2_e.htm).

failure to reduce their emissions. While trying its best to justify its action under Article XX paragraphs (b) and (g) GATT, the United States failed and was proven to violate Article III: 4 GATT concerning national treatment.<sup>95</sup> The Appellate Body of this case stressed that the WTO does not prohibit its members from protecting the environment.<sup>96</sup> On the contrary, such measures should be implemented through coordination in the Committee on Trade and Environment, in other words, through cooperation.<sup>97</sup>

From those cases, it can be understood that international cooperation is the key to reconciling the implementation of WTO rules and international environmental law. In the case of the EU DFR, the European Union adopted this measure to implement stipulations related to environmental law and human rights law, including UNDRIP, and stipulations under the WTO Agreement. To avoid disputes with the producing country, especially Indonesia, the European Union should ensure that the stipulations under Article 30 of the EU DFR are implemented in good faith.

## 2. Dispute Settlement through the World Trade Organization as an Alternative in the Case of EU Bad Faith

A dispute settlement mechanism is a method of settling a conflict of fact and law and a conflict of interests between two or more contesting parties<sup>98</sup> due to the absence of good faith by one or two of the contesting parties.<sup>99</sup> EU's absence of good faith in considering Indonesia's effort to protect its indigenous peoples and fulfilling other criteria set forth under Article 10 of the EU DFR can be contested under the WTO Dispute Settlement Understanding (DSU). Article XXIII GATT concerning nullification and impairment principally states that a WTO member nullified or impaired due to the failure of another member in carrying its obligations under the agreement or the application of that member conflicts with the provision of the WTO Agreement and may address such issue through the WTO dispute settlement mechanism.<sup>100</sup> This statement is further enhanced by Article 3 DSU, which, in turn,

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<sup>95</sup> G. Marin Duran, "Chapter XI.25: Exhaustible Natural Resources and Article XX(g) GATT," in *In: Delimatsis, P and Reins, L, (Eds.) Trade and Environmental Law. (Pp. 219-229). Edward Elgar Publishing (2021), ed. P. Delimatsis and L. Reins, vol. XI (Edward Elgar Publishing, 2021), 219-29, [https://www.elgaronline.com/view/book/9781785369520/b-9781783476985-XI\\_25.xml](https://www.elgaronline.com/view/book/9781785369520/b-9781783476985-XI_25.xml).*

<sup>96</sup> World Trade Organization, "WTO | Dispute Settlement - the Disputes - DS2 - United States — Standards for Reformulated and Conventional Gasoline."

<sup>97</sup> World Trade Organization.

<sup>98</sup> P. J. M. Oosterveer, "Sustainability of Palm Oil and Its Acceptance in the EU," *Journal of Oil Palm Research* 32 (2020): 365-76, <https://doi.org/10.21894/jopr.2020.0039>.

<sup>99</sup> Kirsten Schmalenbach, "Article 26," in *Vienna Convention on the Law of Treaties*, ed. Oliver Dörr and Kirsten Schmalenbach (Berlin, Heidelberg: Springer Berlin Heidelberg, 2018), 26, [https://doi.org/10.1007/978-3-662-55160-8\\_29](https://doi.org/10.1007/978-3-662-55160-8_29).

<sup>100</sup> Suhailah Akbari, "The Relationship Between Freedom of Transit and General and Security Exceptions Under WTO Rules," in *The WTO Transit Regime for Landlocked Countries and Its Impacts on Members' Regional Transit Agreements: The Case of Afghanistan's Transit Trade with Pakistan*, ed. Suhailah Akbari, European Yearbook of International Economic Law (Cham: Springer International Publishing, 2021), 167-201, [https://doi.org/10.1007/978-3-030-73464-0\\_7](https://doi.org/10.1007/978-3-030-73464-0_7).

states that this procedure is the elaboration and modification of Article XXIII GATT and is meant to be the central element in providing security and predictability to the multilateral trade system.<sup>101</sup>

Indonesia may contest the EU DFR implementation based on the GATT stipulations. As explained in the first discussion, the implementation of the EU DFR can be contested based on the rules of non-discrimination under Article I:1 GATT or the MFN Treatment Obligation since Article 29 of this regulation implements a country-based approach, which may provide an unconditional and immediate advantage to one of its trading partners in the trade of the covered products while not giving such advantage to its another trading partner.<sup>102</sup> Furthermore, the EU may also violate Article III:4 concerning national treatment if it discriminates against covered products from Indonesia *vis-à-vis* their products and their like products.<sup>103</sup> The claim based on this is potentially relevant since the European Commission Working Group on the EU DFR explained that the EU domestic industries may replace palm oil originating from third countries such as Indonesia and Malaysia with its rapeseed oil if the countries as mentioned above are classified as high-risk countries.<sup>104</sup>

