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# Preferential Trade Agreements And Its Impact To International Trade Law Policy of Indonesia: A Study Of The Regional Comprehensive Economic Partnership.

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***Abstract:*** Covid 19 brings catastrophic effects not only to the health sector but also other sectors. There is a huge economic turmoil around the world. However, new hopes emerged in the world of international trade, especially in the Southeast Asia region with the signing of the Regional Comprehensive Economic Partnership (RCEP). RCEP is currently the largest free trade agreement in form of Preferential Trade Agreement. The agreement is considered as a multilateralism that developed in the right direction for the global economy and is the latest progress for the world community. Some say that this will create opportunities as well as challenges in its application for Indonesia in the future. Therefore, this study aims to examine juridically from the view of preferential trade agreements about the contents of the RCEP and its application to Indonesia, especially legal policies that can be taken related to its implementation in the future. It also examines the steps and strategies that can be taken by Indonesia to seize opportunities and face challenges due to the implementation of this RCEP in the near future. By using normative legal research method, the author found that the RCEP fulfill its requirements as preferential trade agreement and therefore its application must through national legalization program and comprehensive trade policy. Indonesia can use the RCEP to expand its trade reach and as a means of diversifying its products overseas. In addition, Indonesia should intensify their supervision of products that enter their country through various existing channels to deal with the flood of foreign products entering the country because of the RCEP.

***Keywords:*** *International Trade Law, Preferential Trade Agreements, RCEP.*

## Introduction

International trade is a part of economic activity or business activity which has recently been experiencing rapid development. The phenomenon of globalization has spread the concept of trade liberalization and has led to various economic cooperation at the regional and global level. One of them is manifested in the World Trade Organization (WTO) that has become a vital organization for the world trade today. On the other hand, relations between countries at the international level such as the WTO do not lead the country to become a protector for their citizens. Narlikar stated that it is because of developed countries' intimidation and the lack of involvement of developing and least developed countries in various trade negotiations such as

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the Green Room Meeting at the WTO (Narlikar, 2006). This brings problems to countries that does not have sufficient resources to compete against big players in international trade.

One of the efforts made by countries in accordance with WTO law to overcome this problem is by arranging Preferential Trade agreements (PTA). As the name implies, PTA is a form of agreement that has the nature of preference from one country to another. Nowadays the PTA is increasingly becoming the cornerstone of the world trade system. Its increasing number of appearances and wider coverage of the contents of the agreement are increasingly reshaping the world trade architecture, especially the trading environment of developing countries. The integration of this type of agreement then becomes a separate challenge in the multilateral trading system, especially the WTO (Chauffou & Maur, 2011).

The cause is the indication of the degradation of the principle of non-discrimination, especially the principle of Most Favored Nation. This is because PTA in general contains special treatment for countries that are in the agreement. A country will provide special treatment for other countries, and usually other countries will treat the same to the country giving the special treatment.

PTA is often used by developing countries to strengthen their economic growth, and on the other hand to fight poverty (Chauffou & Maur, 2011). In fact, no Least Developed Countries (LDC) is able to develop their economy without integration with other countries. Therefore, holding a PTA with other countries or groups of countries is a must. This integration contains the transfer of technology that has developed so that they practice it with the learning by doing method, and at the same time increase the competitive ability of domestic entrepreneurs (Chauffou & Maur, 2011).

Covid 19 brings catastrophic effects not only to the health sector but also other sectors. There is a huge economic turmoil around the world. In 2020, according to World Bank forecasts, the global economy will shrink by 5.2%. The world trade situation is in a catastrophic situation. The need of international trade cooperation to overcome this condition is increasingly more meaningful because of unprecedented disruption to world trade.

In the midst of a world trade situation that is on the verge of collapse, new hope emerged in the world of international trade the signing of the Regional Comprehensive Economic Partnership (RCEP). RCEP is currently the largest free trade agreement in form of Preferential Trade Agreement. The agreement which signed by ten ASEAN member countries along with China, Japan, South Korea, New Zealand and Australia is considered as a multilateralism that developed in the right direction for the global economy and is the latest progress for the world community.

