

Observing European Union Rejection of Indonesia's Crude Palm Oil Exports from the Most Favored Nation and Quantitative Restriction Principles

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Abstract

Crude palm oil is one of the main commodities exported by Indonesia to several countries, including European Union. The European Union has pushed through several laws regarding climate change, including the Renewable Energy Directive II. The regulation supplementing the Renewable Energy Directive II has also been adopted by the European Commission, making the criteria for determining the high indirect land-use change-risk feedstock in Commission Delegated Regulation (EU) 2019/807. The objective of this paper is to observe if the measure taken by European Union on determining the indirect land-use change-risk feedstock has satisfied the existing WTO trade principles, the principle of most favored nation and the principle of quantitative restriction. The determining criteria in Commission Delegated Regulation (EU) 2019/807 is trade restrictive and discriminating to the export of crude palm oil, as crude palm oil is the only feedstock that falls under the criteria of high indirect land-use change-risk feedstock. The regulation has impact for the consumption of crude palm oil in Member states of European Union should be gradually reduced 0% by 2030 at the latest. As the provision on General Agreement on Tariffs and Trade embodies the principle of non-discrimination, the result of the study shows the Commission Delegated Regulation (EU) 2019/807 has violated the international trade principles. Furthermore, the general exceptions of GATT 1994 contained in Article XX (b) also doesn't justify the measure.

Keywords: Crude Palm Oil, Most Favored Nation, Quantitative Restriction

JEL Classification: K11, K22, K23, D81, G22.

Introduction

Each country accommodates international trade activities such as the export of goods imports by issuing several national policies that are expected to support the increase of international trade activities. These national policies have also certainly been through harmonization with the current international regulations, including ones from World Trade Organization (WTO).

World Trade Organization or WTO is a global trade organization whose function is to regulate and facilitate international trade. The international trade system is regulated through an agreement that contains the basic rules of international trade as a result of negotiations signed by member countries (Barutu, 2007).

Among import and export activities carried out by Indonesia is related to crude palm oil. The European Union is one of the countries that import crude palm oil from Indonesia. However, the current export and import activities faced a barrier due to policy recommendation from the European Union to gradually stop importing these palm oil considering the accusation that the management of Indonesian oil palm sector has caused deforestation, environmental changes, and other negative impacts such as forest or land fires. Based on data from the Indonesian Palm Oil Plantation Fund Management Agency (BPDP), the value of Indonesia's palm oil exports in 2016 reached Rp 240 trillion, an increase of 8 percent compared to 2015, which was only Rp 220 trillion. On the other hand, the European Union is the largest market share with sales of crude palm oil at 20% of the total exports of Indonesia's crude palm oil products. Crude Palm Oil (CPO), which is a leading commodity in Indonesia, suffered losses due to the policy.

The European Union issued the policy through the Delegated Regulation Supplementing Directive of the EU Renewable Energy Directive II. The draft states that CPO is an unsustainable and high-risk commodity. Previously, the European Union Parliament also issued a Report on Palm Oil and Deforestation of Rainforests on 4 April 2017, where the impact of this policy has planned to change the estimated project of importing crude palm oil into the European Union. On 9 December 2019, the Indonesian delegation also submitted a negotiation to the European Union delegation through the WTO dispute resolution body regarding EU-determined actions that Indonesian palm oil causes deforestation, changes in environmental functions, and other negative impacts on the environmental sector such as fire forest and land. Based on data from the Indonesian Palm Oil Plantation Fund Management Agency (BPDP), the value of Indonesia's palm oil exports in 2016 reached Rp 240 trillion, an increase of 8 percent compared to 2015, which was only Rp 220 trillion. On the other hand, the European Union is the largest market share with sales of crude palm oil at 20% of the total exports of Indonesia's crude palm oil products. Crude Palm Oil (CPO), which is a leading commodity in Indonesia, suffered losses due to the policy.