Another relevant claim to be filed due to the implementation of this regulation is Article XI:1 GATT concerning the prohibition of quantitative restriction.<sup>105</sup> This article prohibits the imposition of import and export bans and only permits protection in the form of tariff imposition.<sup>106</sup> By understanding the negative formulation of Article 3 EU DFR, which allows the EU to ban the export or import of palm oil, wood, soya, cattle, coffee, rubber, and cocoa, this regulation is potentially qualified as a quantitative restriction measure. This is even though Article 3 of the EU DFR bans those products if they are not produced in line with the producing countries' legislations.<sup>107</sup>

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<sup>101</sup> A. K. M. Raquibul Hasan and Khadiza Nasrin, "Reforming the Dispute Settlement Mechanism of WTO: Challenges and Prospects," SSRN Scholarly Paper (Rochester, NY, December 30, 2021), <https://papers.ssrn.com/abstract=4175796>.

<sup>102</sup> Bossche and Zdouc, *The Law and Policy of the World Trade Organization: Text, Cases, and Materials*.

<sup>103</sup> Muhammad Sood, *Hukum Perdagangan Internasional* (Depok: Raja Grafindo Persada, 2018).

<sup>104</sup> The European Commission, "COMMISSION STAFF WORKING DOCUMENT IMPACT ASSESSMENT REPORT Minimising 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," November 19, 2021, <https://op.europa.eu/en/publication-detail/-/publication/43c4301d-4943-11ec-91ac-01aa75ed71a1/language-en>.

<sup>105</sup> Yetty Dewi and Mikaila Jessy Azzahra, "Re-Examining Indonesia's Nickel Export Ban: Does It Violate the Prohibition to Quantitative Restriction?," *Padjadjaran Journal of International Law* 6, no. 2 (August 4, 2022): 180–200, <https://doi.org/10.23920/pjil.v6i2.797>.

<sup>106</sup> Dewi and Azzahra.

<sup>107</sup> European Parliament, 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).

Finally, this regulation may violate the stipulations under Articles 2.2 and 2.1 of the Agreement on the Technical Barriers to Trade (TBT Agreement). This agreement constitutes how WTO members should regulate its technical regulations and procedures for assessing conformity with technical regulations and standards.<sup>108</sup> Since the EU DFR consists of how the covered products should be produced or the processes and production methods (PPMs), this regulation can be qualified as a technical regulation under Annex 1 TBT Agreement.<sup>109</sup> This PPM element can be seen in Articles 8-11 EU DFR as explained in the first discussion. The TBT Agreement also prohibits WTO members from implementing its technical regulations and procedures in a protectionist manner.<sup>110</sup> The implementation of the EU DFR may violate Article 2.2, which arbitrarily prohibits the implementation of technical regulations.<sup>111</sup> EU DFR may also violate Article 2.1 of the TBT Agreement, which prohibits the implementation of technical regulations in a discriminative manner.<sup>112</sup>

The WTO Agreement is an international instrument adopted with general exceptions allowing its members to adopt measures contrary to the agreement under the two-tier test.<sup>113</sup> This exception is regulated under Article XX GATT, *inter alia* allowing members to defy the WTO Agreement because of the necessity to protect public morals, human, animal, and plant life and health, and to conserve exhaustible natural resources.<sup>114</sup> From the *US – Gasoline* case, it can be understood that members may only justify their measure under Article XX GATT after passing the two-tier test. The Appellate Body examining this case stated that to justify the protection under Article XX, the issued measure must not only meet the specific requirement under paragraphs (a) to (j), but it should also satisfy the requirements under the opening clause (*chapeau*) of Article XX GATT.<sup>115</sup> By interpreting this Article according to its ordinary meaning, the *chapeau* is meant to ensure that Article XX is not implemented arbitrarily.<sup>116</sup>

Due to the absence of environmental protection as one of the specific requirements, it is difficult for Article XX GATT to be implemented as justification for environmental policy such as the EU DFR.<sup>117</sup> Giulia Leonelli expressed that the

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<sup>108</sup> Jhanvi Trivedi et al., “Non-Tariff Measures in Regional Trade Agreements in Asia and the Pacific : SPS, TBT and Government Procurement,” 2019, <https://repository.unescap.org/handle/20.500.12870/1314>.