Some say that this will create opportunities as well as challenges in its application for Indonesia in the future. Therefore, this study aims to examine from the view of preferential trade agreements about the contents of the RCEP and its application to Indonesia, especially legal policies from Indonesia government that can be taken related to its implementation. This paper is also examines the steps and strategies that can be taken by Indonesia to seize opportunities and face challenges due to the implementation of the RCEP in the near future.

## Literature Review

International trade would not exist without an access to the domestic markets of other countries. It is very important for all countries, merchants, and service providers, to be able to have access to other country markets that are predictable and growing for their goods and services. Each state has different rules that vary both in the form of tariff and non-tariff to protect the interests of the uncontrolled international trade flow from outside the country, thus causing barriers that make it difficult for other countries, merchants, and service providers to be able to enter the domestic market the country. Therefore, there is an international trade law that exist to proportionally manage these problems.

ISBN: 978-623-92475-1-5

Until now, the scholars has not yet meet their agreement on on the definition of international trade law because of its wide scope and subjects (Jackson, 1998). It even collide with the term of international economic law. International trade law itself often said as the body of rules governing commercial relationship of a private law nature involving different nations (Scmitthoff, 1966). While international economic law can be said as all the international law and international agreements governing economic transactions that cross state boundaries or otherwise have implications for more than one state, such as those involving movements of goods, funds, persons, intangibles, technology, vessels or aircrafts (Henkin, 1995).

Some scholars give their limitation about the international trade law by separating each words and define it as the regulation of the conduct of parties involved in the exchange of goods, services, and technology between nations (Sanson, 2002). This terms divided into two parts, that is the public international trade law which governs trade relations between countries, and private international trade law which governs trade relations between private traders in different countries (Sanson, 2002).

PTA itself has many terminologies used by both countries and other multilateral organizations. However, the common characteristic of all types of PTA is the reciprocal preference. There are several identifiable differences in PTA, namely (Acharya, et al., 2011, in Chauffou & Maur, 2011) :

1. Free trade agreement (FTA). An agreement between two or more parties in which tariffs and other trade barriers are eliminated on most or all trade. Each party maintains its own tariff structure relative to third parties. Examples are the North American Free Trade Agreement (NAFTA) and the Japan–Singapore New-Age Economic Partnership Agreement.
2. Customs union (CU). An agreement between two or more parties in which tariffs and other trade barriers are eliminated on most or all trade. In addition, the parties adopt a common commercial policy toward third parties that includes the establishment of a common external tariff. Thus, products entering the customs union from third parties face the same tariff regardless of the country of entry. Examples are the Southern Cone Common Market (Mercosur, Mercado Común del Sur) and the agreement between the European Union (EU) and Turkey.
3. Partial-scope agreement. An agreement between two or more parties that offer each other concessions on a selected number of products or sectors. Examples are the Asia-Pacific Trade Agreement (APTA) and the agreement between the Lao People's Democratic Republic and Thailand.
4. Economic integration agreement (EIA). An agreement covering trade in services through which two or more parties offer preferential market access to each other. Examples are the U.S.–Peru and Thailand–Australia PTAs. Typically, services provisions are contained in a single PTA that also covers goods. An EIA may be negotiated some time after the agreement covering goods; for example, the Caribbean Community (CARICOM) and the European Free Trade Association (EFTA) have negotiated separate services protocols.
5. Preferential trade agreement (PTA). The generic term used in this study to denote all forms of reciprocal preferential trade agreements, including bilateral and plurilateral agreements.

The WTO uses Regional Trade Agreements in its law as its terminology for all agreements between countries that are reciprocal preference in nature (Schaefer, 2007). Meanwhile, the term Preferential Trade Agreements is the term applied to preference agreements given by developed countries to developing countries or least developed countries that are not reciprocal in nature (Acharya, 2016). PTA in the WTO itself is implemented with the Generalized System of Preferences.