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The policy does not only affect Indonesian oil palm entrepreneurs, as there are also 17 million Indonesians whose lives are linked to oil palm, both directly and indirectly, given that 42% of oil palm plantations in Indonesia are owned by smallholders. This certainly has a negative impact on the economy of the Indonesian people. In addition, the policy has had an impact on the agreement made between PT Pertamina (Persero) with the multinational company, Eni SpA in Italy, where Italy as one of the European Union member countries reprimanded the Eni company that entered into cooperation in the development of green refineries in Indonesia, namely in processing crude palm oil into environmentally friendly fuels. This resulted in the cancellation of the collaboration between PT Pertamina (Persero) and the company Eni S.p.A. The policy issued by the European Union also affected the price of crude palm oil, where the price of crude palm oil fell. This caused oil palm companies, such as private companies such as PT Astra Agro Lestari Tbk (AALI) to suffer losses in the form of corporate profits which fell 94.24% on an annual basis, from Rp. 783.91 billion to Rp. 43.72 billion in 2019. In others side, the United Kingdom of the United Kingdom implemented a policy towards palm oil exports using RSPO certification for palm oil, which only uses palm oil that has been certified as sustainable.

The principle of sustainable environment is one of the principles applied by the European Union in the establishment of the Delegated Regulation Supplementing Directive of the EU Renewable Energy Directive II policy. Awareness of the international community about the environment has increased today, so that often environmental problems are associated with trade by countries. Indirect Land Usage Change is an environmental problem targeted by the European Union in the Renewable Energy Directive II.

World Trade Organizations as an organization that regulates international trade take part in examining whether a policy in trade that affects the environment is contrary to the principles of trade or not. Through the Committee on Treat and Environment (CTE), the international community's awareness of the ongoing global climate change has emerged and continues to grow to this day. The WTO as an international organization also has a stake in the environment when there are policies that regulate the environment affecting international

trade, where the WTO participates in examining whether the policy is contrary to the principles of international trade or not. As the principle of trade upheld by the WTO one of them is the principle of anti-discrimination. The principle of anti-discrimination aims to treat all countries equally. The principle of anti-discrimination is carried out within certain limits, as stated in applicable international law.

European Union policy stipulates that oil derived from oil palm plants is categorized as a crop that causes deforestation. The use of land in palm oil is actually when compared to the type of vegetable oil derived from rapeseed, sunflower, or soybeans which uses 5 to 9 times more land area than palm oil is more efficient than other vegetable oils. However, soybean plants that use 9 times more land to produce oil are not included in the categories as specified in European Union policy. As the principle of WTO international trade in Article I GATT 1994, namely Most Favored Nations, that there is an obligation to give equal treatment to each member of the WTO, as well as the principle of non-discrimination in international trade. In this case, EU policy can be assessed against the principle of most favored nations and general eliminations on quantitative restriction.

Environmental law can be applied in the practice of international trade, but may not conflict with existing international trade principles. A study needs to be done before applying a national law related to the environment in an international trade, because a national law cannot enforce the law's effect on other countries. Therefore, the EU policy also needs to review the existing WTO trade principles, where the EU should pay attention to the principle of international trade before the environment principle is implemented, where in international trade it is necessary to base on the applicable international trade principles. Based on the above background, the issues to be discussed are: EU rejection of Indonesia's crude palm oil exports in terms of the principle of most favored nation and quantitative restriction.

1. Indonesia's Crude Palm Oil exports to the European Union

The European Union issued a policy in 2019 related to sustainable resources for biodiesel, biomass and biofuels through Commission Delegated Regulation (EU) 2019/807. This is a concern for palm oil exporting countries, especially Indonesia as one of the countries that exports the largest crude palm oil or crude palm oil in Southeast Asia.

Crude palm oil is needed internationally, not only in the automotive field as fuel, but crude palm oil is also found in foods we consume daily, such as in chocolate, soap and cream products. The widespread use of crude palm oil in various fields of human life means that crude palm oil cannot be abolished, but is replaced with similar vegetable oils. The subsidiary material however does not guarantee that the material does not have a negative impact on the environment.