<sup>109</sup> World Trade Organization, “WTO | Legal Texts - Marrakesh Agreement - Agreement on Technical Barrier to Trade,” 2023, [https://www.wto.org/english/docs\\_e/legal\\_e/17-tbt\\_e.htm](https://www.wto.org/english/docs_e/legal_e/17-tbt_e.htm).

<sup>110</sup> Trivedi et al., “Non-Tariff Measures in Regional Trade Agreements in Asia and the Pacific.”

<sup>111</sup> World Trade Organization, “WTO | Legal Texts - Marrakesh Agreement - Agreement on Technical Barrier to Trade.”

<sup>112</sup> World Trade Organization.

<sup>113</sup> Peter Van den Bossche and Denise Prévost, *Essentials of WTO Law* (Cambridge University Press, 2021).

<sup>114</sup> Bossche and Zdouc, *The Law and Policy of the World Trade Organization: Text, Cases, and Materials*.

<sup>115</sup> “WTO | Dispute Settlement - the Disputes - DS2,” 2, accessed October 10, 2023, [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds2\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds2_e.htm).

<sup>116</sup> “WTO | Dispute Settlement - the Disputes - DS2.”

<sup>117</sup> Pierre-Marie Dupuy and Jorge E Vinales, *International Environmental Law* (Cambridge: Cambridge University Press, 2022).

exception under Article XX GATT has its constraint once a WTO member uses it to justify their unilateral environmental regulation having an extraterritorial nature.<sup>118</sup> Furthermore, Mansoor and Chopra emphasize this point of view by stating that exceptions under Articles XX(b) and XX(g) are not exceptions that may directly justify environmental protection.<sup>119</sup> Vinitika Vij stated that the different views under WTO jurisprudence have caused uncertainties in explaining whether or not environmental protection is currently implied under Article XX GATT *in concreto* under letter (g) of the article.<sup>120</sup>

The WTO jurisprudence referred to by Vinitika Vij are the findings on the *US – Tuna*, *US – Shrimp*, and *EC – Seal* cases.<sup>121</sup> The 1991 *US – Tuna* Case GATT panel stated that Article XX(g) has a territorial limitation.<sup>122</sup> The 1994 *US – Tuna* case disagreed with its predecessors by stating that Article XX(g) has no territorial limitation.<sup>123</sup> Meanwhile, in the *US – Shrimp* case, the interpretation of Article XX GATT is again challenged by knowing that this stipulation can be applied to an extraterritorial measure if such measure has an adequate nexus with the GATT article.<sup>124</sup> This case, however does not interpret Article XX GATT in the context of letter (g). Finally, another extraterritorial measure is silently accepted in the *EC – Seal* case by understanding the fact that the Appellate Body recognizes the EC extraterritorial measure as having a purpose to ensure that the seal is not hunted or killed inhumanly.<sup>125</sup>

The *EC – Seal* case can be viewed as a case where the obligation to respect indigenous people collides with the WTO law. In this case, Canada and Norway complained about the European Community (EC) Seal Regime since it banned seal products originating from those countries.<sup>126</sup> Both parties claimed their concern by addressing the fact that the EC Seal Regime violated Articles I: 1, III: 4, and XI: 1 GATT, Articles 2 and 5 TBT Agreement, and stated that this measure may not be justified under Articles XX(a) and (b) GATT.<sup>127</sup> The EC, on the other side, stated that this measure is applied for the protection of public morals under Article XX(a) GATT based on the public protest of the inhuman means of killing seals and for the

<sup>118</sup> Giulia Claudia Leonelli, “Anti-Deforestation Npr-PPMs and Carbon Border Measures: Thinking About the Chapeau of Article XX GATT in Times of Climate Crisis,” *Journal of International Economic Law* 26, no. 3 (September 1, 2023): 416–34, <https://doi.org/10.1093/jiel/jgad016>.

<sup>119</sup> Mansoor and Chopra, “Article XX Of GATT: Territoriality Of Unilateral Trade Measure And Sustainable Development.”

<sup>120</sup> Vij, “Changing Realities.”

<sup>121</sup> Vij.

<sup>122</sup> World Trade Organization, “WTO | Environment - Disputes 4 - Mexico Etc. versus US: ‘Tuna-Dolphin,’” World Trade Organization, 2023, [https://www.wto.org/english/tratop\\_e/envir\\_e/edis04\\_e.htm](https://www.wto.org/english/tratop_e/envir_e/edis04_e.htm).

