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The EU – Indonesia CEPA negotiations

Responding to calls for an investment policy reset: are the EU and Indonesia on the same page?

This briefing paper is part of a series of reports on the proposed Indonesia-EU Comprehensive Economic Partnership Agreement (CEPA).

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Introduction

This paper explores the agenda driving the negotiations for an Indonesia-Europe Comprehensive Economic Partnership Agreement (CEPA) in relation to investment and discusses the merits of alternative investment protection frameworks as proposed by Indonesia and other countries in relation to promoting more equitable and sustainable development.

In 2014, Indonesia announced its intention to terminate all of its existing 60+ bilateral investment protection agreements (BITs), which it argued ran counter to its current development interests.[1] Indonesia was no longer willing to accept the infringements on its sovereign policy space entailed in the investor-state dispute settlement mechanism (ISDS) enshrined in its BITs. Threatened by a series of potentially crippling claims brought by foreign investors on the basis of these BITs, Indonesia found itself forced to retract proposed environmental regulations and offer foreign investors exemptions to new laws demanding a higher level of domestic processing of raw materials.[2] Since 2014, Indonesia has denounced 20 BITs, and the one with Argentina was terminated by mutual consent.[3]

Indonesia has joined the ranks of leading developing countries like India and South Africa, which are currently reviewing their BITs because of concerns that the current system exposes them to excessive risks. There is growing discontent worldwide with the far-reaching and, through ISDS, enforceable rights that BITs grant to international investors and investments. These rights, it is felt, severely limit governments' freedom to align foreign investment to their own development policies and lays them wide open to multimillion dollar claims from foreign investors if they seek to subject them to stricter regulations.[4]

This analysis led Indonesia to announce that future investment agreements must be negotiated on the basis of a new model BIT that would significantly curtail protections for foreign investors and allow the government to determine its own development path. With its intention to re-negotiate its BITs to better align foreign investment with its national development and outline investors' responsibilities to counterbalance the protections they enjoy, Indonesia is breaking away from conventional trade and investment policy aimed at opening up deregulated markets.

Such a course would tie in with the Sustainable Development Goals (SDGs), a set of 17 goals and 169 targets endorsed in 2015 by the member countries of the United Nations as part of the 2030 Agenda for Sustainable Development. The SDGs aim to eradicate poverty and promote inclusive economic development, and to protect the world from environmental degradation and climate change. The SDGs define trade as a key means to promote growth and reduce poverty. Investment protection, enforceable through ISDS, would seem to clash with the 2030 Agenda for Sustainable Development. ISDS enables foreign investors to claim vast compensation if a government enacts measures that they argue would have a negative impact on their investments, including those made in the public interest. Compensation awards are internationally enforceable and can pose a serious threat to government budgets. Indeed, even the threat of claims can cause governments to reconsider proposed public interest measures or tighter regulations to bind foreign investment to national development objectives.

The United Nations Conference on Trade and Development (UNCTAD) underscores the need for reform of the investment arbitration regime. UNCTAD confirms that '[m] any Investor-State Dispute Settlement (ISDS) cases have brought to light unanticipated — and partially undesired — side effects of IIAs' and stresses the need for 'ensuring coherence between IIAs and other areas of public policy, including policies addressing global challenges, such as the protection of the environment (climate change) and public health and safety'.[5]

However, although the EU has made a commitment to implement the SDGs in both its internal and external policies,[6] its ambitions for the EU-Indonesia CEPA appear to contradict Indonesia's policy shift to reclaim control over foreign investments, and assert the freedom to regulate and maintain full governance of its natural resources. The EU's agenda remains largely focused on liberalisation and deregulation to boost trade and investment.

There have been calls from Member States[7] and the European Parliament[8] for a 'reset' of the EU's trade and investment policy to ensure policy coherence with the SDGs and a focus on reducing inequality and explicitly linking trade and climate policies. But such a 'reset' is by no means a done deal.

In the negotiations for the EU-Indonesia CEPA, launched in mid-2016, the EU's agenda appears to aim for extensive liberalisation and deregulation, in particular in relation to trade and investment in services.[9] In addition, the far-reaching protections for foreign service providers and investors that the EU includes in its recent trade and investment agreements and also envisages for the CEPA, will have a significant impact on Indonesia's policy space, and may restrict its efforts to regulate in the public interest, respect and promote human rights, and protect the environment. These investment protections are still phrased in such broad and open-ended ways that almost any type of government regulation can be challenged as an indirect expropriation or a breach of fair and equitable treatment (FET), for which compensation is required. To avoid financially crippling claims, states can easily be 'persuaded' to water down or shelve proposed regulation that displeases foreign investors – a phenomenon known as 'regulatory chill'.

The challenge for the EU-Indonesia CEPA negotiations is to provide a framework for genuinely fair and sustainable trade and investment – which means that the EU must fundamentally rethink its trade and investment policies. There is a growing attention to sustainability in EU trade and investment agreements, but such chapters are nowhere near being as enforceable as the chapter enshrining the protections of investments. The EU proposes reform of the ISDS system, but its new 'Investment Court System'(ICS) centres on improving the process of arbitration – not the principles on which the system is based. ICS leaves intact the broad-based rights and protections on which foreign investors can base their mega-compensation claims that can cripple public budgets.[10]

We call on the EU and Indonesia to use the CEPA negotiations to design an investment chapter that prioritises equitable and sustainable development, the preconditions for which include a healthy environment, a climate-friendly economy, security of livelihoods and decent work for all. The CEPA must be conditional on the ratification and implementation of basic human rights law, as well as climate and environmental agreements. To safeguard these preconditions, the framework for foreign investments requires binding and enforceable investor obligations in the area of human rights, climate change and environmental due diligence, and requirements to promote local employment. Other countries that are revising their investment agreements provide examples of promising new approaches (see chapter 5).

1. The EU-Indonesia CEPA: what is on the agenda?

1.1 Indonesia: a priority in ASEAN

In 2006, the EU first identified the Association of Southeast Asian Nations (ASEAN) as a priority region and launched negotiations for a region-to-region free trade agreement (FTA) the following year. When these proved too slow and cumbersome, the EU opted to negotiate bilateral FTAs with individual ASEAN partners. So far, the European Commission finalised a bilateral FTA with Singapore in October 2014, and with Vietnam in 2015. It is in the process of negotiating trade and investment agreements with Thailand (commenced 2013) and the Philippines (commenced 2015). The EU is also negotiating a stand-alone Investment Protection Agreement with Myanmar. In the negotiations with ASEAN member states, the EU will seek to stay close to the templates of the Singapore and Vietnam agreements since its ultimate aim remains to incorporate all bilateral agreements in a single region-to-region EU-ASEAN agreement.[11]

The EU has been keen to also start negotiations for a Comprehensive Economic Partnership Agreement (CEPA) with Indonesia. Indonesia accounts for around 40% of the population and the GDP of ASEAN, and is the bloc's largest economy. But currently, only 1.6 % of all European foreign direct investment (FDI) going into Asia and only 6% of EU investments in ASEAN countries is destined for Indonesia.[12] So the EU sees much scope for expansion here. For Indonesia, the EU is its fourth largest export partner, after Japan, China and Singapore. Both sides see great opportunities in an Indonesia-EU CEPA, which would cover a market of 750 million people.

