

Is Indonesia Ready to be the Party of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership?

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ABSTRACT: The Comprehensive and Progressive Agreement for Trans-Pacific Partnership has been highlighted by Indonesia due to its enhanced rule-based nature. However, the anti-corruption issues and the environmental issues have triggered questions on whether Indonesia is clean or healthy enough to be the party to this agreement. This article aims to understand Indonesia's readiness to be a party to this agreement. It implements the doctrinal method by implementing the related rules of international law related to treaty suspension, anti-corruption, and environmental issues in Indonesia. The implementation of such a method is also supported by the treaty approach, conceptual approach, and case approach. From the first discussion, it can be understood that treaty suspension is a regime constituted under the Vienna Convention on the Law of Treaties, and the CP-TPP's Suspension has no specific deadline. The second discussion expresses that since Indonesia has not brought its anti-corruption rules in conformity with the United Nations Convention Against Corruption, the accession of CP-TPP may bring threats to Indonesia. This threat is caused by the CP-TPP dispute settlement mechanism's competence to settle disputes on anti-corruption issues. Lastly, the third discussion of this article states that the current Indonesian environmental law norms may be perceived as a potential threat to its national interests. Such a threat will arise if the current parties to the CP-TPP eventually decide not to suspend Article 20.17 concerning Conservation and Trade.

KEYWORDS: Anti-corruption; CP-TPP; Environment; Suspension.



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I. INTRODUCTION

Are we “clean” yet? Are we “healthy” enough? These questions can be perceived as an early illustration of how Indonesia shall determine its position before accessing The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CP-TPP). Ji and Rana stated that the CP-TPP can be viewed as one of the most politically resilient economic arrangements of the past decades.¹ This plurilateral agreement is a free trade agreement between Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, Peru, New Zealand, Singapore, and Vietnam.²

As the Regional Comprehensive Economic Partnership (RCEP) and Joint Statement Initiative on e-commerce (eJSI), CP-TPP were adopted to achieve both economic and non-economic objectives. The economic objectives of this agreement are to achieve economic integration, growth, and all the social benefits that it brings forth.³ Meanwhile, the non-economic objectives of this agreement are to ensure its members regulate its environment, conserve its living and non-living exhaustible natural resources, and the integrity of financial systems and public morals.⁴ These objectives of course include transparency, good governance, corruption elimination, and the promotion of cultural diversity and identity.⁵

In the blink of an eye, the CP-TPP can be perceived as an agreement that will prosper its members and hence it will provide benefits to any country that enters this preferential agreement. However, one may change its mind upside down once one understands the issue concerning the suspended articles of this agreement. Those suspended articles can be found in the Customs Administration and Trade Facilitation Chapter, The Investment

¹ Xianbai Ji & Pradumna B Rana, “A Deal that Does Not Die: The United States and the Rise, Fall and Future of the (CP)TPP” (2019) 34:2 Pacific Focus 230–255.

² “Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)”, online: *Aust Gov Dep Foreign Aff Trade* <<https://www.dfat.gov.au/trade/agreements/in-force/cptpp/comprehensive-and-progressive-agreement-for-trans-pacific-partnership>>.

³ Andrew Mitchell & Vandana Gyanchandani, “Convergence & Divergence in Digital Trade Regulation: A Comparative Analysis of CP-TPP, RCEP, and EJSI” (2023) 19:2 The South Carolina Journal International Law & Business.

⁴ *Ibid.*

⁵ *Ibid.*

Chapter, The Cross-Border Trade in Services Chapter, The Telecommunications Chapter, The Government Procurement Chapter, The Intellectual Property Chapter, The Environment Chapter, and The Transparency and Anti-Corruption Chapter, due to their incompatible nature with the members' national interests.⁶

To intuitively understand this issue, this article implements the concept of conflicts between free trade and national interest explained by Van den Bossche and Zdouc. These scholars stated this concept as the basic rules of the World Trade Organization (WTO) Law which prevail if a conflict between a free trade obligation and a national interest occurs.⁷ In the practice of the WTO Law, these rules can be found in Article XX General Agreement on Tariffs and Trade 1994 (GATT) concerning the General Exception, and Article XXI GATT concerning the National Security Exception. Although this article discusses regional trade issues synonymous with the "WTO-Plus" Term⁸, this concept is relevant in addressing how primary international obligation and the national interest of a state conflict with one another.

Indonesia is not one of the members of the CP-TPP. However, based on the information acquired from Indonesia's Coordinating Minister of Economy on October 18th, 2023, Indonesia had an ambition to be one of its members.⁹ Wu stated that the Association of Southeast Asian Nations (ASEAN) members consisting of Thailand, Indonesia, and the Philippines

⁶ "CPTPP Suspensions Explained", online: *Australia Government Department of Foreign Affairs and Trade* <<https://www.dfat.gov.au/trade/agreements/in-force/cptpp/outcomes-documents/Pages/cptpp-suspensions-explained>>.

⁷ Peter Van Bossche & Werner Zdouc, *The Law and Policy of the World Trade Organization: Text, Cases, and Materials* (Cambridge: Cambridge University Press, 2022).

⁸ Shahid Ahmed & Saba Ismail, "Is 'WTO-Plus' a Policy Option for India-China Agriculture Trade? A CGE Analysis" (2020) 13:26 *Eurasian Journal of Business and Economics* 23–44.

⁹ Martyasari Rizky, "Menko Airlangga Ungkap RI Incar Masuk Blok Perdagangan CPTPP", online: *CNBC Indonesia* <<https://www.cnbcindonesia.com/news/20231018155209-4-481659/menko-airlangga-ungkap-ri-incar-masuk-blok-perdagangan-cptpp>>.

have an express interest in being members of the CP-TPP.¹⁰ Wu referred to the Indonesia Minister of Trade, Enggartiasto Lukita's Proposal to Thailand, Philippines, Myanmar, Cambodia, and Laos to join the CP-TPP to liberalize ASEAN and to actualize high-standard trade regulations in conjunction with ASEAN economic development.¹¹ Furthermore, Indonesia is also interested in signing this agreement since its ASEAN competitors (Malaysia and Brunei) also signed this agreement to receive benefits in the form of foreign investment and technological cooperation with Western members of the CP-TPP.¹² This article seeks to analyze whether Indonesia is ready to be part of this preferential trade agreement or not. Due to the large substantial issues covered under this agreement, this article takes into account the suspended articles of the CP-TPP as the main object of this article's analysis. By addressing the rhetoric in the first paragraph of this introduction, this article also notes that it will focus its discussion on the environment and anti-corruption issues covered under the CP-TPP. According to this background, this article consists of these three discussions. The first discussion will provide explanations concerning the suspended articles of the CP-TPP. Meanwhile, the second discussion seeks to express Indonesia's readiness to be a member of the CP-TPP according to the environmental arrangements covered under this agreement. Furthermore, the third discussion discusses Indonesia's readiness to be a CP-TPP member according to the anti-corruption arrangement under the following agreement.

II. METHODS

This article is written as an outcome of doctrinal research conducted by gathering the rules of international law and Indonesian national law related to the legal issues above. It therefore applies secondary data in the form of law in the books or *lex lata*. In conducting such implementation, this

¹⁰ Chien-Huei Wu, "ASEAN at the Crossroads: Trap and Track between CPTPP and RCEP" (2020) 23:1 J Int Econ Law 97–117.

¹¹ *Ibid.*

¹² Nguyen Quoc, "Impacts of IPRs Basic Provisions in CPTPP on Technology Transfer and Innovation - Suggestion in Indonesia" (2021) 18:4 Indones J Int Law 457–480.

doctrinal research is supported by the treaty approach, conceptual approach, and the case approach explained herein.

The treaty approach is implemented by gathering the legal substances of The Comprehensive and Progressive Agreement for Trans-Pacific Partnership, the Vienna Convention on the Law of Treaties 1969, the General Agreement on Tariffs and Trade, and the Agreement Establishing the World Trade Organization as the major premises to this article discussions. Furthermore, this approach is also conducted by implementing the United Nations Convention Against Corruption, the International Covenant on Civil and Political Rights, and the Convention on International Trade of Endangered Species as the supporting legal sources in this article. These international treaties are implemented to analyze Indonesia's anti-corruption and environmental laws and issues.