<sup>123</sup> Vij, “Changing Realities.”

<sup>124</sup> World Trade Organization, “WTO | Dispute Settlement - the Disputes - DS58 - United States — Import Prohibition of Certain Shrimp and Shrimp Products.”

<sup>125</sup> World Trade Organization, “WTO | Dispute Settlement - the Disputes - DS401 - European Communities — Measures Prohibiting the Importation and Marketing of Seal Products,” 2023, [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds401\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds401_e.htm).

<sup>126</sup> World Trade Organization.

<sup>127</sup> World Trade Organization.

protection of human, animal, and plant life and health under Article XX(b) GATT since seal hunting may threaten the health and the welfare of seals.<sup>128</sup> Article 3 (1) of Regulation Number 1007/2009 prohibited the importation of seal products unless such products are used for a non-commercial purpose in private use, and those products are by-products regulated under its national law and for the sustainable management of marine resources.<sup>129</sup> Despite prohibiting the killing of seals, this regulation legitimizes the seal hunting conducted by indigenous people and the Inuit.<sup>130</sup> Both the panel and the Appellate Body stated that Regulation Number 1007/2009 and the EC Seal Regime are discriminative measures since they provide advantages to seal products imported from Greenland while discriminating against those from Canada and Norway.<sup>131</sup> This product was also stated as a discriminative technical regulation, and the EC was ordered to bring their measures into conformity with the WTO Agreement.<sup>132</sup>

The EC's defeat, in this case, can be understood as the premise that the WTO legal system does not fully consider international law related to the protection of indigenous people. However, this WTO point of view should not be viewed as a threat to Indonesia if it wants to challenge the EU DFR to the WTO. However, the same situation will not be applicable if Indonesia has measures related to the protection of indigenous people, which could cause a potential violation of the WTO Agreement. Back to the discussion of this article, the EU and Indonesia need to cooperate under Article 30 EU DFR in achieving reciprocal and mutually advantageous trade on the products covered under Annex I EU DFR before executing the worst-case scenario in the form of dispute settlement explained herein.

In closing this discussion, this article emphasizes that Indonesia should reform its national legislation concerning indigenous people recognition and cooperate with the EU to the best of its ability. However, since the principle of cooperation strongly relies on good faith, this article should also consider the good faith of both parties (Indonesia and EU). The EU DFR may, therefore, be challenged through the DSB if the EU constitutes disguised protection, regardless of Indonesia's efforts in reforming its legislation and cooperating with them. Hence, the dispute settlement should only be seen as a last resort to secure the Indonesian market.

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<sup>128</sup> Carolina Maciel and Bettina Bock, "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*, CABI Books, January 2020, 156–72, <https://doi.org/10.1079/9781786392312.0156>.

<sup>129</sup> World Trade Organization, "WTO | Dispute Settlement - the Disputes - DS401 - European Communities — Measures Prohibiting the Importation and Marketing of Seal Products."

<sup>130</sup> World Trade Organization.

<sup>131</sup> World Trade Organization.

<sup>132</sup> World Trade Organization.

#### D. Conclusion

The first discussion has proposed that EU DFR has an extraterritorial nature, as it indirectly regulates the obligations of exporters and producers of the relevant product to comply with their national legislations, including those that recognize indigenous peoples' rights. Indonesia should respond to this regulation by implementing the rules of the Minister of Forestry and the Minister of Agrarian, which govern the recognition of indigenous land and forests. To enhance the verdict under the Constitutional Court Verdict Number 35/PUU-IX/2012, Indonesia should enact regulations that provide the appropriate compensation for indigenous people to comply with the EU DFR due diligence requirements indirectly.

The second discussion principally states that Indonesia should view the EU DFR as a regulation that encourages it to enhance the protection of local indigenous people. By enhancing its national legislation on indigenous peoples' recognition, protection, and compensation, Indonesia may demonstrate its good faith in cooperating with the EU and securing market access. Since Indonesia may qualify as a high-risk country, it should utilize the mechanism set forth under Article 30 EU DFR to ensure the continuation of the Indonesia-EU partnership. However, to counter any potential lack of good faith by the EU in implementing green protection for domestically produced products, EU DFR could be challenged through the WTO dispute settlement mechanism. In this case, Indonesia may file a claim based on the legal grounds discussed.

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