After scoping exercises were completed (see section 1.2), negotiations for a FTA between the EU and Indonesia were officially launched on 18 July 2016. The European Commission, which conducts the negotiations on behalf of the EU, stresses that the CEPA negotiations will 'take into account the specificities of the EU-Indonesia relations'. But it also underlines 'the need for coherence with what the EU has already negotiated in its bilateral free trade agreements with other Member States of ASEAN, in view of the long-term objective to conclude an EU-ASEAN region-to-region FTA'.[13]

1.2 Corporate capture: EU-Indonesia Vision Group recommendations for the negotiating agenda

In 2009, an EU-Indonesia Vision Group was established to explore how to invigorate EU-Indonesian trade and investment relations. Business organisations from both sides were heavily involved in this Vision Group,[14] and the resulting recommendations, presented in 2011,[15] clearly reflect the interests of transnational corporations (TNCs).

For the CEPA, the Vision Group recommends a standard recipe of far-reaching liberalisation in the areas of goods, services and investment, plus strong commitments on intellectual property rights.

For goods, it recommends a move to zero tariffs for 95% of all tariff lines; and in services, liberalisation beyond what was agreed at the World Trade Organization (WTO), starting with the binding of existing liberalisation, and linked with greater freedom to invest. It is this corporate agenda that underpins the negotiations. The EU would like to use Indonesia as a production platform for sales to the wider ASEAN economic community. So, enhancing the freedom to invest is very much a key issue for Europe. To help increase its FDI in Indonesia, the EU wants to see Indonesia do away with its current investment restrictions, which include limits on foreign ownership. The EU also targets local content requirements for foreign investors which are part of Indonesia's development strategies. The EU aims to include an ambitious investment protection chapter at the CEPA treaty level, to replace all 17 existing bilateral investment agreements between Indonesia and EU member states.

The final scoping papers for the EU-Indonesia CEPA negotiations, covering issues such as trade in goods, customs and trade, technical regulations, trade in services and investment, public procurement, intellectual property rights, competition policy, transparency of regulations, dispute settlements and trade and sustainable development, were completed in April 2016.[16]

1.3 The implications of the EU's agenda: potential negative impacts on public services and development policy

The EU's report on the first round of negotiations has long explanations of the parameters of the negotiations and presentation of its objectives and approaches, in particular in relation to services and investment. These are clearly major interests for the EU. Liberalisation in services may, however, clash with the need to provide universally accessible and affordable public services, in particular in combination with a ban on performance requirements.

BOX 1

What are performance requirements?

Many developing countries make use of performance requirements to ensure the materialisation of expected benefits of foreign direct investment. Incoming transnational businesses are driven by their own corporate strategies and the competitive advantages offered by the host country. Performance requirements, i.e. requiring foreign investors to meet certain obligations, are a tool to ensure that incoming investments contribute to the national development objectives in the host country.

Performance requirements can take a number of forms, such as limits on foreign ownership, requirements to enter into joint ventures with local companies, local content requirements demanding that foreign investors use local materials in their production processes and employ local workers and/or research and development and technology transfer requirements.

Indonesia's new mining act caps foreign ownership and imposes export performance requirements on mining corporations, requiring them to process raw materials domestically before they are exported.

BOX 2

Controversial and crippling ISDS claims against Indonesia

The Newmont investment claim

In 2009, Indonesia revised its mining law as part of its national development policy. The main objective was to reduce dependence on the export of raw materials and to boost domestic employment and the local economy. Law No.4/2009 on Mineral and Coals requires mining companies to refine and process minerals in Indonesia prior to export, and the export of raw and semi-finished mineral products would be subject to a progressive export tax ranging from 20% to 60%. The new law also limits foreign ownership, obliging foreign-owned mining industries to progressively divest to become a shareholder minority within 10 years, by selling off shares to the Indonesian government, municipalities or local industries. The law was fiercely opposed by the large foreign mining corporations operating in Indonesia, including Freeport-McRoran and Newmont Mining, two of the world's largest. Newmont even went as far as to close down its operations and lay off 3,200 local workers. In the end, the Indonesian government agreed to amend the regulations for Freeport and Newmont, offering a much-reduced export tax (7.5% rather than 25%), and to postpone obligations to build mineral refinery plants in Indonesia.[17] Whereas Freeport chose to settle, in July 2014, Newmont filed an investment claim against Indonesia at ICSID, the World Bank's centre for the settlement of investment disputes. The claim was withdrawn one month later, in exchange for even more favourable legal exemptions. The case of Newmont Mining vs Indonesia is a powerful example of how companies use investment agreements to get exemptions from government regulations and legislation, thereby undermining democracy and development.[18]

Churchill Mining

Indonesia also faces an investment dispute brought by British-owned Churchill Mining involving a claim for more than $2 billion for revoking coal-mining permits in Borneo. Churchill has been suing Indonesia over ownership of a mine in East Kutai province, estimated to be the seventh largest undeveloped coal resource.[19] Indonesia maintains that Churchill forged its mining license.[20] In December 2016, an ICSID tribunal rejected Churchill's claim, ruling in favour of the Republic of Indonesia. The tribunal further ruled that 'the entire EKCP project is an illegal enterprise affected by multiple forgeries'.[21] Nonetheless, Churchill Mining indicated it will continue to pursue its claim against Indonesia.[22] The ISDS allows companies like Churchill, Newmont and Freeport to exert undue influence over Indonesia's domestic policy, undermining the realisation of human rights and protection of the environment.

Indian Metal Ferro Alloys

Indonesia is being sued in an ISDS case by an Indian company, Indian Metal Ferro Alloy, for introducing a new mining licensing standard. The new standard, which categorises mining operations as Clean and Clear (CnC) and Non Clean and Clear (NCnC), aims to improve good governance and better stewardship of the mining sector. Companies applying for a license are assessed on their administrative, financial and environmental performance. The conditions and circumstances in the relevant area are also considered. The CnC/NCnC licensing seeks to reduce the human rights abuses associated with the mining sector, such as occupying populated areas, adverse impacts on the right to health and negative environmental effects. Indian Metal Ferro Alloys is suing the Indonesian government over its NCnC status, which will undermine the government's efforts to protect citizens' human rights.