Furthermore, the conceptual approach is implemented by applying legal doctrines related to this article's issues. Those legal doctrines are gathered from books and journal articles related to international trade law, international environmental law, and international anti-corruption law. Furthermore, this article also implements expert commentaries on Indonesian national law as supporting material in providing the discussions.

Last but not least, the case approach is implemented by gathering the WTO Dispute Settlement Body's Documents. Those documents consist of the Report of the Panel and the Report of the Appellate Body on trade and environmental or climate litigation disputes. The following cases are the United States – Shrimp – Turtle Case, the United States – Tuna – Dolphin Case, and the Brazil – Retreaded Tyres Case. The findings of those cases are implemented to provide an understanding of the development of trade and the environment related to this article.

To ensure that those approaches are comprehensively implemented, this article is written by gathering secondary data. Those secondary data consist of the primary legal sources and secondary legal sources. The primary legal sources consist of international treaties and WTO Cases as mentioned above. Furthermore, this article also implements Indonesian national law for an explanatory purpose. The secondary legal sources implemented in

this article consist of books and journal articles that interpret and explain the primary legal sources

III. SUSPENDED ARTICLES UNDER THE CP-TPP: THE *RATIO MATERIE* AND *RATIO TEMPORIS* MATTERS OF THE ISSUE

A treaty suspension is a concept in line with the axiom of *inadimplenti non est adimplendum* generally constituted under Article 60 Vienna Convention on the Law of Treaties 1969 (VCLT 1969).¹³ To understand this rule further, this article quoted Article 60 paragraph 1. VCLT 1969 states that “*A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.*”¹⁴ Argent stated this principle allows a party to a treaty not to exercise its obligation due to the breach in the form of an act or an omission conducted by another party.¹⁵ It is important to note that according to Article 60 paragraph 5 VCLT 1969, the concept of treaty suspension is inapplicable to a treaty with an imperative categorial nature as the human rights treaty.¹⁶

Helfer stated that treaty suspension is a mechanism provided for its parties to balance a competing concern or a conflict of interest.¹⁷ An example of how this mechanism can be performed by a party to a treaty can be seen in the Intermediate-Range Nuclear Forces (INF) Treaty issue explained herein. In 2019, President Donald Trump of the United States announced that he planned to terminate the INF Treaty of 1987.¹⁸ This action was

¹³ Thomas Giegerich, “Article 60” in Oliver Dörr & Kirsten Schmalenbach, eds, *Vienna Conv Law Treaties Comment* (Berlin, Heidelberg: Springer, 2018) 1095 at 60.

¹⁴ *Ibid* at 13; “United Nations Treaty Collection”, online: <https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en>.

¹⁵ Pierre d’Argent, *International Law Textbook: Applying International Law* (Louvain: edX & UC Louvain, 2021).

¹⁶ Giegerich, *supra* note 13 at 13; Argent, *supra* note 15 at 17; Jeffrey White, “Autonomous Reboot: Kant, the categorical imperative, and contemporary challenges for machine ethicists” (2022) 37:2 *AI Soc* 661–673.

¹⁷ Laurence R Helfer, “Rethinking Derogations from Human Rights Treaties” (2021) 115:1 *American Journal of International Law* 20–40.

¹⁸ Shervin Taheran & Kingston Reif, “As INF Treaty Falls, New START Teeters” (2019) 49:2 *Arms Control Today* 26–29.

taken by the United States due to its political tension with Russia. Even though German Chancellor Angela Merkel's Persuasion to ensure that the United States did not terminate its obligation, Russia immediately reciprocated by announcing that it would suspend its obligation.¹⁹ The announcement made by Russia was declared after the United States stated that it would effectively withdraw itself in August 2019.²⁰

The conjunction between the material breach concept under Article 60 VCLT 1969 with the issue that lies within the INF Treaty is explained herein. The INF Treaty is principally a bilateral treaty consisting of the United States and Russia (formerly known as Uni Soviet Socialist Republic) having a vital role in controlling nuclear weapons usage.²¹ Under this treaty, the United States has an obligation of means to ensure that this treaty will evolve into a multilateral treaty especially to invite other nuclear states such as China and India.²² Russia perceived the United States' omission as a material breach thereby it may be used as a justification to develop, test, and deploy intermediate-range missiles and launch a new nuclear arms race.²³ Furthermore, the United States during President Trump's Administration perceived Russia's action in developing its missiles and nuclear arms as a material breach of the treaty, thereby allowing itself to withdraw itself from this bilateral and reciprocal treaty.²⁴ Under the perception of those contracting parties, both the United States' failure to perform its positive obligation and Russia's action in expanding its missiles and nuclear can be seen as a material breach of a primary obligation constituted under a reciprocal treaty, causing its opposing parties justified not to perform its obligation.

Therefore, those INF Treaty's Parties' Acts constitute the *inadiplenti non est adimplendum* axiom under Article 60 VCLT 1969.²⁵ Xiouri quoted Fitzmaurice's opinion stating that suspension is a ground of non-

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ Safak Oguz & Mehmet Seyfettin Erol, "End of the INF Treaty: Are We Entering a New Cold War Era?" (2021) 14:28 Dergi Park Akad Gazi Akad Bakis 1–20.

²² *Ibid.*

²³ *Ibid.*

²⁴ Michael Fitzsimmons, "Russian Strategy and the End of the INF Treaty | 10 | Survival 60.6 |" in *Surviv 606*, 1st edition ed (London: Taylor & Francis, 2023) 106.

²⁵ Argent, *supra* note 15.

performance.²⁶ To be concise, this article interpreted the “non-performance” as a performance consisting of both an act and an omission. Xiouri furthermore states that this stipulation was created in order to achieve reciprocity and proportionality in the implementation of a treaty.²⁷

Furthermore, this article would like to emphasize that the suspension mechanism is performed by not conducting an obligation due to the non-performance of another party.²⁸ As the INF treaty explained above, the CP-TPP also has articles temporarily suspended. After the negotiation process of this plurilateral treaty, the Final Text of the CP-TPP Text was reduced from 622 pages to 584 pages due to the removal of the suspended provision.²⁹ According to Article 2 of this treaty, those stipulations will remain suspended until the 11 signatories decide otherwise by consensus.³⁰ This suspension was proposed by Japan and Australia to ensure that the door is open for the United States to return to this agreement.³¹

In providing a comprehensive understanding of the current status of the CP-TPP as a preferential agreement, this article provides the following explanation. Such an explanation is necessary to understand the correlation between this mega-regional treaty with the rules of suspension. This mega-regional treaty was adopted and signed in Santiago, Chile on March 8th, 2018.³² This agreement was then entered into force on December 30th,

²⁶ Maria Xiouri, “The Relationship between Responses to the Breach of a Treaty in International Jurisprudence” in *Breach Treaty* (Brill Nijhoff, 2021) 215.

²⁷ Maria Xiouri, “Common Elements and Tension between Responses to Breach of a Treaty” in *Breach Treaty* (Brill Nijhoff, 2021) 38.

²⁸ August Reinisch & Sara Mansour Fallah, “Post-Termination Responsibility of States?—The Impact of Amendment/Modification, Suspension and Termination of Investment Treaties on (Vested) Rights of Investors” (2022) 37:1–2 *ICSID Review - Foreign Investment Law Journal* 101–120.

²⁹ “The CPTPP Enters into Force: What Does it Mean for Global Trade? | White & Case LLP”, (21 January 2019), online: <<https://www.whitecase.com/insight-alert/cptpp-enters-force-what-does-it-mean-global-trade>>.