One of the raw materials that may be a substitute is soy beans, as stated in the European Union press release (Itkonen & Rietdorf, 2019):

"The Commission has concluded today that U.S. soya beans meet the technical requirements to be used in biofuels in the EU. Soya beans from the U.S. happen to be a very attractive feed option for European importers and users thanks to their competitive prices".

Crude palm oil which also has a high level of efficiency and is easy to find for companies producing products that use crude palm oil is the choice of why it is used as one of the basic ingredients of the company's products.

This can be a consideration for a company using crude palm oil as their raw material, where one of the countries that conduct Brexit, namely the UK, refuses to implement a policy similar to the European Union where the UK allows the use of crude palm oil taking into account international certification factors against crude palm oil used by the company, namely Roundtable On Sustainable Palm or known by the abbreviation ROSP.

As a result of policies issued by the European Union, companies engaged in the export of crude palm oil are affected because the price of palm oil is affected by the European Union's policies. In addition, the anti-dumping policy adopted by the European Union on crude palm oil also has an influence on the price of crude palm oil in the international world (Sujarwo & Brümmer, 2019).

The policy issued by the European Union has affected the export of Indonesian crude palm oil to the European Union, where crude palm oil is categorized as a plant that has a high ILUC risk so that this has led Indonesia to sue the EU policy on the WTO panel in 2019.

2. The European Union's Rejection of Indonesia's Crude Palm Oil Exports in terms of the Most Favored Nation Principle

The principle of most favored nation lies in Article I GATT 1994 regarding equal treatment of all WTO member countries. As stated in the principles of international trade, the WTO official website (World Trade Organization, 2020) has five principles, namely trade without discrimination, freer trade: gradual through negotiation, predictability: through binding and transparency, promoting fair competition, and encouraging development and economic reform .

The principle of most favored nation is one of the principles included in the principle of anti-discrimination in international trade. In the journal (Thalib, 2012) it is written that the principle of most favored nation aims to eliminate discrimination against international trade practices and also with the existence of this principle, it will guarantee and protect the rights of developing countries to benefit from the best trade conditions. negotiated by developing countries. Article I (1) General Most-Favored-Nation Treatment stated that:

"Any advantage, favor, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the product originating in or destined for the territories of all other contracting parties."

As stated in Article III Commission Delegated Regulation (EU) 2019/807, there is a regulation regarding the criteria used by the European Union in determining raw materials with high ILUC risk, which according to the calculation determined by European Union, crude palm oil is classified as vegetable oil which exceeds the 10% limit as one of the biodiesel that has a high risk of ILUC. When looking at (Deringer, et al., 2019) that:

"The core of the problem lies in how the delegated regulation defines - high ILUC risks' on the basis of the type of feedstock, regardless of the actual conditions that apply in the territory where it was grown. Moreover, the proposal weighs the risk of crops that are sometimes cultivated in wetlands three times higher. In addition, the EU's calculations accurately determine that only palm oil is grown on such lands. This leads to a threshold being set at a level where only palm oil - and no other comparable biofuel feedstock - is defined as a high-risk crop. "

In the study mentioned that crude palm oil is the only one classified in the high ILUC risk category. This policy determined by the European Union makes acts of discrimination, where the European Union does not treat the same actions against other WTO member countries affected. One example is soybean as vegetable oil which is also exported to the European Union also grows in wetlands. As stated in wetlands.org: "In Argentina, Brazil, Paraguay and Bolivia, soy expansion results in wetland loss and degradation. Various wetlands of high conservation status are being affected for this expansion. " (Stolk, 2016).

In the European Union policy, other vegetable oils that are taken into account are soybean, rapeseed, sunflower, which according to EU policy, vegetable oil is not classified as high ILUC risk as stated in the attachment to the Commission Delegated Regulation (EU) 2019/807 states soybean is not included in the criteria wetlands in Article 29 (4) (a) Directive (EU) 2018/2001 concerning share of expansion into land. "Overall, our study shows that the Chaco is currently losing forests at an alarming pace, and that deforestation is primarily fueled by the global demand for soybean." (Fehlenberg, et al., 2017).