[In energy and raw materials, the EU wants to address trade restrictions and is aiming for 'disciplines on export restrictions, the elimination of export duties and the prohibition of new export duties'. It views such measures as trade restrictions rather than development policy choices. The EU wants 'non-discriminatory' access to Indonesia's natural resources, which contradicts Indonesia's own development policy that now includes stipulations to promote domestic processing of raw materials. This has met with much opposition from foreign investors, who were quick to revert to the ISDS mechanisms in Indonesia' bilateral investment agreements and threaten the state with multi-million dollar claims for compensation in order to get exemptions from these new laws.

2 Indonesia's review of investment protection policy

2.1 Termination of existing BITs

Discontent with the way in which investment arbitration allows foreign investors to ignore national courts, circumvent national regulations and thus thwart national development policies prompted Indonesia to take the decision, in 2014, to terminate all of its 67 bilateral investment agreements. Indonesia has indicated it will discontinue its BITs and seek to renegotiate them[23] to secure more policy space to regulate in the public interest.[24] Frustration with the ISDS system was an important factor in the decision to terminate. Indonesia's former Coordinating Minister for Economic Affairs, Sofyan Djalil, was quoted as saying that the reason to terminate the BITs was their unsuitability and irrelevance to Indonesia's current development, describing preliminary decisions in investment cases against Indonesia as unfair and contrary to its interests.[25] Indonesia joins the ranks of a growing number of countries around the world that are revisiting their frameworks for investment protection, including Ecuador, India and South Africa. India, one of the most frequently sued states in 2015,[26] is also taking a hard line. In its bid to limit investor protections and preserve policy space, India has recently indicated its unwillingness to extend its bilateral investment agreement with the Netherlands, which is about to expire.[27] Even when BITs are terminated, however, they can still bite: existing investments can continue to rely on a terminated treaty's protections for another 15–20 years under the so-called 'sunset clause'. This means that established investors can still invoke such treaties to challenge government interventions.

2.2 A new model BIT

Indonesia has indicated that it aims to not simply terminate its BITs, but to (re)negotiate them on the basis of a revised model. The information that is publicly available[28] suggests that this new model aims to curb the excessive protections that provide investors with a broad base to challenge the host state's regulatory measures, including those aimed at enhancing social security and the protection of the environment. Indonesia wishes to preserve full policy space to determine its own development path.

Under public pressure and in response to the growing backlash, in particular from countries in the global South, the EU is currently proposing the inclusion of a revised ISDS mechanism in its trade and investment agreements, which it calls the Investment Court System (ICS) (see box 6). However, this does not foresee a reduction of the substantial provisions that investors can invoke to bring their investment claims, which, for example, India (to some extent) proposes in its newly published model BIT (see box 4).

Like Indonesia, India has indicated it will not renew its BITs without renegotiation.[29] Indonesia's model BIT has not yet been published and may not be made public, but indications are that it follows India's model in tightening definitions and limiting substantive clauses, such as the controversial 'fair and equitable' treatment standard (FET), on national treatment (NT), most-favoured nation (MFN) treatment, and the abolition of the indirect expropriation clause.[30] Indonesia is also looking at other examples, including those of Brazil and the Southern African Development Community (SADC), in seeking the best model for its new BIT (see chapter 5 on alternatives). The FET and indirect expropriation clauses enable transnational investors to challenge almost any government intervention before an international arbitration tribunal. The ISDS has already been used to challenge government measures relating, for example, to social, environmental and consumer protection; fiscal policies; financial security; intellectual property; land use; mining; agriculture; energy; public health; and public transport.[31] National treatment obligations severely limit host states' scope for tailored policies to boost the domestic economy. And MFN acts as a loophole for foreign investors to invoke more favourable clauses found in other treaties concluded by the host state.

BOX 3

The danger is not just with BITs

Indonesia is also party to or negotiating multilateral trade agreements with investment protection and investor-state dispute settlement provisions (TIPs) similar to BITs (for a full list, see Annex I).[32] These include the ASEAN Comprehensive Investment Agreement (ACIA), the ASEAN-Australia-New Zealand Free Trade Area and the Agreement for the Protection, Promotion and Guarantee of Investments of the Organization of Islamic Cooperation. Some of these ASEAN-wide TIPs are with countries with which Indonesia has terminated its bilateral agreements, including China and India. Like the potential EU-Indonesia CEPA, The Regional Comprehensive Economic Partnership (RCEP) between ASEAN and Australia, China, India, Japan, the Republic of Korea and New Zealand, in negotiation since 2014, will also contain investment protection and ISDS provisions.

BOX 4

India's revised model BIT: some key elements[33]

In the preamble to its model BIT, India adopts a development-centred approach, aligning the objectives of investment promotion and protection with the promotion of sustainable development. Only investments that contribute to India's economic development qualify for protection under the treaty. Mailbox companies are excluded: investors must have a substantial commercial presence in their home state. The aim is to exclude investors which have restructured their investments, incorporating in a certain jurisdiction in order to take advantage of business-friendly investment agreements, from bringing claims against a host state.

India seeks to build in guarantees to safeguard its policy space and its new model BIT demands that government measures be assessed on a case-by case basis to determine whether they constitute an indirect expropriation for which compensation is required. The model BIT explicitly states that measures to 'protect legitimate public interest or public purpose objectives such as public health, safety and the environment, shall not constitute expropriation'. It also includes an exhaustive list of economic, environmental and social measures that are excluded from the treaty, such as measures to protect public morals or maintain public order; to protect human, animal or plant life or health; to protect and conserve the environment, including all living and non-living natural resources; to protect national treasures or monuments of artistic, cultural, historic or archaeological value; and measures taken by a central bank or monetary authority of a treaty party in pursuit of monetary and related credit or exchange-rate policies.

India's model BIT imposes obligations that investors are bound to observe on penalty of exclusion of the benefits of the treaty. Investors are required to operate in line with the domestic laws of the parties to the agreement, and specifically host-country laws related to taxation and the disclosure of information. Investments tainted by fraud and corruption, or that have violated the host country's laws, are excluded from treaty protection. However, there are no binding social, environmental and human rights responsibilities – investors are merely encouraged to voluntarily adopt corporate social responsibility (CSR) principles to address issues such as labour, environment and human rights.

Access to ISDS mechanisms is made conditional on the exhaustion of local remedies. Investors can take their complaint before an investment tribunal only if their case is not satisfactorily resolved in the domestic courts within five years, or if investors can prove that (timely) legal remedies are not available in the domestic system. Investors are obliged to issue a notice of arbitration to the host country at least 90 days before submitting a claim to international arbitration, which is currently not always the case.

India also aims for a periodic review of investment treaties every five years and the opportunity to amend a treaty's provisions at any time at the request of either party. These amendments would be binding on the arbitration tribunals and their awards 'must be consistent with all amendments'. BITs would be in force for ten years, and would not be automatically renewed. India also wants to shorten the term under which established investors continue to enjoy the protection of a treaty after it has been terminated. As stated earlier, standard practice now extends treaty protection for a further 15 years under the so-called sunset clause). India would like to see this cut down to five.