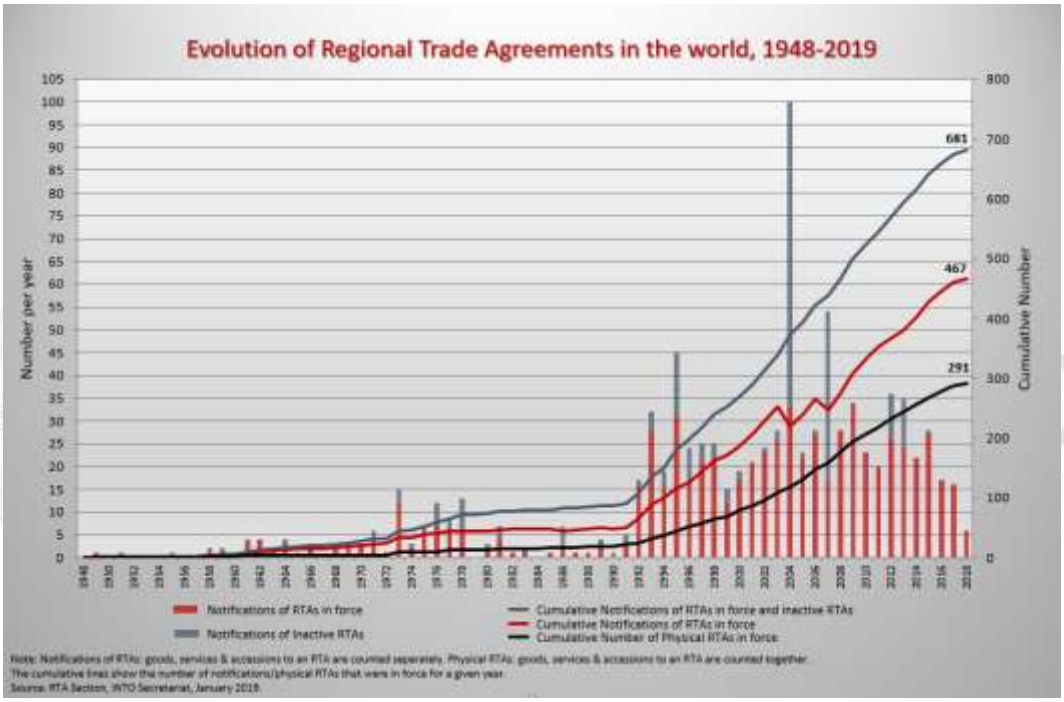
ISBN: 978-623-92475-1-5

## Research Methods

By reviewing the literature on preferential trade agreements in international trade law and opinions of the experts stated in various journals, as well as reviewing reports of several international organizations, particularly related to world trade, RCEP, complemented with WTO Agreements and reports from various institutions related to this study, the author will try to explain the issue that arise in the world of modern commerce today, namely the effect of emergence of the RCEP in covid-19 pandemic to Indonesian trade policy. This study also uses several Indonesian laws as the basis of study about the application of the RCEP in Indonesia such as Undang – Undang Nomor 7 Tahun 2014 tentang Perdagangan (Law No.7/201 about Trade), and Indonesian General Import Provisions.

## Findings & Discussion

The agreement in the for of PTA has been increasing and agreed upon every year. Since 1948, there have been more than 400 PTAs notified to the WTO.