³⁰ *Ibid.*

³¹ *Ibid.*

³² Department of Foreign Affairs and Trade, “Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)”, (2021), online: [dfat.gov.au <https://www.dfat.gov.au/trade/agreements/in-force/cptpp/comprehensive-and-progressive-agreement-for-trans-pacific-partnership>](https://www.dfat.gov.au/trade/agreements/in-force/cptpp/comprehensive-and-progressive-agreement-for-trans-pacific-partnership); Global Affairs Canada, “About the Comprehensive and Progressive Agreement for Trans-Pacific Partnership”, (19 November 2015), online: *Gov Can* <<https://www.international.gc.ca/trade-commerce/trade-agreements-accords->

2018 for its six members consisting of Canada, Australia, Japan, Mexico, New Zealand, and Singapore.³³ At this present time, this plurilateral agreement is in force on its 11 members consisting of Canada, Australia, Brunei, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam.³⁴ The United Kingdom was then welcomed to be the 12th member of this agreement pursuant to the Accession Protocol signed by the parties and the United Kingdom on July 16th, 2023.³⁵

Based on the explanations above, CP-TPP is an applicable treaty for its parties and henceforth shall not be viewed as a dead letter. This brings us to the explanation of how several parts of this agreement were then suspended solely to ensure the United States entered this agreement. The United States withdrew its signature from the CP-TPP in January 2017, after President Trump was elected at that time.³⁶ Regardless of the withdrawal done by the United States, the 11 members' efforts to ensure this treaty entered into force can be seen as a success.³⁷

However, the absence of the United States in this plurilateral agreement has caused its members to suspend several articles under this agreement. Australia is a member of the CP-TPP which provides transparent information concerning the suspended articles and its measures defying this agreement. Such information is plausible to express the fact that CP-TPP members materially breached their provision, causing the barrage of suspension. A concrete example of this material breach can be seen in Australia's omission to invoke and implement measures to combat the international trade of endangered species. This kind of action has triggered

commerciaux/agr-acc/cptpp-ptpgp/background-
document_information.aspx?lang=eng> Last Modified: 2024-01-23.

³³ Department of Foreign Affairs and Trade, *supra* note 32; Canada, *supra* note 32.

³⁴ Canada, *supra* note 32.

³⁵ *Ibid*; Department of Foreign Affairs and Trade, *supra* note 32.

³⁶ *Financial Integration in the CP-TPP and its co-movements with the United States and China*, Technical Report, by Mayank Hirde & Faisal Ahmed, dspace.fsm.ac.in, Technical Report (FORE School of Management, 2022) Accepted: 2022-03-07T09:54:15Z.

³⁷ *Ibid*.

other members to suspend Article 20.17.5 CP-TPP which constitutes the international trade on endangered species.³⁸

This practice has shown the fact that although Australia has become the contracting party of the Convention of International Trade on Endangered Species³⁹, it does not fully bring its measures in conformity with the convention. Due to the existence of the dispute settlement mechanism specifically designed for the implementation of the environmental chapter of the CP-TPP, it can be understood that the suspension of Article 20.17.5 of the agreement saves Australia as the party of this legal instrument. The article therein *inter alia* states that “*In further effort to address the illegal take of, and illegal trade in, wild fauna and flora, including parts and products thereof, each Party shall take measures to combat, and cooperate to prevent, the trade of wild fauna and flora that, based on credible evidence, were taken or traded in violation of that Party's law, the primary purpose of which is to conserve, protect, or manage wild fauna or flora.*”⁴⁰ The suspension of this article has indeed caused Australia not to violate the obligation of means set forth therein.

Based on the explanation above, it can be understood that the suspension of several articles under this agreement will remain unless the parties decide otherwise. The suspended articles of the CP-TPP according to the data presented by the Government of Australia are hereby described and explained herein:

Table 1. The Suspended CP-TPP Articles
Source: CPTPP suspensions explained

Chapter (Number)	Suspended Provision	Effect of the suspension
Customs	Article 5.7.1(f): Each	CPTPP Party

³⁸ “CPTPP suspensions explained”, online: *Aust Gov Dep Foreign Aff Trade* <<https://www.dfat.gov.au/trade/agreements/in-force/cptpp/outcomes-documents/Pages/cptpp-suspensions-explained>>.

³⁹ Convention of International Trade on Endangered Species, “List of Contracting Parties | CITES”, (2020), online: <<https://cites.org/eng/disc/parties/bonn.php>>.

⁴⁰ “Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)”, online: *Aust Gov Dep Foreign Aff Trade* <<https://www.dfat.gov.au/trade/agreements/in-force/cptpp/comprehensive-and-progressive-agreement-for-trans-pacific-partnership>>.

<p>Administration and Trade Facilitation (5)</p>	<p>Express Shipments Suspend second sentence</p>	<p>has agreed not to assess customs duties on express shipments valued at or below a fixed amount as set under its domestic law. That amount is currently set at \$1,000 under Australian law.</p> <p>There will no longer be an obligation for Parties to review the threshold below which no duties on express shipments are charged.</p>
<p>Investment (9)</p>	<p>1. 9.1 Definitions Suspend "investment agreement" and "investment authorization" and associated Footnotes (5 - 11) 1. 9.19.1 Submission of Claim to Arbitration an (i) B and C; (b)(i) B and C (investment authorization or investment agreement), chausette, footnote 3 1. 9.19.2 Submission of</p>	<p>This narrows the scope of Investor-State Dispute Settlement (ISDS). Foreign investors can no longer make an ISDS claim for violation of private investment contracts with the Government, or investment authorizations.</p> <p>Foreign investors can still bring an ISDS claim for a violation of an investment obligation, such as expropriation or the minimum standard of</p>

		Claim to Arbitration	to treatment.
	Footnote 32	1. 9.19.3 Submission of Claim to Arbitration	Expropriation is where a government takes over, or nationalizes, an investor's property.
	(b) delete investment authorization or investment agreement	1. 9.22.5 Selection of Arbitrators 2. 9.25.2 Governing Law 3. Annex 9-L Investment Agreements	The minimum standard of treatment means a government has to treat a foreign investor fairly, such as giving them due process in a local court.
Cross-Border Trade in Services (10)	Express Services – Suspend paragraphs 5 and 6	Delivery – Annex 10-B paragraphs 5	Parties are no longer obliged to refrain from cross-subsidizing express delivery services with revenues derived from monopoly postal services. There will no longer be a requirement for each Party to ensure that its postal monopoly refrains from abusing its monopoly position when supplying express delivery services. This

		provision would not have required Australia to make any legislative or competition policy changes.
Financial Services (11)	Minimum Standard of Treatment in Article 11.2 Suspend sub-paragraph 2(b); footnote 3 and Annex 11-E	Foreign investors in the Australian financial services sector will not be able to bring an ISDS claim against Australia for violating the minimum standard of treatment obligation.
Telecommunications (13)	Resolution of Telecommunications Disputes - Article 13.21.1(d)	This suspends a process for reconsideration of decisions made by telecommunications regulatory bodies.
Government Procurement (15)	Conditions for Participation - Article 15.8.5 Suspend commitments relating to labor rights in conditions for participation	The suspended provision clarifies that procuring entities may promote compliance with international labor rights as part of their procurement processes. Australia's government procurement processes are not affected.
	Further Negotiations - Article 15.24.2 Suspend "No later than three years after the date of entry into force of this Agreement"	CPTPP countries have agreed to delay the TPP's in-built agenda to enhance government procurement commitments by two

years. That is, instead of commencing negotiations within three years from the entry into force of the Agreement, the Parties will commence negotiations five years after entry into force.

Intellectual Property (18)

Article 18.8: National Treatment Footnote 4
Suspend the final two sentences

This suspension relates to technical aspects of non-discriminatory treatment obligations with respect to copyright works, phonograms, and performances. This provision would not have required Australia to make any legislative changes.

Article 18.37: Patentable Subject Matter
Suspend Paragraph 2 and Paragraph 4, second sentence

There will no longer be a requirement that patents be made available for either new uses of a known product, new methods of using a known product, or new processes of using a known product. Also, there will no longer be a requirement that patents be available for inventions derived from plants. These

provisions would not have required Australia to make any legislative changes.

Article 18.46: Patent Term Adjustment for Unreasonable Granting Authority Delays

There will no longer be a requirement to adjust, upon request, a patent's term of protection to compensate the patent owner if there are unreasonable delays in a patent office's issuance of patents. This provision would not have required Australia to make any legislative changes.

Article 18:48: Patent Term Adjustment for Unreasonable Curtailment

There will no longer be a requirement to adjust a pharmaceutical patent's term of protection to compensate the patent owner for unreasonable curtailment of the effective term of a patent as a result of the marketing approval process for a pharmaceutical product. This provision would not have required Australia to make any legislative changes.