With these and other provisions in its model BIT, India seeks to significantly restrict investment protections, tie investment to development objectives and social responsibilities and preserve its flexibility to regulate in the public interest.

BOX 5

Indonesia's revised model BIT: reducing protections and preserving policy space

In 2016, Mr Adbulkadir Jailani, at the time the Director for Treaties and Legal Affairs in the Ministry of Foreign Affairs of the Republic of Indonesia, provided some insights into where Indonesia was intending to go with its BIT reform, indicating that Indonesia's revised model BIT would significantly tighten the definition of investment, narrowing it down from a broad, asset-based definition to a much more limited production-based one. Furthermore, Indonesia intended to offer foreign investment protection in its revised investment treaties only if investors contribute to its national development. Foreign investors would be bound to comply with domestic laws and to refrain from any corrupt practice. Non-compliance would result in withdrawing the protections. According to Jailani, Indonesia also aimed to oblige investors to comply with domestic and international standards on labour and the environment, as well as to abide by the UN Guiding Principles on Business and Human Rights, and/or any future binding instruments. In all these areas, Indonesia wished to stipulate that the highest standard counts, which should encourage a race to the top. The inclusion of such binding obligations in investment agreements has been a long-standing demand of civil society worldwide. Jailani also pointed to statements that any measure taken to comply with Indonesia's international obligations under other treaties or conventions would not imply a breach of the investment treaty and consequently would also not entitle foreign investors to seek compensation. This would leave Indonesia with the right to comply with, for example, the Paris climate agreement, or its obligations under international human rights law. Indonesia would also seek to reserve the right to pursue development goals, including by extending preferential treatment to domestic businesses, and by taking measures to strengthen production capacity, promote employment, develop new technologies and promote technology transfer, and to support marginalised groups.

It remains to be seen if Indonesia will indeed include all of these elements in its future trade and investment agreements. The Ministry for Foreign Affairs confirmed in discussions with the local NGO I*ndonesia for Global Justice* that Indonesia will aim to limit the scope of controversial investor protection provisions, in terms of both substance and procedure. Indonesia aims to significantly tighten the definition of investment and exclude sensitive sectors such as government procurement and intellectual property rights from the scope of its investment treaties. Government loans, grants, insurances and guarantees, as well as taxation, are to be excluded from the ISDS. Indonesia also seeks to curtail the so-called FET clause, which is one of the investment protection clauses most frequently invoked by foreign investors as the basis for an ISDS claim. Likewise, Indonesia aims to curtail the current scope of the NT clause to only cover the post-establishment phase and restrict the MFN clause, so that investors cannot invoke clauses from other Indonesian treaties that offer more favourable treatment. Indirect expropriation clauses enable foreign investors to challenge almost any government regulatory measure that has an adverse impact on their investments. Indonesia's new model intends to substantially curb or even exclude this clause, thus limiting the grounds on which foreign investors can bring a claim. Indonesia intends to fully retain the right to regulate, including in order to protect public order, public safety, public health, the environment, labour and human rights. The final verdict on whether measures are to be considered legitimate would not be left to arbitrators with a potential conflict of interest, but to domestic judges. A foreign investor would have obtain consent to bring a matter to international arbitration on a case-by-case basis. In the new model BIT, a state-to-state dispute settlement will be strongly advocated as an alternative mechanism to resolve investment conflicts.

With these and other elements in its new approach to investment agreements Indonesia advocates a model that still protects the rights of foreign investors and grants them access to international, treaty-based arbitration, but only in very limited circumstances, while adding investor obligations to the mix.

2.3 Balancing investor rights and sovereign policy space

Although Indonesia's new model BIT has not been published, the available information[34] suggests that the country is aiming to curb both procedural and substantive provisions in it future investment agreements in order to prevent foreign investors from lodging complaints that constrain the government's duty to regulate in the public interest (see box 5).

Indonesia seeks to strike a better balance between investment protection and ensuring sufficient policy space by reducing the scope of its treaty-based investment protection and including obligations for foreign investors. It will break away from generically protecting all foreign investors by including obligations as a precondition for eligibility for protections offered under an investment treaty, which is potentially a step in the direction of promoting sustainable investment.

Indonesia's envisaged investment protection reform goes well beyond the EU's proposed ICS, which focuses almost exclusively on process. In its report on the third round of the CEPA negotiations, the European Commission indicates that notwithstanding 'constructive' discussions on investment in the CEPA, the two parties still differ on the substantive investment protections for foreign investors. Performance requirements remain a contentious issue and Indonesia is still in a process of internal reflection on ICS.[35]

3 The 2015 EU-Vietnam Free Trade Agreement: lessons to be learned

3.1 Impacts on sustainable development, human rights; little scope for new approaches to investment protection

Calls for a reset of trade and investment policy in both Europe and Indonesia should provide flexibility in the CEPA negotiations to explore new angles. However, Indonesia's revised approach to investment protection clearly clashes with the EU's new ICS framework, which was first included in its 2015 FTA with Vietnam. It was also included in the CETA agreement between the EU and Canada, which provisionally entered into force in 2017. The EU aims to include ICS in all its future trade and investment agreements. Since its stated aim is to expand ICS into a full-blown multilateral investment court, this leaves little scope for flexibility in the EU's negotiation of investment protection chapters with partner countries. Moreover, since ICS almost exclusively addresses procedural and hardly any substantive reforms, it is clearly at odds with Indonesia's own revised approach to investment protection.

The EU-Vietnam template also sits uneasily with the aim to promote sustainable and equitable development and combat climate change, voiced in the Dutch trade minister's vision for a European trade policy reset.[36]

Civil society has recently condemned the EU-Vietnam FTA, as the first EU agreement to include ICS, for not meeting core requirements aimed at avoiding governments compromising their human rights obligations with regard to international investment. These core requirements include a) prior independent human rights impact assessments; b) the exclusion of investor protections that impede governments' policy space to legislate, regulate and reach court decisions to protect and fulfil human rights, including the right to health and access to essential medicines; the right to a safe and healthy environment; the right to development and to an adequate standard of living; the right to water, sanitation and food; indigenous peoples' rights; and core labour rights; and c) the inclusion of effective protections for human rights, the environment and labour rights in investment agreements and their dispute-resolution mechanisms.[37]

In EU trade agreements, clauses on the protection of labour, environmental and human rights in trade agreements tend to be included in ways that are non-binding and non-enforceable. This stands in stark contrast to the extensive protections offered to foreign investors in investment chapters in trade agreements and stand-alone bilateral investment agreements. In addition, when negotiating the Paris climate agreement, the EU made clear that it wanted to avoid explicit links made with trade policy.[38]

3.2 The 2015 EU-Vietnam FTA: a template to be emulated?

In December 2015, the EU concluded an FTA with Vietnam. The EU promotes this agreement as a template for ASEAN's other middle-income countries. The EU Chief Negotiator and Deputy Director-General for Trade at the European Commission, Mauro Petriccione, writes: '...the Vietnam agreement is the most ambitious and comprehensive FTA that the EU has ever concluded with a middle-income country. As such, it sets a new benchmark for Europe's engagement with emerging economies'.[39] According to EU trade commissioner Cecilia Malmström, this FTA creates new opportunities for market access in services and investment and 'sets a new, better and modern model for Free Trade Agreements between the EU and developing countries, and establishes a good standard for the trade relationship between the EU and South East Asia as a whole'.[40] Hence, the EU-Vietnam FTA must be viewed as a benchmark for the EU-Indonesia CEPA.