The WTO itself has adopted Principles of Non – Discrimination which consist of two main principle namely National Treatment and Most Favored Nation as their basis. Following this principle, the contracting parties shall not treat domestic market participants more favorably than foreign market participants or differentiate between foreign market participants from different origin (Lombok, 2017). Whereas the National Treatment is concerned with the relation between the regulatory country and a specific trading partner, the Most Favored Nation treatment provides that a state shall not discriminate between its different trading partners, which has been regulated in Article I of the GATT. In other words, favorable trading conditions about goods, services or the protection of intellectual property rights granted to one trading partner must be accorded at the same time to all other Members of the WTO. But even though this principle is the basic operational guide for the WTO law, the WTO rules allow exceptions to the principle of Most Favored Nation. These exceptions are contained in several sets of WTO rules, namely:

ISBN: 978-623-92475-1-5

1. Article I:2 GATT :

   > *The provisions of paragraph 1 of this Article shall not require the elimination of any preferences in respect of import duties or charges which do not exceed the levels provided for in paragraph 4 of this Article and which fall within the following descriptions:*
   > *(a) Preferences in force exclusively between two or more of the territories listed in Annex A, subject to the conditions set forth therein;*
   > *(b) Preferences in force exclusively between two or more territories which on July 1, 1939, were connected by common sovereignty or relations of protection or suzerainty and which are listed in Annexes B, C and D, subject to the conditions set forth therein;*
   > *(c) Preferences in force exclusively between the United States of America and the Republic of Cuba;*
   > *(d) Preferences in force exclusively between neighbouring countries listed in Annex*es *E and F."*

   The exception to the Most Favored Nation originating from this article is for countries listed in Annex A to Annex F GATT 1947.
2. GATT Article XXIV, Ad Article XXIV, and Understanding The Interpretation Of Article XXIV of The GATT 1994.
   These articles acknowledge the existence of Custom Union and Free Trade Area in the world. The recognition to it implicitly excludes the application of the principle of Most Favored Nation. The nature of this rule is more of one way preferential, or not reciprocal in nature. The exception to the principle of Most Favored Nation which is regulated in this article is only given from a Custom Union to another party without any mutual relationship. In its development, the existence of this rule was often debated with the position of the Enabling Clause rule that was decided by the GATT 1947 member country in 1979.
3. The Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, 28 November 1979 (L/4903) or *The Enabling Clause*.
   The Enabling Clause was the result of discussions during the Tokyo Round of Multilateral Trade Negotiations in 1979. Regulated as a legal framework, this regulation is often considered the most significant regulation regarding special treatment of developing countries and least developed countries. The derogation of the principle of Most Favored Nation can be clearly seen in this regulation, namely in Paragraph 1 which reads :

   > *"Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries, without according such treatment to other contracting parties."*

   Based on this paragraph, contracting parties are given the opportunity to give different and special treatment to developing countries without having to impose it on other countries. The content of this regulation is quite problematic, which is ambiguous and does not explain its position towards other GATT regimes or beyond (GATT 1994). The relation of this rule to Article XXIV GATT 1947 above is not clear. The fact that world trade is currently "*quid pro quo*" shows that this rule is not in sync with the recent development. However, the existence of the Enabling Clause is an opportunity for developing and least developed countries to enter into preferential trade agreements. This is mainly done with countries that have the ability to transfer of knowledge to them because in general these agreements are carried out with developed countries.

ISBN: 978-623-92475-1-5

4. Article V General Agreement on Trade in Service (GATS).
   One of the derogations to the principle of Most Favored Nation is also contained in this rule which can be seen in paragraph 1 which reads:

   > *"This Agreement shall not prevent any of its Members from being a party to or entering into an agreement liberalizing trade in services between or among the parties to such an agreement, provided that such an agreement:*
   > *(a) has substantial sectoral coverage, and*
   > *(b) provides for the absence or elimination of substantially all discrimination, in the sense of Article XVII, between or among the parties, in the sectors covered under subparagraph(a),through:*
   > *(i) elimination of existing discriminatory measures, and/or*
   > *(ii) prohibition of new or more discriminatory measures, either at the entry into force of that agreement or on the basis of a reasonable time-frame, except for measures permitted under Articles XI, XII, XIV and XIV bis."*

   According to this regulation, each contracting party can make an agreement or enter into an agreement containing the cooperation of the parties for trade liberalization between them. This cooperation also includes flexibility to developing countries as stipulated in paragraph 3 which reads :