Article 18.50: There will no longer be Protection of a requirement for five Undisclosed Test or years of protection for Other Data tests or other data submitted to a regulatory authority for the purposes of obtaining regulatory approval to market a pharmaceutical product. This provision would not have required Australia to make any legislative changes.

Article 18.51: Biologics There will no longer be a requirement for five years of protection for tests or other data submitted to a regulatory authority for the purposes of obtaining regulatory approval to market a biologic pharmaceutical product, along with other measures. This provision would not have required Australia to make any legislative changes.

Article: 18.63: Term of Protection for a requirement for a Copyright and Related copyright term of Rights) protection for the life

of the author plus 70 years. This provision would not have required Australia to make any legislative changes.

Article 18.68: Technological Protection Measures

18.68: There will no longer be a requirement for civil remedies and criminal penalties for the circumvention of technologies that control access to protected copyright works. This provision would not have required Australia to make any legislative changes.

Article 18.69: Rights Management Information

18.69: There will no longer be a requirement for civil remedies and criminal penalties for altering or removing information attached to a protected copyright work that identifies the work, author, or terms of use of the work. This provision would not have required Australia to make any legislative changes.

Article 18.79: Protection

18.79: There will no longer be of a requirement for civil

Encrypted Program-Carrying Satellite and Cable Signals	remedies and criminal penalties for decoding encrypted satellite signals without authorization. This provision would have required minor regulatory amendments in Australia.
Article 18.82: ISP Liability and Annexes 18-E and 18-F	There will no longer be a requirement for a legal framework for online service providers to cooperate with rights holders in deterring online copyright infringement. This provision would not have required Australia to make any legislative changes.
Environment (20)	Conservation and Trade (measures 'to combat' trade) - Article 20.17.5 Suspend "or another applicable law" and footnote 26 There will no longer be a requirement for CPTPP countries to take measures to combat trade in wild flora and fauna that were taken or traded in another jurisdiction, in violation of the laws of that jurisdiction. This provision would not have required Australia to make any legislative

		changes.
Transparency and Anti-corruption (26)	Transparency and Procedural Fairness for Pharmaceutical Products and Medical Devices Suspend Annex 26A - Article 3 on Procedural Fairness	This suspension concerns processes to ensure the transparency and procedural fairness of systems related to the listing and pricing of pharmaceutical Products and Medical Devices. This provision would not have required Australia to make any legislative changes.
Annex IV – State-Owned Enterprises and Designated Monopolies	Malaysia Suspension of: "after the signature of this Agreement"	Malaysia is to commence certain commitments with regard to its State-Owned Enterprise, Petronas, from the date of entry into force of the CPTPP, rather than from the date of signature.
Annex II – Investment and Cross-Border Trade in Services	Brunei Darussalam – 14 – Coal – paragraph 3 Suspension of: "after the signature of this Agreement"	Brunei Darussalam is to commence certain commitments with regard to coal from the date of entry into force of the CPTPP, rather than from the date of signature.

This discussion would like to emphasize the fact that the rules of suspension under Article 60 VCLT 1969 are indeed transposable to this

CP-TPP issue. Such a premise is supported by the fact that CP-TPP is an agreement currently enforced on its members. Furthermore, the practices of Australia, Malaysia, and Brunei as presented above have shown that the suspension of the articles described above has shown the fact that such suspension is conducted to ensure that this agreement is enforced reciprocally. The concept of suspension shall not be confused with another mechanism constituted under the VCLT known as reservation.

In explaining these general rules of international treaty further, this article describes the differences between suspension with another unilateral action on treaty named reservation. Article 19 of the VCLT 1969 stated that a state may formulate a reservation while taking action to make that treaty enforced for them.⁴¹ Such unilateral action is allowed unless the reservation is prohibited by the treaty, the treaty provides that only specified reservations, which do not include the reservation in question, may be made, or in cases not failing under those matters, the reservation is incompatible with the object and purpose of the treaty.⁴²

Reservation is a statement that modifies state obligation under a ratified treaty to adjust particular obligations.⁴³ This mechanism is used to relax an obligation that might otherwise make a given treaty too costly to ratify a treaty.⁴⁴ McKibben and Western stated that this mechanism is used by taking into account state policies and practices and the relation between one of its organs to another.⁴⁵ The mechanism herein is used by a state government to anticipate the potential challenge that the treaty could raise *vis-à-vis* their domestic policies.⁴⁶ Furthermore, reservation is available in human rights treaties such as the International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Discrimination Against Women 1979, and the Convention on the Rights

⁴¹ Christian Walter, “Article 19” in Oliver Dörr & Kirsten Schmalenbach, eds, *Vienna Conv Law Treaties Comment* (Berlin, Heidelberg: Springer, 2018) 261 at 19; note 14.

⁴² Walter, *supra* note 43 at 43; note 14.

⁴³ Kelebogile Zvobgo, Wayne Sandholtz & Suzie Mulesky, “Reserving Rights: Explaining Human Rights Treaty Reservations” (2020) 64:4 *International Studies Quarterly* 785–797.

⁴⁴ *Ibid.*

⁴⁵ Heather Elko McKibben & Shaina D Western, “‘Reserved Ratification’: An Analysis of States’ Entry of Reservations Upon Ratification of Human Rights Treaties” (2020) 50:2 *British Journal of Political Science* 687–712.

⁴⁶ *Ibid.*

of Persons with Disabilities: Peer Engagement and the Value of a Clear Object and Purpose.⁴⁷

From the explanation herein, it can be understood that reservation is a unilateral action that can be conducted by a party to ensure that its international primary obligation is in line with its national measures and/or its national interests. This mechanism has a *nexus* with the political interest of the reserving state.⁴⁸ Therefore, reservation is different from suspension which is a unilateral action that can be invoked by a state due to the material breach of another party of that treaty. These conceptual differences can be true by referring to wording under the referred VCLT 1969 Articles and the scholar's explanation above. However, one of these mechanisms (suspension and reservation) can be used due to the absence of the other one in the practice of international law.⁴⁹

The CP-TPP Text does not contain any arrangement concerning reservation.⁵⁰ The absence of such a mechanism thereby caused its member which does not perform its primary obligation violate the following obligation. As explained in this article's introduction, such non-performance is motivated by its national interest and/or the local or societal values protected by the member state.⁵¹ Such material breach has therefore caused this treaty's other members to suspend its obligation to ensure that the CP-TPP is applied in accordance with the reciprocity principle.⁵²

The suspension arrangement in CP-TPP is constituted under Article 2 of the treaty stating that “*Upon the date of entry into force of this Agreement, the Parties shall suspend the application of the provisions set out in the Annex to this Agreement until the Parties agree to end suspension of one or more of these*

⁴⁷ Zvobgo, Sandholtz & Mulesky, “Reserving Rights”, *supra* note 45 at 47; Ilias Bantekas, “Reservations to the Convention on the Rights of Persons with Disabilities: Peer Engagement and the Value of a Clear Object and Purpose” (2020) 33 NY Int Law Rev 61.

⁴⁸ Laurence R Helfer, “Treaty Withdrawals in a Turbulent World: A Retrospective on Exiting Treaties” in *Lead Works Int Law* (Routledge, 2023).

⁴⁹ *Ibid.*

⁵⁰ “Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)”, online: Aust Gov Dep Foreign Aff Trade <<https://www.dfat.gov.au/trade/agreements/in-force/cptpp/comprehensive-and-progressive-agreement-for-trans-pacific-partnership>>.

⁵¹ Bossche & Zdouc, *supra* note 7.

⁵² Xiouri, *supra* note 26.

provisions.” This article can be understood as a stipulation which mentioned and explained in the figure above is suspended for the whole parties of the CP-TPP. By referring to the footnote of this article, a party may end the suspension of an article, and such termination shall only apply to that party upon the completion of that Party’s applicable legal procedure.⁵³

The table above shows the fact that there are a lot of issues covered within the suspended CP-TPP articles. To provide issues which crucially related to Indonesia's national interest, this article thereby decided to limit to scope of this article. Such limitation is conducted by only discussing the suspended articles of the CP-TPP related to anti-corruption and the environment. The anti-corruption issues are discussed due to the large number of corruption existing in Indonesia and since this issue is related to international trade and foreign direct investment. The environmental issues on the other side, are discussed to understand Indonesia's current national legislation which can be perceived as both with and against environmental protection. Those issues and its suspended articles are discussed to know whether Indonesia is already clean and healthy or not.