3.2.1 Extensive liberalisation of (public) services and government procurement

Apart from eliminating almost all tariffs, the EU Vietnam FTA envisages a strengthening of intellectual property rights and deep liberalisation of trade as well as investment in services – including public services, such as health and education – well beyond Vietnam's commitments in the WTO. Commercial service providers are granted access to invest in sensitive public services. Experience shows that the corporate sector is more concerned with making a profit than with universal service provision, and that it has a tendency to cherry-pick, preferring to offer their services to more affluent consumers in densely populated urban areas and being far less interested in extending services to poorer customers in outlying, sparsely populated areas. Strengthening intellectual property rights can significantly extend, for example, patents on expensive branded medicines, making it harder to obtain cheaper generic drugs. Vietnam has also agreed to open up its government procurement market extensively to European investors. This limits Vietnam's opportunities to use government procurement policy as a tool for development, by granting preferential treatment to local contractors, small and medium enterprises (SMEs) or workers when putting government contracts out to tender.[41]

3.2.2 Ban on performance requirements

Setting performance requirements for service provider and investors – an important tool for development, including in Indonesia – is prohibited in the EU-Vietnam agreement. The establishment or operation of investments may not be linked to obligations such as to a given level or percentage of domestic content; purchase, use or give preference to goods produced or services provided in its territory, or to purchase goods or services from natural persons or enterprises in its territory; or the transfer of technology.[42] In the EU-Indonesia CEPA negotiations, performance requirements are a contentious issue.[43] Indonesia's 2014 Trade Law focuses on the development of local production to boost economic growth. The law facilitated government intervention to protect local industries, and includes stipulations for the mandatory use of locally produced goods. The law also empowers the government to impose trade restrictions and bans on services in the interests of domestic trade and to restrict exports and imports to serve national interests, such as ensuring that local demand is met, guaranteeing the supply of raw materials for domestic industries and maintaining Indonesia's trade balance.[44] Indonesia also continues to maintain limitations on foreign ownership.[45]

3.2.3 ICS: a continued risk of crippling investment claims

The EU-Vietnam FTA also comprises an investment chapter that replaces all existing 21 BITs between Vietnam and EU Member States. The investment chapter enhances market access for investors and deepens post-establishment investment protections. The chapter follows the ICS system, which the EU insists that the clauses on the grounds of which investors can bring a case are strictly circumscribed and that the rights of the parties to the agreement are well protected. However, the EU's approach has been heavily criticised for inadequately narrowing the scope of investment provisions such as the infamous 'fair and equitable treatment' clause and the clause on indirect expropriation. Critics argue that ICS continues to enable investors to challenge almost any government measure with a potential negative impact on their profit margins before an international investment tribunal. The ICS continues to leave it up to arbitrators to decide whether a government measure is necessary, legitimate and/or proportionate – in a system that still lacks the necessary legal checks and balances to guarantee their impartiality and independence and in which only foreign investors can bring a claim against states. The ICS by no mean precludes the threat of claims involving tens if not hundreds of millions of dollars against states that pass regulations, including in the public interest. Public health, environmental and tax measures have already been challenged before investment arbitration tribunals, and research shows that some of the most controversial cases under the 'old' ISDS settlement system would still be equally possible under the ICS approach.[46] The threat of investment claims can and has caused governments to water down or even shelve (public interest) regulations.[47]

BOX 6

The EU's ICS reform: no substantial limitation of investor privilege

In November 2015, the European Commission presented its proposal for the ICS,[48] which it wants to replace the existing investor-to-state mechanisms in all the ongoing and future EU investment negotiations. Ultimately, the EU aims to set up a permanent International Investment Court to 'increase the efficiency, consistency and legitimacy of the international investment dispute resolution system'.[49] In September 2017, the Commission issued a recommendation, which, once adopted by the European Council of Ministers, would permit the EU to take part in negotiations for a Multilateral Investment Court (MIC). The Working Group on Investor-State Dispute Settlement Reform of the United Nations' Commission on International Trade Law has agreed to facilitate the discussion on a MIC.[50]

Elements of ICS

- The ICS includes some moves to make the system more transparent and disclose more dispute-settlement case information.
- It would set up a roster of arbitrators who would be appointed randomly on a rotational basis, removing the current privilege of each disputing party appointing their own judge.
- It would pave the way for development of the system through jurisprudence and establish an appeals mechanism.
- ICS arbitrators would not be allowed to act as counsel, or expert, or witness in any ongoing investment cases, whether under ICS, other IIAs or domestic law. Nor would they be allowed to participate in disputes where there is a clear conflict of interests. A 'minor omission' is that the EU's proposal does not clearly define what would count as a conflict of interest. But on the whole, this would make the system more accountable and predictable as opposed to the current practice.
- The ICS proposal would allow for the submission of expert evidence in investment cases and for third-party interventions, provided they have a direct and present interest in the outcome of the dispute.
- The ICS also intends to put some limits on how and when claims can be brought. Parallel claims in domestic courts and other ICS are not allowed, although bringing consecutive claims is not ruled out.
- The ICS proposal also foresees the swift rejection of so-called frivolous or unmerited claims, and that claims will be inadmissible if the dispute was foreseeable at the time when the claimant acquired ownership or control of the investment.
- On compensation, the ICS proposal says that arbitrators may award monetary damages plus interest, and/or the restitution of property to an amount no greater that the loss suffered, and punitive damages are not allowed.

These elements constitute a substantial change in the process compared to the current ad hoc ISDS practice. But under the surface, not everything is as good as it seems, because the proposal does not adequately address the problems associated with the perceived lack of independence and impartiality associated with the current system:

- Arbitrators are re-labelled as judges and will receive a set fee for being on the roster, but will also still be paid by the disputing parties. In other words, ICS judges will still be highly paid lawyers with an interest in more and longer-running cases. The ICS proposal does not remove financial incentives for expansive interpretation of investment protections in favour of foreign investors as the only party that can bring disputes.
- The ICS continues to allow foreign investors to bypass national courts and result in unequal access to justice between foreign investors and domestic investors, citizens and states.
- It will still allow foreign investors to bring claims on the basis of virtually the same broad and open-ended protection clauses that are causing so many problems in the existing ISDS system.
- The right of a sovereign state to regulate has not been unequivocally preserved. The European Commission's model for investment protection and ICS mentions the right of states to take 'measures necessary to achieve legitimate policy objectives'. Critical international legal experts say this leaves ample scope for investment arbitrators to continue to second-guess states' regulatory actions and to determine in retrospect whether such interventions should be deemed necessary or proportional. The fact that the proposal has clauses to expressly rule out public debt restructuring and the discontinuation of state subsidies as grounds for investment claims strongly suggests that the freedom of host governments to regulate has not been sufficiently safeguarded overall.