   > *"(a) Where developing countries are parties to an agreement of the type referred to in paragraph 1, flexibility shall be provided for regarding the conditions set out in paragraph 1, particularly with reference to subparagraph (b) thereof, in accordance with the level of development of the countries concerned, both overall and in individual sectors and subsectors.*
   > *(b) Notwithstanding paragraph 6, in the case of an agreement of the type referred to in paragraph 1 involving only developing countries, more favourable treatment may be granted to juridical persons owned or controlled by natural persons of the parties to such an agreement."*

With this regulation, special treatment for developing countries gets its legal framework through flexibility in it in paragraph 3(b). Developing countries can be given more favorable treatment by considering the level of development of the country both from the individual sector and its sub-sectors.

In this regard, Indonesia has entered and been involved in various international agreements with various countries indicating the formation of a group of countries. This agreement is made in the form of a PTA. Based on the release of the Ministry of Trade, there are several categories of Indonesian involvement in the PTA, which are currently being explored, currently in negotiations, have been signed and are in the process of ratification, and those that have been implemented.

The latest negotiation that been concluded was the Indonesia – Korea Comprehensive Economic Partnership Agreement (IK-CEPA) that been signed on 18 December 2020. The signing of IK-CEPA was an important achievement in bilateral economic relation between Indonesia and South Korea remembering South Korea increasingly interested to make Indonesia as their new production base in ASEAN. This agreement added to a long list of Indonesian Ministry of Trade in year of 2020 in the cocnlusion of several international trade agreement, from the implementation of Indonesia – Australia CEPA (IA-CEPA), ASEAN – Hongkong, China Free Trade Agreement (AHKFTA), ASEAN – Hongkong, China Investment Agreement (AHKIA), the ratification of Indonesia – Mozambique PTA and Protocol to Amend

ISBN: 978-623-92475-1-5

ASEAN-Japan Economic Partnership Agreement (ASEAN-Japan EPA) with Peraturan Presiden (Presidential Law). The list of negotiations that are currently being explored, on-going, and implemented is as follows:


One of the best achievement that were concluded by Indonesian government alongside with their trade partners is the RCEP. The RCEP was initiated by Indonesia in 2011 to consolidate five ASEAN + 1 Free Trade Areas (ASEAN+1 FTA). ASEAN itself has extended its ASEAN Free Trade Area (AFTA) framework since 1992 by adding up plus-one economies: ASEAN-China FTA (ACFTA), ASEAN-Korea FTA (AKFTA), ASEAN-Japan FTA (AJFTA), ASEAN-Australia-New Zealand FTA (AANZFTA), and ASEAN-India (AIFTA). Since the RCEP has a function to merge these ASEAN-plus-one FTAs, will reduce trade diversion effect at least among plus-one countries such as China, Korea and Japan, and will expand trade creation effect if the preferential tariff rates are unified to the lowest level (Taguchi, et al., 2016).

The RCEP which signed by 16 countries (10 ASEAN Member Countries and 6 ASEAN FTA partner countries), was initiated by Indonesia when Indonesia became Chair of The ASEAN in 2011 to reduce the overlap among the current FTAs, avoiding "*confusing noodle bowls*" from various FTAs exist, as well as consolidating the ASEAN + 1 FTA. RCEP was formed with the aim of forming a modern, comprehensive, high-quality and mutually beneficial economic partnership agreement between ASEAN Member Countries and ASEAN Partner Countries. At the 21st ASEAN Summit and Other Related Summits, the Heads of State / Government ratified the Guiding Principles and Objectives for Negotiating The RCEP and announced the start of negotiations in early 2013. Indonesia was appointed as The RCEP country coordinator and became chair of Trade Negotiating Committee (TNC) - RCEP. Initially RCEP was targeted to be completed in 2015, but it was completed in 2020.