As the principle of most favored nation states member countries must not discriminate among other WTO members by not ignoring customs fees, import and export policies, and taxes, and regulations. An advantage, privilege or immunity granted to a country must also be given to all member countries. Indonesia as one of the WTO member countries together with the United States, Paraguay, Brazil, the European Union, and other countries makes the European Union have an obligation as a WTO member country to implement Article I GATT 1994, where no discrimination should be made against the determination of oil criteria vegetable products exported by several countries to the European Union. Criteria in the Commission Delegated Regulation (EU) 2019/807 causes only crude palm oil to be classified as high risk ILUC, even though the journal above shows that the European Union has ruled out other crops, such as soybean oil which also has ILUC high risk criteria, but according Commission Delegated Regulation (EU) 2019/807, soybean is not included.

Therefore, it can be concluded that the European Union violated Article I GATT 1994, namely the principle of the most favored nation where the European Union indirectly only targets crude palm oil in its policy criteria. Soybean oil, which is exported by the European Union from the United States, Paraguay, Brazil, has a high ILUC risk factor that is not categorized in the European Union policy making the European Union have discriminated against crude palm oil producing countries.

When looking at one of the exceptions to the principle of most favored nation, namely Article XX of the GATT 1994, where there are restrictions relating to the protection of the health or life of humans, animals and plants, that does not mean the existence of Article XX of the GATT 1994 makes EU policy become valid. Previous WTO cases relating to the environment can be considered that despite the relationship between a policy and environmental factors, the WTO as a trade dispute resolution organization can decide by not taking sides with Article XX of the GATT 1994. An example is the case of Tuna / Dolphin I between Mexico and the United States. In that case, Mexico is suing the United States because of its policy towards the protection of endangered dolphins related to tuna fishing practices.

The journal (Priyono, 2013) stated that the GATT Panel may decide that if the use of Article XX (b) is permitted to be applied outside of US jurisdiction, actions that are included are not a necessary category in terms of Article XX (b). To declare 'necessary', the country submitting must show that there is no other action in accordance with GATT. The Panel ruled that US actions, if the use of Article XX (b) was interpreted broadly as extraterritorially implemented, would not meet the "necessary" requirements set out in that article.

The European Union does not consider the possibility of sustainable oil palm planting, as the European Union generalizes that all oil palm plantations are at high risk of ILUC, regardless of which country is producing it. In addition, the European Union did not consider that the restriction on the use of crude palm oil for companies in the European Union did not have high efficiency. Companies that switch to the use of other vegetable oils that have a high risk of ILUC in addition to crude palm oil are also possible, which makes the EU restriction policy useless to policies that are claimed to reduce ILUC. "In conclusion, any differentiated treatment or selective exclusion of one individual crop, as preferred by the European Parliament in the case of palm oil, will not comply with the WTO law given the existing jurisprudence." (Deringer & Lee-Makiyama, 2018).

3. The European Union's Rejection of Indonesia's Crude Palm Oil Exports in terms of the Quantitative Restriction Principle

The principle of quantitative restriction is contained in Article XI GATT 1994 regarding General Elimination of Quantitative Restrictions, where this principle prohibits a non-tariff limitation. In these provisions mentioned that:

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

In terms of prohibitions or restrictions other than duties, taxes or other charges, states that there are two criteria considered by the WTO Panel in the example of the Japan - Trade in Semi-conductors case, namely First, there are reasonable grounds to believe that sufficient incentives or disincentives existed for non-mandatory measures to take effect. Second, the operation of the measures to limit exports of semi-conductors at prices below company-specific costs was essentially dependent on Government action or intervention.