It can be understood from this discussion that treaty suspension is a stipulation under public international law that allows a member of the treaty to suspend its obligation due to the breach conducted by its opposing party. The CP-TPP itself consists of suspended articles based on its parties' consensus. There is no time period concerning this treaty suspension, therefore the suspended article will remain unenforced until the party’s consent to re-enforce those articles or permanently remove those articles from the CP-TPP text.

IV. ANALYSIS OF INDONESIA’S READINESS IN ACCESSING CP-TPP BASED ON THE ANTI-CORRUPTION ISSUES

Anti-corruption is one of the provisions constituted under the CP-TPP. The anti-corruption arrangement under this agreement is strengthened in terms of legal enforceability.⁵⁴ Those enhanced anti-corruption provisions

⁵³ *Ibid.*

⁵⁴ Yaoyuan Zhang, “The Legal Enforceability of CPTPP Anti-corruption Provisions and The Implications to Dispute Settlements” (2024) 58:1 J World Trade, online:

are constituted under Articles 26.6 and 26.7 CP-TPP.⁵⁵ Article 26.6 of this provision constitutes how the CP-TPP members shall eliminate bribery and corruption in international trade and investment by implementing the APEC Conduct Principles for Public Officials, observing the APEC Code of Conduct for Business: Business Integrity and Transparency Principles for the Private Sector, and ratify the United Nations Convention Against Corruption. Meanwhile, Article 26.7 CP-TPP *inter alia* obliges its members to combat corruption through the adoption or maintenance of legislative and other measures to establish criminal offenses on corruption that affect international trade and investment.⁵⁶

Before providing an in-depth explanation of Indonesia and anti-corruption, this article provides explanations concerning the correlation between the general explanation of treaty suspension and anti-corruption practice in Indonesia. The previous discussion has shown that the CP-TPP members agreed to suspend Annex 26A of the agreement which constitutes transparency on pharmaceutical products. By implementing the understanding provided by Article 60 VCLT, it can be understood that this suspension has caused CP-TPP members are not obliged to implement measures that show the price list of pharmaceutical products. This article has its own *nexus* with Indonesia's pharmaceutical policy.

In 2014, the Indonesian government launched Social Health Insurance (*Jaminan Kesehatan Nasional* hereinafter abbreviated as “JKN”).⁵⁷ This measure was aimed to achieve universal health coverage by 2019.⁵⁸ The Ministry of Health then selected medicines for JKN as the National Formulary.⁵⁹ The National Formulary allows the government to determine the ceiling prices of medicines as a reference for pharmaceutical producers

<<https://kluwerlawonline.com/api/Product/CitationPDFURL?file=Journals\TRAD\TRAD2024007.pdf>>.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ Yusi Anggriani et al, “The Impact of Pharmaceutical Policies on Medicine Procurement Pricing in Indonesia Under the Implementation of Indonesia’s Social Health Insurance System” (2020) 21 Value Health Reg Issues 1–8.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

to conduct negotiations.⁶⁰ However, the implementation of this measure was unclear due to the vague mechanism to set the ceiling prices.⁶¹

The implementation of JKN is plausible to demonstrate Indonesia's unreadiness to be a member of the CP-TPP if the suspended Annex 26A is discontinued. However, Indonesia's condition in the context of corruption eradication has shown the fact that it is far from ready to access the CP-TPP due to the existence of the Transparency and Anti-Corruption Chapter under this agreement. Therefore, not only Indonesia is unready due to the suspended Annex 26A of the CP-TPP, but it is also not ready to be the party to this agreement due to its current condition. This condition is explained in the second discussion presented herein.

To provide objective information concerning Indonesia *vis-à-vis* its corruption practice, this article provides a brief explanation of the 2020 Report of the WTO Trade Policy Review Body under the Trade Policy Review Mechanism. The full report of this WTO permanent organ stated that Indonesia's lack of transparency and lack of public accountability creates a space for administrative discretion and therefore corruption.⁶² However, during the review period, Indonesia has its Presidential Regulation Number 54/2018 which constitutes the National Strategy of Corruption Prevention. This national strategy has three focuses which are the licensing and trade system, the state finance management, and the law enforcement and bureaucratic reform.⁶³ Indonesia's corruption eradication is mainly conducted by the Indonesia Corruption Eradication Commission (Komisi Pemberantas Korupsi), the Republic of Indonesia Supreme Court (Mahkamah Agung Republik Indonesia), the Finance and Development Supervisory Agency (Badan Pengawasan Keuangan dan Pembangunan), and the Ombudsman of the Republic of Indonesia.⁶⁴

According to the view of international law, Indonesia's efforts to eradicate corruption within its jurisdiction are conducted to implement the United

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² World Trade Organization, "Trade Policy Review: Indonesia", (2023), online: *World Trade Organ* <https://www.wto.org/english/tratop_e/tpr_e/tp501_e.htm>.

⁶³ *Ibid.*

⁶⁴ *Ibid.*

Nations Convention Against Corruption ratified by Indonesia under Law Number 7/2006.⁶⁵ Despite those efforts, a large number of corruption still occurs in Indonesia. Indonesia Statistic Centre Bureau stated that Indonesia's anti-corruption behavior index decreased to 3,92 on a scale of 0-5.⁶⁶ This number is lower compared to the 2022 number which was 3,93.⁶⁷ This score is Indonesia's lowest score since 2015, and it caused Indonesia to become the 110th Country from 180 Countries applying this Corruption Perspective Index.⁶⁸ Instead of discussing the empirical aspects of Indonesia's anti-corruption issue which become the scope of Indonesia's domestic criminal law, this article discusses the weakness of Indonesia's anti-corruption measures which is perceived as its commitment to enforce its obligation under the UNCAC and the Agreement Establishing the World Trade Organization (WTO Agreement).

Since Indonesia is not a party yet to the CP-TPP, this article systematically discusses this issue by explaining Indonesia's obligation under multilateral treaties which obliges it to eradicate corruption and to provide its measures transparently. Article 5 paragraph 1 of the UNCAC states that “*Each State Party shall, in accordance with the fundamental principles of its legal system, develop and implement or maintain effective, coordinated anti-corruption policies that promote the participation of society and reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability.*”⁶⁹ According to this obligation, it can be

⁶⁵ M Edwar Rinaldo & Hervin Yoki Pradikta, “Analisis Fiqh Siyasah Dusturiyah dalam Pembentukan Peraturan Tentang Trading in Influence dalam Hukum Positif di Indonesia” (2021) 1:1 As-Siyasi Journal of Constitutional Law 63–84.

⁶⁶ Badan Pusat Statistik Indonesia, “Indeks Perilaku Anti Korupsi (IPAK) Indonesia 2023 sebesar 3,92, menurun dibandingkan IPAK 2022”, online: <<https://www.bps.go.id/id/pressrelease/2023/11/06/2046/indeks-perilaku-anti-korupsi--ipak--indonesia-2023-sebesar-3-92--menurun-dibandingkan-ipak-2022.html>>.

⁶⁷ *Ibid.*

⁶⁸ Humas BPHN, “Indeks Persepsi Korupsi Indonesia Turun Lagi, Penegakan Hukum Tipikor Perlu Dikaji Ulang?”, online: <<https://bphn.go.id/publikasi/berita/2023031603084646/indeks-persepsi-korupsi-indonesia-turun-lagi-penegakan-hukum-tipikor-perlu-dikaji-ulang>>.

⁶⁹ “United Nations Convention against Corruption”, online: *U N Off Drugs Crime* <http://www.unodc.org/unodc/en/corruption/tools_and_publications/UN-convention-against-corruption.html>.

understood that Indonesia is not only obliged to adopt and implement measures that eradicate corruption, but it also obliged Indonesia to adopt measures that prevent such action.⁷⁰ By understanding that this obligation requires Indonesia to regulate its law transparently, this obligation has a strong connection with Article X paragraph 1. GATT.⁷¹ This article obliges WTO members to ensure that their laws, regulations, judicial decisions, and administrative rulings related to trade are accessible to other members and that member's business actor.⁷² Knowing that Indonesia does not promptly publish its domestic regulations and judicial decisions on the WTO website⁷³, one may understand that Indonesia needs a lot to improve to ensure such transparency.