The RCEP negotiations were consists of nine Working Groups (WGs), including trade in goods, trade in services, investment, economic and technical cooperation, intellectual property, competition, dispute resolution, e-commerce, small and medium enterprises and procurement of goods. In addition, The RCEP has five Sub Working Groups (SWGs) under the Trade in Goods, namely Sub-Working Group on Rules of Origin (SWG-ROO), Sub-Working Group on Customs Procedures and Trade Facilitation Working Group (SWG-CPTF), Sub-Working Group on Standards, Technical Regulations and Conformity Assessment Procedures (SWG-STRACAP), Sub-Working Group on Sanitary and Phytosanitary Measures (SWG-SPS), and

ISBN: 978-623-92475-1-5

SWG-TR (Direktorat Jenderal PPI, 2018). The RCEP also has two SWGs under WG Trading Services namely SWG-Financial and SWG-Telecom.

There are twenty provisions that contained in the RCEP namely :

1. Initial Provisions and General Definitions.
2. Trade in Goods.
3. Rules of Origin including Annex on Product Specific Rules.
4. Customs Procedures and Trade Facilitation.
5. Sanitary and Phytosanitary Measures.
6. Standards, Technical Regulations, and Conformity Assessment.
7. Trade Remedies.
8. Trade in Services including Annexes on Financial, Telecommunication and Professional Services.
9. Movement on Natural Persons.
10. Investment.
11. Intellectual Property.
12. Electronic Commerce.
13. Competition.
14. Small and Medium Enterprises.
15. Economic and Technical Cooperation.
16. Government Procurement.
17. General Provisions and Exceptions.
18. Institutional Provisions.
19. Dispute Settlement.
20. Final Provisions.

The most prominent rules for Indonesia in terms of its market access of all these provisions are the Trade in Goods, Trade in Services including Annexes on Financial, Telecommunication and Professional Services, Temporary Movement of Natural Person, and Investment. These provisions led to benefit and challenges that could be gained by Indonesia. A research by Ira Aprilianti from Center for Indonesian Policy Studies concluded that Indonesia can take advantage of the spill-over effect of FTAs owned by RCEP members with non-RCEP members that could potentially increase the export up to 7.2% through the expansion of Indonesia role in global supply chain (Aprilianti, 2020). The RCEP also will contribute to the planned ASEAN Comprehensive Recovery Framework that will help expand intra-ASEAN trade with East Asian economic powerhouses, by promoting supply chain connectivity in the 'New Normal' era (Chongkittavorn, 2020).

In dealing with Indonesian rules, the RCEP will face few obstacles. The most prominent one is the ratification process that was mandated by the *Undang – Undang No.24/2020 Tentang Perjanjian Internasional* (Law No. 24/2000 about International Treaty). The process itself requires approval of the DPR (house representatives). To achieve such ratification, the RCEP document must first be translated into Indonesian language, such document consist of 14.367 pages with certain terms that does not have Indonesian words. After that, the government must mitigate the representatives about the challenges that could occur from the RCEP to several trade fields, among others, telecommunications, Information and Technology, garment/textiles, footwear, and automotive.

To achieve such benefits from the RCEP, there are several things that needs to be done by the Indonesian government. There should be a reform and policy adjustments to improve the Ease of Doing Business Index (EODB Index). The Indonesian government should also pay more attention to the service sector in order to become "lubricant" sector for the manufacturing sector and other sectors, and become more offensive in domestic market to the competing

ISBN: 978-623-92475-1-5

products by creating laws that restrict its circulation but with conformity to the RCEP and other international trade treaties. This offensive action could also be translated into giving more attention to small and medium enterprises and start-ups, by providing capitals, and other form of business assistance.

Indonesia could use RCEP as an umbrella to the many bilateral arrangements with other South East Asia Countries and other participants. RCEP should further improve Indonesia–ASEAN intra-trade relations on which Indonesia heavily relies. Indonesian achievement from the RCEP would bring a new era of free trade through preferential and regional trade agreements.

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