In the first criterion, there is a reason based on the disincentive applied by the European Union through the Commission Delegated Regulation (EU) 2019/807, which applies to the restriction of crude palm oil that has been in effect, where there is a clause stating that restrictions on imports of crude palm oil begin in 2023 Article III of the GATT 1994 general section on sub mandatory versus discretionary legislation, it is explained that:

"... that is, to protect the expectations of the contracting parties as to the competitive relationship between their products and those of the other contracting parties. Both articles are not only to protect current trade but also to create the predictability needed to plan future trade. That objective could not be attained if contracting parties could not challenge existing legislation mandating actions at variance with the General Agreement until the administrative actions implementing it had actually been applied to their trade. Just as the very existence of a regulation providing for a quota, without it restricting particular imports, has been recognized to constitute a violation of Article XI: 1".

The second criterion has been fulfilled, where actions taken to limit imports are caused by policies that constitute EU intervention. Therefore, the first element of Article XI: 1 GATT 1994 has been fulfilled. The second element is made effective through quotas, import or export licenses or other measures, where the European Union through the criteria of high risk indirect-land-usage-change stipulates raw materials that are included in the criteria according to its policies may not exceed the consumption level of member countries in 2019 which includes in these criteria, unless they are certified with low indirect land-use change-risk. In the provisions of Article 26 (2) Directive (EU) 2018/2001 states that "From 31 December 2023 to 31 December 2030 at the latest, that limit shall gradually decrease to 0%".

As the definition of the prohibition principle of Quantitative Restrictions above, if it is examined the European Union policy, namely the Commission Delegated Regulation (EU) 2019/807 as a follow-up policy of Directive (EU) 2018/2001, then it can be seen in Article 3 Commission Delegated Regulation (EU) 2019 / 807 determines the criteria for high indirect land-use change-risk feedstock. In this Article set two criteria for determining raw materials that include high risk ILUC, namely the average annual expansion of the global production area of the feedstock since 2008 is higher than 1% and affected more than 100 000 hectares; the share of such expansion into land with high-carbon stock is higher than 10%. With the formula specified in the policy, palm oil with 41.92% has exceeded the ILUC risk limit set by the European Union. However, it should be noted before in the consideration of the four policies that the European Union recognizes the calculations used are still uncertain.

This is supported by one of the reports published by The High Level Panel of Experts on food security and nutrition (HLPE, 2013) namely "Calculating ILUC effects is complex and requires establishing the link between biofuel production in a certain place and new crop production established on former forest or grassland elsewhere. "

In addition, uncertain calculations make the purpose of restrictions imposed by the European Union inaccurate, which causes uncertainty in the application of policies, and the goals to be achieved by the European Union in the environmental field are less effective and inaccurate. One example where the data used by the European Union against soybean as one of the raw materials that are not included in the high risk ILUC has been discussed in the previous sub-chapter, where the research article (Boerema, et al., 2016) stated that "Our analysis shows that the European soybean import has deleterious ecological and socio-economic effects, eroding natural capital by provoking permanent losses of important ecosystem services, while providing no economic benefits to society at large. "

Indonesia has stated its disapproval by using a dispute resolution tool through the WTO panel, which begins with a request for consultation to the European Union. In this policy, the European Union based its policy making based on the criteria specified in Article 29 paragraph (4) letters a, b, and c of Directive (EU) 2018/2001 or known as Renewable Energy Directive II. The policy is based on subparagraph 4 Article 26 (2) of Directive (EU) 2018/2001, which is followed by the clause "By 1 February 2019, the Commission shall adopt a delegated act in accordance with Article 35 to supplement this Directive by setting out the criteria for certification of low indirect land-use change-risk biofuels, bioliquids and biomass fuels and for determining the high indirect land-use change-risk feedstock for which a significant expansion of the production area into land with high-carbon stock is observed ".

The policy that began in 2023 resulted in the gradual use of raw materials with high ILUC, which according to the 2019/807 Commission Delegated Regulation (EU) policy is crude palm oil. This caused the company to stop using raw materials with palm oil, and switch to other substitute raw materials, such as rapeseed, or soybean.