The article herein would like to emphasize that Indonesia's anti-corruption law is currently ineffective and not proportional to be implemented in practice. This can be seen from the arrangement under Law Number 31/1999 concerning Corruption Criminal Act Eradication and Law Number 20/2001 as its amendment which implements prison sentence and fine sentence as the main sanction.⁷⁴ This domestic legislation does not stress the obligation for the perpetrator to return his/her asset to the state treasury therefore it is not in line with the UNCAC which glorifies the

⁷⁰ Kitjapat Kesiranon, "Scrutinize the United Nations Convention against Corruption (UNCAC)" (2023) 3:2 *Journal of Contemporary Sociological Issues* 133–157.

⁷¹ Elissa Alben & Logan Brown, "Is the WTO in Sync with the Business Community?" (2021) 12:S3 *Global Policy* 23–29.

⁷² World Trade Organization, "WTO | legal texts - Marrakesh Agreement - General Agreement on Tariffs and Trade 1994", (2023), online: <https://www.wto.org/english/docs_e/legal_e/06-gatt_e.htm>; Joost Pauwelyn & Krzysztof Pelc, "WTO Rulings and the Veil of Anonymity" (2022) 33:2 *Eur J Int Law* 527–564.

⁷³ Putu George Matthew Simbolon & Angel Damayanti, "Indonesian Trade Policy in Adjusting the 2020 WTO's Trade Policy Review" (2023) 12:1 *Jurnal Hubungan Internasional* 76–87.

⁷⁴ Rida Ista Sitepu & Yusona Piadi, "Implementasi Restoratif Justice dalam Pemidanaan Pelaku Tindak Pidana Korupsi" (2019) 1:1 *J Rechten Ris Huk Dan Hak Asasi Mns* 67–75; Anak Agung Gede Budhi Warmana Putra, Simon Nahak & I Nyoman Gede Sugiarta, "Pemidanaan terhadap Pelaku Tindak Pidana Korupsi Melalui Double Track System" (2020) 1:2 *J Prefer Huk* 196–200; Tri Novita Sari Manihuruk, "Problematika Penegakan Hukum Tindak Pidana Korupsi Dana Desa di Provinsi Riau" (2021) 5:2 *J Wawasan Yuridika* 290–314.

enforcement of asset recovery.⁷⁵ Article 51 of the convention obliges its contracting party to establish an asset recovery mechanism and to conduct international cooperation concerning this subject matter.⁷⁶

Based on Article 4 of Law Number 31/1999, this article explains that the action that constitutes asset recovery by the perpetrator does not cause his/her charges to be dropped by the Anti-Corruption Commission or by the prosecutor.⁷⁷ This article applies to a material delict under Article 2 concerning illicit enrichment and Article 3 concerning the abuse of authority.⁷⁸ In the blink of an eye, this issue can be perceived as a technical issue *per se*. However, knowing that this stipulation will not recover the state revenue deprived by the perpetrator under the notion that “*The perpetrator decided to pay the fine and proceed with its prison sentence while having its unlawful asset kept somewhere else*”, has indeed caused this issue as a major issue which needs to be solved. This issue may only be solved through the amendment of Indonesia's anti-corruption legislation and the amendment of Indonesia's criminal procedural law so that the Anti-Corruption Commission and the prosecutor may exercise their authority to recover the deprived state asset due to a corruption offense.

Unlike Australia which has a specific concern about Article 26A which constitutes transparency and procedural fairness in pharmaceutical products, this article perceives that Indonesia has a wider concern in this anti-corruption and transparency issue. Since Indonesia's anti-corruption laws are not yet in line with the asset recovery concept under the UNCAC, this article views that accessing the CP-TPP will be a boomerang for

⁷⁵ Eri Satriana, Dewi Kania Sugiharti & Muhammad Ilham Satriana, “Asset Recovery of Detrimental to The Finances of The State From Proceeds of Corruption in The Development of National Criminal Law System” (2019) 19:2 Jurnal Dinamika Hukum 350–369.

⁷⁶ Prosper Maguchu & Ahmad Ghozi, “The Role of Civil Society Organisations in Asset Recovery” (2022) 19:2 Indones J Int Law 317–338; Radha Ivory, “Asset recovery: regulation and theory” in *Elgar Concise Encycl Corrupt Law* (Edward Elgar Publishing, 2023) 43.

⁷⁷ “UU No. 31 Tahun 1999”, online: *Database Peratur JDIH BPK* <<http://peraturan.bpk.go.id/Details/45350/uu-no-31-tahun-1999>>.

⁷⁸ Ester Sheren Monintja, “Tinjauan Yuridis Pasal 2 dan 3 Undang-Undang Tindak Pidana Korupsi Sebagai Delik Materil Menurut Putusan Mahkamah Konstitusi No. 25/PUU-XIV/2016” (2020) 9:2 Lex Crimen.

Indonesia. This boomerang exists due to the dispute settlement arrangement under Article 26.12 CP-TPP.⁷⁹ Paragraph 2 of this article states that the party having a measure inconsistent with an obligation under this section or a party failing to carry out its obligation under this section in a manner affecting trade or investment can be challenged through the CP-TPP Dispute Settlement.

One of the CP-TPP Articles that Indonesia may violate if it becomes a member of this agreement is Article 26.7 Paragraph 2 CP-TPP which obliges its party to impose sanctions by taking into account the gravity of that offence.⁸⁰ Knowing that Indonesia does not put the asset recovery arrangement as the primary means to combat corruption, Indonesia's national law may fail to implement such a measure. The inability of Indonesia to perform this primary obligation may lead to another failure in implementing the following obligation. Article 26.9 paragraph 1. CP-TPP obliges its parties not to fail in effectively enforcing its law to combat corruption which affects trade or investment.⁸¹ Therefore to ensure that the CP-TPP is not viewed as a trojan horse for Indonesia, this article opined that Indonesia shall reform its national law *prima facie* prior to entering this comprehensive plurilateral agreement.

By understanding the current situation related to the implementation of Indonesia's anti-corruption law, this article opined that Indonesia shall not enter the CP-TPP unless it has its national anti-corruption law reformed. This unreadiness can be seen in Indonesia's national legislation which is currently not in line with the asset recovery spirit under the UNCAC. Becoming a member of the CP-TPP based on this situation will cause Indonesia to be contested by other CP-TPP.

⁷⁹ New Zealand Ministry of Foreign Affairs and Trade, "Comprehensive and Progressive Agreement for Trans-Pacific Partnership texts", online: *New Zealand Minister Foreign Affairs & Trade* <<https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/cptpp/comprehensive-and-progressive-agreement-for-trans-pacific-partnership-text-and-resources/>>.

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

V. ANALYSIS OF INDONESIA'S READINESS IN ACCESSING CP-TPP BASED ON ENVIRONMENTAL ISSUES

There are no multilateral rules or legal framework that constitutes how the international trade obligation and environmental protection shall be reconciled. This can be seen by understanding that there is no multilateral agreement concerning the trade of green products and how the green product's production process shall be conducted.⁸² The arrangement under Article XX GATT can be viewed as a stipulation that may balance the trade and environmental legal issues, however, uncertainties exist in the case law concerning this article.⁸³ Before diving into the WTO jurisprudence, this article explains the arrangement under Article XX GATT in the first place.

This article prohibits the WTO member from implementing arbitrary or unjustifiable discrimination between members or a disguised restriction on international trade unless it is implemented under the justification under this article.⁸⁴ Among ten of the exceptions constituted under this article, letter (b) of this article concerning the protection of human, animal, and plant life and health, and letter (g) of this article concerning the protection of exhaustible resources are the justifications invoked by WTO members.⁸⁵ This practice is explained under the case law herein. Bossche and Zdouc quoted the Appellate Body finding in the United States – Gasoline Case by stating that a member may only implement Article XX by stating that one

⁸² Robert Hamwey, Henrique Pacini & Lucas Assunção, "Mapping Green Product Spaces of Nations" (2013) 22:2 *The Journal of Environment & Development* 155–168.