The right to regulate curtailed by investment protection

There are strong frictions between a state's sovereign right to regulate and the protections granted to investors. In a claim brought before an ICSID tribunal by the Cypriot company ADC against Hungary, the tribunal stated in its Award: 'It is the Tribunal's understanding of the basic international law principles that while a sovereign State possesses the inherent right to regulate its domestic affairs, the exercise of such right is not unlimited and must have its boundaries. [...] the rule of law, which includes treaty obligations, provides such boundaries. Therefore, when a State enters into a bilateral investment treaty like the one in this case, it becomes bound by it and the investment-protection obligations it undertook therein must be honoured rather than be ignored by a later argument of the State's right to regulate'.[51] The EU's investment protections under ICS do not change this line of argument.

- In ICS, as in ISDS, investors still retain every opportunity to challenge all kinds of government measures that affect their bottom line as indirect expropriations.
- The European Commission's investment protection and ICS model largely leaves intact the FET clause that has been widely used as a catch-all provision for challenging government actions affecting companies, which has given international arbitrators such formidable power to question the actions of national legislators and regulators. Rather, the FET clause is expanded to include a reference to 'legitimate expectations' of investors regarding their investments – an example of broad legal phrasing that is wide open to expansive interpretation by arbitrators.
- Impacts on public budgets as a result of major investment awards also continue to loom large. Nothing prevents arbitrators from including the loss of future profits – profits the investor was expecting to make in the course of their investment – in their determination of compensation. It is this kind of ruling that has driven up the amounts awarded in compensation.

- Human rights, sustainable development and fair and ethical trade are highlighted as key principles underpinning Europe's new trade policy, published in 2015.[52] But ICS, like ISDS, is still all about enshrining corporate rights. The ICS proposal makes no mention of investor responsibilities. And the sustainability chapters regarding environmental and labour standards that the EU includes in its FTAs are always in non-binding language, and never accompanied by any stringent monitoring or enforcement mechanisms.

In sum, the ICS proposal does not address the fundamental flaws associated with the current system of investment dispute settlement. It is a missed opportunity to balance investor privileges with a binding framework that outlines the obligations of investors in relation to their responsibility to uphold human rights and protect the environment.

4 Human Rights Context

4.1 No binding protection for labour and wider human rights, and the environment

The EU boasts that the EU-Vietnam FTA contains 'strong commitments on fundamental labour rights and environmental protection', while 'respect for human rights is also embedded in the FTA'.[53] At the same time, the EU was strongly criticised by the European Ombudsman for failing to carry out a prior human rights impact assessment for EU-Vietnam FTA.[54] The European Commission sees no need for a separate human rights impact assessment, on the basis that the 2009 Sustainability Impact Assessment (SIA) covering the whole of ASEAN suffices. The Ombudsman, however, concluded that the ASEAN SIA 'covers only certain aspects of the impact on social rights, it is not a proper substitute for a human rights impact assessment'.[55]

In its Action Plan on Human Right and Democracy 2015-2019, however, the European Commission has committed to 'aim at systematically including in EU trade and investment agreements the respect of internationally recognised principles and guidelines on Corporate Social Responsibility, such as those contained in the OECD Guidelines for Multinational Enterprises, the UN Global Compact, the UN Guiding principles on business and human rights (UNGPs), the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, and ISO 26000'.[56]

4.2 Need for human rights impact analyses and broad stakeholder involvement

It is important to hold the EU to these promises. Its human rights impact analysis should be based on a broad, transparent and inclusive dialogue with CSOs in the countries with which trade and investment agreements are being negotiated. It should pay particular attention to sectors with a history of human rights abuses, and negotiators of trade and investment agreements must incorporate clauses to ensure that investors cannot escape liability for human rights violations and environmental damage by relocating and/or restructuring their investments in third countries where they cannot be held to account. Human rights and sustainability impact assessments should also be carried out in a timely manner, so that they can actively inform the trade and investment negotiations. Current practice shows that impact assessments tend to be concluded towards the end of such negotiations, which prevents them from influencing the process in a meaningful way.

It is also important to bear in mind that, naturally, the EU carries out its sustainability impact assessments in parallel to its own aggressive trade agenda. Indonesia would be wise not to rely solely on the outcomes of the EU's assessment. Rather, it should carry out its own independent complementary impact assessment, to establish the potential impacts of a CEPA on crucial economic sectors, actors or policies. A broad stakeholder involvement that extends beyond immediate business interests to include a broad representation of environmental organisations; organisations of farmers, SMEs, small producers, consumers' associations, etc.; trade unions; human rights groups; and other CSOs might be better able to map potential impacts and concerns. It is also important to establish a broad and inclusive stakeholder process to periodically monitor the impacts of trade and investment agreements on economic, social and cultural rights and the environment after they come into effect.

4.3 Rendez-vous clauses to safeguard human rights

In relation to evaluations, all trade and investment agreements should include rendez-vous clauses that allow for (parts of) the agreement to be revisited in the case of adverse human rights or sustainability impacts.

In his 'Guiding principles on human rights impact assessments of trade and investment agreements', UN Special Rapporteur Olivier De Schutter calls particular attention to the risks dispute settlement mechanisms and arbitral tribunals pose to the duty to respect, protect and promote human rights.[57] De Schutter recommends that 'safeguard clauses should be inserted into the trade or investment agreement to ensure that, should ex post assessments lead to the conclusion that the State is unable to comply with its human rights obligations within the constraints of the agreement, it should be released from such constraints to the extent of the incompatibility'.[58]

5 A different approach is possible

A rebalancing of rights and obligations of states and investors is no longer a theoretical exercise. A growing number of treaties break from the traditional IIA model whereby states have obligations and investors have rights. The idea that investors should not only have rights, but also carry responsibilities and obligations, is gaining ground.