This led to import restrictions that led to the complete elimination of the use of raw materials that were not included in the criteria set forth in the policy in 2030 by companies in the European Union, which are crude palm oil, because crude palm oil is classified as one vegetable oil criteria only has a high level of ILUC (indirect land usage change) risk according to Commission Delegated Regulation (EU) 2019/807.

The criteria based on RED II regulation do not have international standards, where the determination of the criteria for a biofuel is sustainable as stated in (Deringer, et al., 2019) that "... there are no international standards on sustainable biofuels, and there are several competing sustainability certifications on the market who certify based on actual production and process methods of individual producers. "

Barriers that are prohibited in the principle of quantitative restriction have a broad reach, where a policy which is inhibiting can be included. Barriers applied by the European Union cause crude palm oil cannot be exported by palm oil entrepreneurs in Indonesia. These constraints, if assessed, have an element of discrimination against crude palm oil as discussed in the previous sub-chapter, where the process of producing crude palm oil which is categorized in the 2019/807 Commission Delegated Regulation (EU) is the same, without considering how the process is.

This can be compared to the WTO Brazil - Retreaded Tires case, which despite having the objective of protecting the environment, the focal point in question does not affect the environment effectively, so the WTO decides that the policy violates international trade principles. Exceptions to the principle of quantitative restriction as contained in Article XI: II are also not fulfilled in the case of European Union policy. European Union policies that are in close contact with the environment make it necessary to review Article XX (b) GATT 1994 as one of the exceptions to the principle of quantitative restrictions. There are two criteria in determining the use of Article

XX (b) GATT 1994 in this case are (i) whether the objective of the measure is to protect human, animal or plant life or health and (ii) whether the measure is 'necessary' to fulfill this policy objective (Marceau, 2016).

In determining whether the EU policy is included in the category of 'necessary' according to Article XX of the GATT 1994, it is necessary to look at one of the three criteria is 'contribution of the measure to the realization of the ends pursued by it', where the criteria This is still lacking. As the European Union has the goal of suppressing the effects of greenhouse gases through regulation of ILUC, the adoption of policies using criteria to determine raw materials that have a high risk of ILUC which leads to the elimination of the use of these raw materials has less significant effect on decreasing ILUC levels. In that case, the European Union which rejects crude palm oil, one of the affected countries is the Republic of Indonesia, where the impact of the refusal is if the crude palm oil included in the ILUC category is not exported to the European Union, the crude palm oil is of course it will be used for other purposes, or exported to other countries that do not have export barriers. Despite that, if palm oil ended up being substituted by other vegetable oils, then the purpose of the regulation won't be reached as palm has high yield efficiency compared to other crops on producing oils. The demands of European Union's market in the future for the vegetable oil may result in using more lands to produce other vegetable oils, and make another ILUC risk.

In other words, the restrictions imposed by the European Union by refusing to export crude palm oil through the criteria in the Commission Delegated Regulation (EU) 2019/807 make the 'necessary' factor in Article XX (b) GATT 1994 unfulfilled. Therefore, by not fulfilling the elements of Article XX (b) GATT 1994 does not exclude a violation of Article XI: I GATT 1994 regarding the principle of quantitative restrictions.

This is supported by WTO's experience in handling international trade conflicts related to the environment, one of which is in the case of Tuna-Dolphin. The case examines Americans who use a general exception to Article XX of the GATT 1947 as the basis for a policy that implements an embargo on tuna imports from Mexico. In this case, the WTO decided that America had violated Article XI General Prohibition on Quantitative Restrictions. In such cases, the environmental reasons as stated in the WTO exclusion principle in Article XX of GATT 1947 become invalid, as written in (Multilateral Trade System Department, 2007):

"Because the US prohibitions are not measures necessary to protect the life and health of animals and are not primarily aimed at the conservation of exhaustible natural resources, the panel concluded that the US measures violated Article XI: 1 and were not covered by the exceptions in Articles XX: (b) or (g) ".