⁸³ Sheikh Inam UI Mansoor & Menuu Chopra, "Article XX Of GATT: Territoriality Of Unilateral Trade Measure And Sustainable Development" (2020) 19:04 *Ilk Online - Elem Educ Online* 7784–7792; Giulia Claudia Leonelli, "Environmental Unilateralism and the Chapeau of Article XX GATT: The 'Line of Equilibrium' and the Question of 'Differently Situated' Countries" (2023) 57:5 *J World Trade*, online: <<https://kluwerlawonline.com/api/Product/CitationPDFURL?file=Journals\TRAD\TRAD2023030.pdf>>; Vinitika Vij, "Changing Realities: Evolution and Extraterritoriality within Article XX(G) of GATT for Global Environmental Concerns" (2022) 14:02 *Trade Law Dev* 195–238.

⁸⁴ World Trade Organization, *supra* note 76.

⁸⁵ *Ibid.*

of the protections constituted in this article is necessary to be conducted, to ensure that the *chapeau* is fulfilled.⁸⁶

The first two cases presented to explain this justification are the United States – Shrimp – Turtle Case, and the United States – Tuna – Dolphin Case. These cases are related to the food certifications applied by the United States whereas this domestic arrangement is related to maritime conservation, eco-friendly agriculture, and meat or fish production.⁸⁷ The United States – Shrimp – Turtle Case was caused by the application of Section 609 of the US Endangered Species Act (1973) and its related regulations.⁸⁸ This domestic legislation prohibits the capture of shrimp using a trawl which may cause the extinction of green turtles.⁸⁹ Since India, Malaysia, Pakistan, and Thailand use the prohibited instrument to capture their shrimp, the United States imposed an import prohibition on the shrimp imported from those WTO members.⁹⁰ Although the United States justified its measure under Article XX (b) and (g) and under the CITES, both the panel and Appellate Body of this case recommend the states to⁹¹ bring its measure in conformity with the WTO Agreement.⁹² In explaining their reasoning, the DSB stated that it does not deny the United States the

⁸⁶ Bossche & Zdouc, *supra* note 7 at 7; World Trade Organization, “WTO | dispute settlement - the disputes - DS2 - United States — Standards for Reformulated and Conventional Gasoline”, (2023), online: <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds2_e.htm>.

⁸⁷ Rodrigo Fagundes Cezar, “Food certification, domestic politics and international trade: the US compliance response in three WTO disputes” (2020) 29:2 *Environmental Politics* 317–335.

⁸⁸ World Trade Organization, “WTO | dispute settlement - the disputes - DS58 - United States — Import Prohibition of Certain Shrimp and Shrimp Products”, (2023), online: <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds58_e.htm>; Cezar, “Food certification, domestic politics and international trade”, *supra* note 93 at 95.

⁸⁹ World Trade Organization, *supra* note 94.

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

⁹² Tolulope Anthony Adekola, “US–China Trade War and The WTO Dispute Settlement Mechanism” (2019) 18:3 *J Int Trade Law Policy* 125–135; World Trade Organization, *supra* note 94.

right to protect its environment under CITES, however, the practice of a unilateral act may create a bad precedent for the multilateral trade system.⁹³

A different situation occurred in the second round of the United States – Tuna – Dolphin Case. During this round, the United States succeeded in bringing its Dolphin-Safe Labelling scheme in conformity with the WTO Agreement.⁹⁴ During this dispute, the United States implemented the per set method (under its risk-based approach) to justify its Tuna production process method which is qualified as a technical barrier.⁹⁵ This label was challenged by Mexico by stating that this United States action is unjustifiable under Article XX(g) GATT. In examining this dispute, both the second panel and the Appellate Body stated that although the per set method is not the only method applicable in conducting dolphin conservation, this method has proven itself to be effective in practice.⁹⁶ Therefore, the United States trade barrier contested in this dispute was justifiable under Article XX(g) GATT and it does not violate Article 2 TBT Agreement.⁹⁷

The third case presented in this article is the Brazil–Retreaded Tyres. This dispute was caused by the imposition of an import ban by Brazil on the Retreaded Tyres from the European Community.⁹⁸ Brazil invoked this measure under Article XX(b) GATT by stating that such an import ban is necessary to protect the environment from those waste tires since those

⁹³ World Trade Organization, *supra* note 94; Adekola, *supra* note 98.

⁹⁴ Elisa Baroncini & Claire Brunel, “A WTO Safe Harbour for the Dolphins: The Second Compliance Proceedings in the US–Tuna II (Mexico) case” (2020) 19:2 *World Trade Rev* 196–215; “WTO | dispute settlement - DS381: United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products”, online: <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds381_e.htm>.

⁹⁵ World Trade Organization, “WTO | legal texts - Marrakesh Agreement - Agreement on Technical Barrier to Trade”, (2023), online: <https://www.wto.org/english/docs_e/legal_e/17-tbt_e.htm>.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ World Trade Organization, “WTO | dispute settlement - the disputes - DS332: Brazil — Measures Affecting Imports of Retreaded Tyres”, (2023), online: *World Trade Organ* <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds332_e.htm>; Weihuan Zhou, “In Defence of the WTO: Why Do We Need a Multilateral Trading System?” (2020) 47:1 *Leg Issues Econ Integr*.

tires would be difficult to dispose of.⁹⁹ The panel of this case expressed that Brazil's national legislation *in concreto* Potraria SECEX 14/2004 and Potraria SECEX 8/1991 (which impose such ban) are inconsistent with Article XI: 1 GATT (concerning the quantitative restriction prohibition) and thereby unjustifiable under Article XX(b) GATT.¹⁰⁰ The Appellate Body of this case consolidated that panel report, and it also stated that Brazil violated Article I: 1 GATT concerning the Most Favored Nations Treatment since it invoked its exemption under the MERCOSUR Agreement.¹⁰¹

From these three cases, the WTO Dispute Settlement Body (DSB) can be viewed as the heart of the climate litigation and it determines where the trade and environmental law implementation are going to be driven.¹⁰² The inability of Article XX(b) and (g) GATT to provide certainties concerning this trade and environmental issue has yet caused the international trade law dispute settlement system (or the climate litigation) in general to become the worst place to bet. The situation can be even worse for Indonesia based on the existing domestic issue explained herein.

This article needs to note that these case laws are necessary to explain the Indonesian domestic protest against the Job Creation Law (Law Number/2020 as amended by The Government Regulation on the Lieu of Law Number 2/2022).¹⁰³ Several groups from the societies stated that the Job Creation Law is unfriendly to the environment and hence it is unfriendly to the climate change global issue.¹⁰⁴ The protests were *inter alia*

⁹⁹ World Trade Organization, *supra* note 105; Henok Asmelash, "The WTO Dispute Settlement System As A Forum for Climate Litigation?" (2023) 32:2 Rev Eur Comp Int Environ Law 321–333; Roberto Azevêdo & Tatiana Prazeres, "Brazil in the WTO" in *Elgar Companion World Trade Organ* (Edward Elgar Publishing, 2023) 795.

¹⁰⁰ World Trade Organization, *supra* note 105.

¹⁰¹ *Ibid.*

¹⁰² Asmelash, *supra* note 106.

¹⁰³ Melisa Ayu Azhara & Siti Ruhama Mardhatillah, "Partisipasi Publik dalam Penyusunan Dokumen Analisis Dampak Lingkungan Pasca Berlakunya Undang-Undang/Perppu Cipta Kerja" (2023) 30:2 J Hukum Ius Quia Iustum 256–276.