- **Brazil** does not conclude BITs, but Agreements on Cooperation and Facilitation of Investments (ACFIs). With the ACFIs Brazil has sought to tailor a new type of investment agreement that is more sensitive to its needs as an emerging economy. Brazil's investment policy is driven by more than strictly economic considerations. The ACFI model is aimed at facilitating investment through cooperation and dialogue to ensure that the investments are beneficial to both the home and the host country, such as by promoting local employment in the latter. The ACFI model also includes CSR clauses, but it is unclear how far these are binding. The ACFI model focuses strongly on consultation and mediation to avoid conflict, and does not allow for investor-state arbitration.[59]
- The **Economic Community of Western African States** (ECOWAS) demands, among other things, that foreign investors comply with 'all applicable laws and regulations of the host member State and take into account 'the development plans and priorities of the host state; the Millennium Development Goals and; the indicative list of corporate social responsibilities agreed by the member States'.[60] ECOWAS' Investment Rules also seek to future-proof investors' social responsibility by stating that 'where standards of corporate social responsibility increase, investors should endeavour to apply and achieve the higher level standards'.[61] ECOWAS also imposes post-establishment obligations on foreign investors, stipulating that they are bound to 'uphold human rights in the workplace and the community in which they are located' and to 'act in accordance with fundamental labour standards as stipulated in the ILO Declaration on Fundamental Principles and Rights of Work'.[62]

  The model BIT for the **Southern African Development Community (SADC)** requires investors and (proposed) investments to meet environmental and social assessment criteria as well as a human rights impact assessment and lays down that the so-called precautionary principle will be applied 'to their environmental impact assessment and to decisions taken in relation to a proposed investment, including any necessary mitigating or alternative approached to the Investment, or precluding the Investment if necessary'.[63] The **SADC** model BIT further enshrines minimum standards for human rights, environment and labour in Art 15.1: 'Investors and their investments have a duty to respect human rights in the workplace and in the community and State in which they are located. Investors and their investments shall not undertake or cause to be undertaken acts that breach such human rights. Investors and their investments shall not assist in, or be complicit in, the violation of the human rights by others in the host State, including by public authorities or during civil strife'. Art. 15.2 binds investors to act in accordance with ILO core labour standards and Art. 15.3 states that '[i]nvestors and their investments shall not [establish] (sic), manage or operate Investments in a manner inconsistent with international environmental, labour, and human rights obligations binding on the Host State or the Home State, whichever obligations are higher'.[64]

SADC also seeks to ensure that foreign investors cannot escape liability. Art.17 reads: 'Investors and Investments shall be subject to civil actions for liability in the judicial process of their Home State for the acts, decisions or omissions made in the Home State in relation to the Investment where such acts, decisions or omissions lead to significant damage, personal injuries or loss of life in the Host State'.[65]

- **Nigeria and Morocco** recently concluded a very forward-looking BIT.[66] While it still contains ISDS, it counterbalances this by including a number of progressive elements in relation to the screening of investments, investor responsibilities and protection of people and the planet. To name a few:
  - The treaty's preamble unequivocally puts poverty reduction and sustainable development first, stressing that sustainable development is not only about economic development, but equally involves social progress and environmental protection. The government's right to regulate to meet national development objectives is confirmed, in particular for the partner with the weaker regulatory framework.
  - A commission will oversee the implementation of the treaty, and both the private sector and civil society are expressly invited to participate.
  - The treaty uses a narrow definition of investors, limiting treaty protection to natural persons or permanent residents of one party investing in the territory of the other and to legal corporate entities headquartered and having their central economic activity in the home state.
  - Investments covered by the treaty must involve 'a commitment of capital or other similar resources, pending profit, risk-taking and certain duration'. Government loans and portfolio investments are excluded.
  - The treaty stipulates that it will treat foreign investors no less favourably than domestic investors or investors from third countries. However, such *national treatment and most-favoured nation treatment* will only apply 'in like circumstances'. Whether conditions are alike will be assessed on a case-by-case basis, with special consideration given to the impacts for the local community and the environmental impacts (locally, regionally and nationally, as well as the cumulative impacts of the aggregate investments).
  - The treaty seeks to limit the right to *fair and equitable treatment*[67] – frequently invoked to bring investment claims, because it is generally so vaguely worded that it is easily interpreted expansively. Alleged indirect expropriations will be assessed on a case-by-case basis, based on factual investigation.

- Should an investment dispute lead to arbitration, the case must be conducted with full transparency. The notice of arbitration, the pleadings memorials, briefs submitted to the tribunal, written submissions, minutes of transcripts of hearings, orders, awards and decisions of the tribunal must all be made public.

- Investors are granted free transfer of funds, but the treaty stipulates, among other matters, that the host state can force investors to fulfil their tax obligations before allowing any capital transfers in relation to their investment.

The European Commission has shown some indication of a willingness to allow counter-claims by states to be heard by its proposed Multilateral Investment Court, if the treaty under which a particular claim is brought before the MIC 'foresees that a counter claim can be made by the state alleging that the investor has acted incorrectly'.[68] This means that in cases where investors are in breach of obligations such as those outlined in the treaties mentioned above, the host state could file a counter-claim with the MIC – but only in response to a claim launched by a foreign investor. States would not have the right to initiate a direct claim when an investor has acted in breach of the treaty obligations – not even in cases where the investor seeks to evade accountability before the national courts in the host state by restructuring the investment to a country/jurisdiction in which there is no liability for transgressions committed in the former host state. IIA dispute settlement, whether it is called ISDS or rebranded as ICS or MIC, will remain a one-sided system if only foreign investors can initiate claims and states can only defend their actions.

6 Conclusions

UNCTAD underscores the need for reform of the investment arbitration regime, stating that today's key question is 'not about whether to reform international investment policy-making, but how to do so' and that it will not suffice to change 'one aspect in a particular agreement', but that what is needed is a 'comprehensive reorientation of the global IIA regime to balance investor protection with sustainable development considerations'.[69] With an approach to investment protection that seeks to hold foreign investors to certain performance requirements and more firmly bind them to domestic development objectives Indonesia is on the right track towards the realisation of the SDGs' objective of more inclusive and sustainable socioeconomic development.

How far Indonesia will succeed in including the provisions of its model BIT in new trade and investment deals depends on each party's bargaining power. In the CEPA negotiations, the EU carries significant weight, but UNCTAD notes that the international dynamics of investment policy-making have changed: 'A new investment landscape, where developing countries account for more than half of global foreign direct investment (FDI) inflows and almost one third of global FDI outflows, is beginning to alter the context and background against which IIAs are being negotiated'.[70] And Indonesia is in a good bargaining position: with 40% of the region's economic output, it is the largest economy in ASEAN.[71] This should enable Indonesia not to give up its regulatory autonomy in order to attract investment – especially since the literature shows no immediate correlation between investment agreements and FDI flows. Rather, the literature suggests that IIAs are not a deciding factor in TNC investment decisions: in fact, market opportunities, i.e. people with sufficient income to buy products and services, adequate infrastructure and political stability appear to be much more critical criteria.[72] This is corroborated by the facts. When Indonesia first announced its intention to terminate its BITs, it was widely denounced as a move that would undermine investor confidence and cost Indonesia dearly in terms of diminishing FDI. This is contradicted by an UNCTAD business survey, which continues to list Indonesia as a top prospective host country for FDI in 2016-2018, ranking ninth worldwide.[73]

6.1 General recommendations

With their aims to revise their investment policies to reduce and circumscribe the protections for foreign investors, Indonesia and India are on the right track. In the EU-Indonesia CEPA negotiations, it is important for Indonesia to take a firm stand in its envisaged narrowing down of investment protections. The ISDS remains a high-risk, parallel and one-sided legal system that allows foreign investors to unilaterally sue states. For the CEPA, as for the EU-Vietnam FTA, the EU's aim will be to include its own revised model for the settlement of investment disputes: the ICS. While the EU's ICS proposals offer some improvements in terms of the arbitration process, they do not limit the substance of investment protections in a way that is consistent with the revisions desired by Indonesia.