Conclusions

The European Union's restrictive measures through the issuance of Commission Delegated Regulation (EU) 2019/807 when examined against the principle of most favored nation and quantitative restrictions in the General Agreement on Tariffs and Trade violated Article I: 1 and Article XI: 1 GATT 1994. In that case, The European Union has violated one of the principles of international trade, namely the principle of anti-discrimination against raw palm oil raw materials, which although the regulation has environmental goals, exceptions contained in Article XX (b) of the 1994 GATT cannot be applied.

The policy on sustainable energy issued by the European Union should be able to use the same method as the United Kingdom, where the UK considers the company's need for crude palm oil by using crude palm oil that has been certified by the RSPO (Roundtable on Sustainable Palm Oil), or follows the system certification that has been applied by countries that produce crude palm oil.

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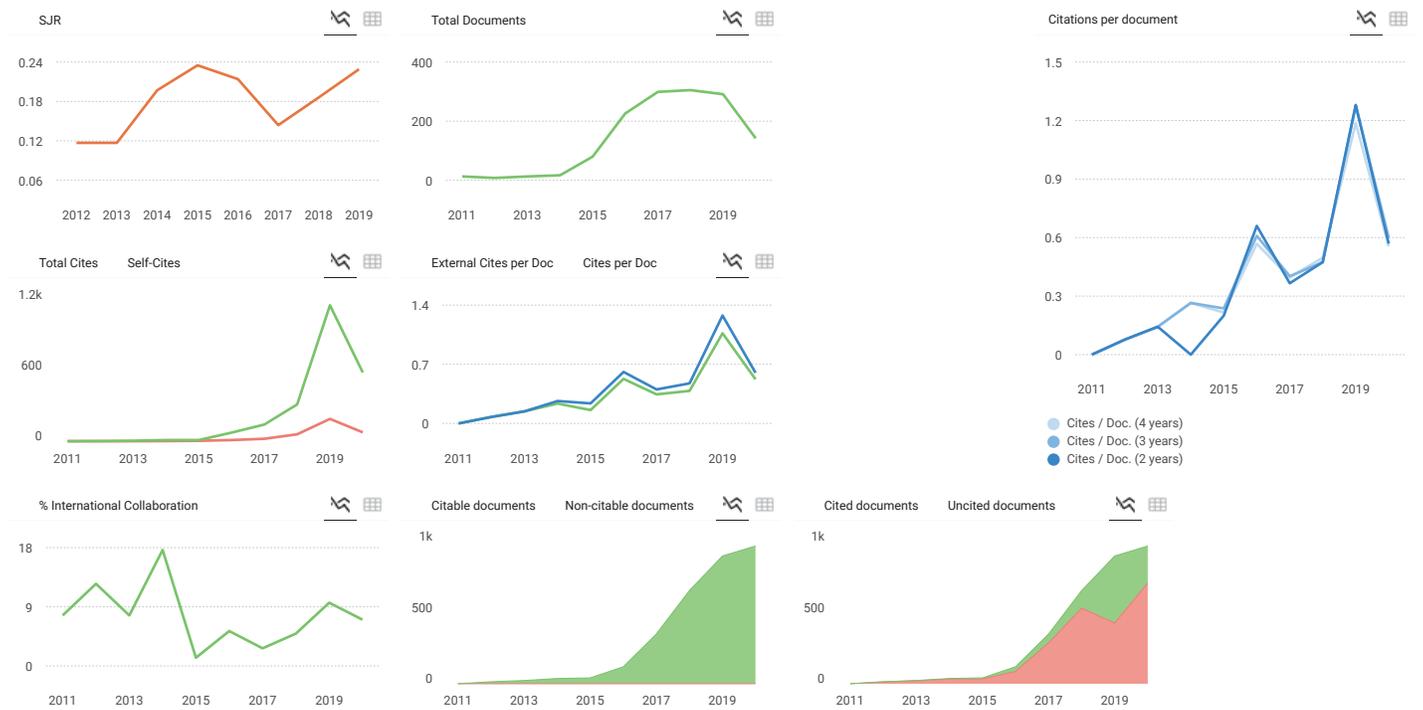
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