¹⁰⁴ Sapariah Saturi, "Organisasi Masyarakat Sipil Protes Perppu Cipta Kerja: Ancam Lingkungan dan Masyarakat", (5 March 2023), online: *Mongabay.co.id* <<https://www.mongabay.co.id/2023/03/05/organisasi-masyarakat-sipil-protos->

addressed due to the simplification of *Analisis Mengenai Dampak Lingkungan* (AMDAL), an environmental analysis which shall be conducted by any investment that will be conducted in Indonesia, and the environmental permit¹⁰⁵, the land liberalization and deforestation arrangement which deprived the rights of indigenous people, and the arrangement concerning the establishment of food estate.¹⁰⁶

From the government's point of view, such protest may of course be countered based on the aspects taken into account by the risk-based approach under the Government Regulation Number 5/2021 concerning the Conduct of Risk-Based Permit.¹⁰⁷ Article 7 Indonesia Job Creation Law and Article 5 Government Regulation Number 5/2021, the conduct of investment *ipso facto* trade in Indonesia shall *inter alia* be in accordance with the environmental protection principle.¹⁰⁸ From this stipulation, Indonesia in a glance, may of course enforce Article 20.2 paragraph 3 CP-TPP which obliges its parties not to impose an environmental protection as a restriction to international trade, if it becomes the party of the CP-TPP. Furthermore, this risk-based approach implemented by Indonesia may also be viewed as a method in line with the finding of the US – Tuna – Dolphin Case as explained above.

perppu-cipta-kerja-ancam-lingkungan-dan-masyarakat/>; Pradipta Pandu, “Sisi Lingkungan Hidup Tetap Diabaikan dalam Perppu Cipta Kerja”, (29 January 2023), online: *kompas.id* <<https://www.kompas.id/baca/humaniora/2023/01/28/sisi-lingkungan-hidup-tetap-diabaikan-dalam-perppu-cipta-kerja>>; Tim detikcom, “Ini Dampak Omnibus Law Cipta Kerja Bagi Lingkungan dan Pekerja”, online: *detiknews* <<https://news.detik.com/berita/d-5201842/ini-dampak-omnibus-law-cipta-kerja-bagi-lingkungan-dan-pekerja>>.

¹⁰⁵ detikcom, *supra* note 111.

¹⁰⁶ Saturi, *supra* note 111.

¹⁰⁷ Ade Juang Nirboyo, “Potensi Korupsi Dalam Perizinan Lingkungan Melalui Sistem Online Single Submission Pasca Peraturan Pemerintah Nomor 5 Tahun 2021 Tentang Penyelenggaraan Perizinan Berusaha Berbasis Risiko” (2021) 36:2 Jatiswara 219–228.

¹⁰⁸ Fitri Yanni Dewi Siregar, “Aspek Hukum Penyederhanaan Perizinan Badan Usaha di Bidang Lingkungan Hidup dalam Undang-Undang Cipta Kerja” (2020) 7:2 J Ilm Penegakan Huk 184–192; “PP No. 5 Tahun 2021”, online: *Database Peratur JDIH BPK* <<http://peraturan.bpk.go.id/Details/161835/pp-no-5-tahun-2021>>; “PERPU No. 2 Tahun 2022 tentang Cipta Kerja [JDIH BPK RI]”, online: <<https://peraturan.bpk.go.id/Home/Details/234926/perpu-no-2-tahun-2022>>.

However, such regulatory adequacy shall be viewed as a dilemma for the Indonesian government to understand its country's position before Article 20.17 CP-TPP, which is one of the suspended articles. This article obliges CP-TPP parties to combat the illegal take of wild flora and fauna, and hence it obliges its parties to implement the primary obligations under CITES. To avoid ambiguity, this article will explain Indonesia's position *vis-à-vis* this article *prima facie*. And then, it will relate those positions with the case law as explained above.

Pursuant to Article 12 of Law Number 25/2007 concerning Capital Investment as amended under the Job Creation Law, the trade of fish listed under CITES is classified as one of Indonesia's negative investment lists.¹⁰⁹ The existence of this national obligation on one side may allow Indonesia to enforce its promise under Article 20.17 CP-TPP if Indonesia joins this agreement, and if the suspended article is adhered to as part of the CP-TPP. However, and pursuant to the findings of the US – Shrimp – Green Turtle and the Brazil – Retreaded Tyres explained above, the application of this CP-TPP obligation may cause the breach of a multilateral obligation under the WTO Agreement, especially Article XXIV paragraph 4 GATT. This article prohibits the imposition of restrictive trade measures under the regional trade framework.¹¹⁰ Furthermore, if this suspended article isn't eventually adhered to by the CP-TPP, Indonesia may still potentially violate the environmental protection obligation under the environmental chapter of the CP-TPP. The article potentially violated by Indonesia is Article 20.2 paragraph 3 CP-TPP which prohibits the disguised trade restriction under the environmental protection justification.

As the transparency and anti-corruption chapter, any members of the CP-TPP may be challenged by the CP-TPP Dispute Settlement if it breaches one of the obligations within this environmental chapter. Such dispute settlement arrangement is specifically constituted under Article 20.23 CP-

¹⁰⁹ Angga Dwi Prasetyo, Abdul Rachmad Budiono & Shinta Hadiyantina, “Politik Hukum Perubahan Norma Perizinan dan Iklim Investasi Dalam Undang-Undang Cipta Kerja Menggunakan Metode Omnibus Law” (2022) 5:2 Media Iuris 159–188; note 115.

¹¹⁰ World Trade Organization, *supra* note 76.

TPP.¹¹¹ The explanation above describes how the Indonesian environment falls in the middle of liberalization and protectionism¹¹², Indonesia may and may not violate the environmental obligation under the CP-TPP. Since the environmental obligation both under Indonesian domestic legislation and under the CP-TPP can be viewed as an obligation of means or obligation to do something¹¹³, this article doubted that Indonesia shall join the CP-TPP. To avoid being pessimist, this article perceives that Indonesia may only join the CP-TPP under the condition that it balance its free trade obligation and its environmental obligation. That effort however shall not be viewed as an excuse not to anticipate the potential upcoming dispute due to environmental protection measures related to trade and investment imposed by Indonesia.

From this last discussion, this article also opined that Indonesia shall not become the party of the CP-TPP if the parties decide not to suspend Article 20.17 which constitutes Conservation and Trade. This CP-TPP Article covers a sensitive issue which is the trade of endangered species. In discussing this environmental law issue, it is important to note that Indonesia shall brace itself due to the trade and environmental dispute that may arise due to the implementation and/or the interpretation of the CP-TPP.

VI. CONCLUSION

The opening rhetoric asking whether Indonesia is clean yet or healthy enough yet shall be perceived as a self-introspection on Indonesia's law vis-à-vis its readiness to be a member of the CP-TPP. This article perceives that Indonesia should reform its national law concerning anti-corruption and the environment prior to being a member of the CP-TPP. If the

¹¹¹ *Ibid.*

¹¹² Kent Jones, "Populism, Globalization, and the Prospects for Restoring the WTO" (2023) 11:1 *Polit Gov* 181–192; Jingyao Fu, *International Trade Liberalization and Protectionism: A Review* (Atlantis Press, 2021).

¹¹³ PM Dupuy, "Reviewing the difficulties of codification: on Ago's classification of obligations of means and obligations of result in relation to state responsibility" (1999) 10:2 *Eur J Int Law* 371–385; Pierre d'Argent, *International Law Textbook: Claiming Responsibility* (Louvain: UC Louvain & edX, 2021).

current Indonesian anti-corruption law is still enforced during its accession to the CP-TPP, Indonesia may be challenged by this plurilateral dispute settlement mechanism. Furthermore, this article also views the suspended CP-TPP environment articles as a basis for Indonesia not to be a member of this plurilateral agreement. This is due to the fact that the suspended article may threaten Indonesia's national interest since Indonesia's national law under the Job Creation Law may be challenged in the CP-TPP dispute settlement mechanism.

Due to the large substance covered under the suspended articles of CP-TPP, this article suggested that other various and thematic research be conducted to examine Indonesia's readiness to be a member of the CP-TPP *vis-à-vis* the suspended articles based on its chapter. These thematic researches are necessary not only to enrich the public understanding concerning Indonesia and regional trade law. However, the upcoming research is also necessary to ensure that Indonesian stakeholders directly involved with this CP-TPP issue have an adequate and comprehensive understanding of the CP-TPP legal substances. The authors of this article hope that this research outcome may provide one of the pieces of comprehensive understanding for the related Indonesian stakeholders, and to take a prudent decision whether Indonesia shall be a member of this plurilateral agreement or not.

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