More generally, trade and investment agreements should be designed to attract sustainable investment that promotes human rights and ensures environmental protection. They should not hinder governments in their obligation to regulate in the public interest. Governments must retain full power to act in the interest of promoting inclusive and sustainable social and economic development at the national level, and address overriding global concerns, including measures to mitigate climate change. In order to achieve equitable and sustainable domestic development, as outlined in the SDGs, states must be able to bind investors to domestic development objectives and impose local content and performance requirements accordingly.

In the near future, combating climate change will require drastic policy changes and therefore far-reaching government policies and regulatory interventions in their territories. In order to avoid climate policy-related claims, an explicit exemption for such claims should be included in all BITs and other agreements involving investment provisions.

We firmly believe that the only sure way to avoid multimillion dollar investment claims is to abandon the ISDS mechanism entirely, whether treaty-based or enshrined in contracts with individual companies.

As modern trade agreements deal not only with at-the-border trade in goods, but also with behind-the-border trade in services and investment, they can cut deep into the domestic social structure. Parliamentary oversight is imperative to define development objectives and to monitor trade deals both in the negotiating phase as well as by periodically assessing the impacts. Parliaments in Europe and Indonesia must insist on full transparency in relation to the negotiations and maximise their competences to closely monitor and adjust trade and investment policy. Where powerful business lobbies generally already have privileged access to policy-makers,[74] the participation of NGOs, labour unions and citizen interest groups must also be ensured to ensure wider social support for trade and investment deals.

In the interest of promoting equitable and sustainable development, foreign investors must be fully accountable for their business activities. Investment protection must be balanced with investor obligations. Treaty-based investment protection should be made conditional on foreign investors observing specific social, environmental and human rights obligations, based on domestic laws and international standards and principles. The highest standard should always apply in order to stimulate a race to the top. Investment agreements should also include a stipulation that binds foreign investors to comply with any higher social, environmental and human rights laws and instruments that might be adopted in the future.

To avoid locking in potentially harmful protections, investment protection agreements and investment chapters in trade agreements should be agreed for a fixed term. Renewal should not be automatic, and 'sunset clauses' extending a treaty's protections to established investors beyond the termination of the treaty should be limited. Investment chapters in comprehensive trade agreements should include a clause that allows parties to separately revisit and amend this part of the agreement in the case of adverse impacts, including in the area of human rights and environmental protection.

6.2 Civil Society on the CEPA

BOX 7

According to Riza Damanik, former executive director of Indonesia for Global Justice, 'there is a new modus operandi of foreign investors using these treaties to threaten weak governments. We do not want it like this. We want dignity. Indonesia is an independent country and we have the sovereignty to regulate our country including foreign investment, especially when it comes to protecting natural resources.'[75]

In a statement to the Indonesia-EU negotiators on the occasion of the fourth round of the CEPA negotiations, CSOs from Indonesia, Europe and Asia stress that trade and investment agreements like CEPA must primarily serve public interests, rather than those of TNCs. A CEPA must contribute to 'equitable and sustainable development, the preconditions for which include a healthy environment, a climate-friendly economy, security of livelihoods and decent work for all [and] must be conditional on the ratification and implementation of basic human rights law, as well as climate and environmental agreements'. Civil society writes: 'A CEPA must in no way limit government's policy space to regulate the economy and to take measures to ensure citizens' rights to life, food, water and sanitation, energy, health, housing, education and decent work. We see that the current negotiations are largely driven by the interests of large transnational corporations. Unlimited market access and protection for foreign investment will result in further concentration of markets and capital. This contributes to inequitable socioeconomic development in and between countries and is hence not a sustainable way forward'. The CEPA must not restrict Indonesia's export measures aimed at promoting the domestic processing of raw materials, as this policy will support the development of local downstream industry and help reduce unemployment and poverty. Also, 'Indonesia must remain at liberty to set performance requirements (i.e. restrictions) for foreign investors, including limitations on foreign (majority) ownership, limitations on foreign workers in key positions, and local content requirements (i.e. use of local resources and workers). Such regulations are vital instruments to ensure that incoming investments effectively contribute to national development trajectories aimed at enhancing competitiveness, added value of local industries and boosting local employment'. Performance requirements remain a contentious issue in the negotiations.[76] The substantial and procedural rights of foreign investors must be strictly curtailed. The ISDS provides foreign investors with an unjustifiably powerful political tool to influence public policy.

Civil society further calls for the CEPA to contain sustainable development chapters with concrete and binding objectives and effective mechanisms to enforce human rights, environmental and labour standards. All parties to the CEPA are called upon to 'proactively and constructively engage with the negotiations at the UN for a Treaty on Business and Human rights that aims to remedy the current imbalance between the investment protection regime and the limited access to justice for victims of human rights violations'.

Endnotes

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28. We base our analysis largely on Abdulkadir Jailani (2016) 'Indonesia's Perspective on Review of International Investment Agreements'. In Kavaljit Singh and Burghard Ilge (eds.) Rethinking Bilateral Investment Treaties: Critical Issues and Policy Choices. BothEnds/Madhyam/SOMO, pp. 113-127. As the then Director for Treaties of Economic, Social and Cultural Affairs at the Republic of Indonesia's Ministry of Foreign Affairs it provides an insider perspective on Indonesia's reform process.

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31. See, for example, Eberhardt, P. & Olivet, C. (2012) Profiting from Injustice: How law firms, arbitrators and financiers are fuelling an investment arbitration boom. Brussels & Amsterdam: Corporate Europe Observatory and Transnational Institute. https://www.tni.org/files/download/profitingfrominjustice.pdf

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34. See Jailani, A. (2016), op.cit. Mr Jailani provides his insights in Indonesia's drafting of its model-BIT in his capacity of Director for Treaties and Legal Affairs in the Ministry of Foreign Affairs of the Republic of Indonesia.

35. Report of the 3rd round of negotiations for a Free Trade Agreement between the European Union and Indonesia 11-15 September 2017, Brussels. http://trade.ec.europa.eu/doclib/docs/2017/september/tradoc_156114.pdf

36. Non-paper by the former Dutch trade minister, Ms Liliane Ploumen, sent to the Dutch parliament, in which she outlines her vision for a trade 'reset' as presented to the OECD: Lilianne Ploumen, Reforming EU trade policy: protection, not protectionism, Non-paper The Netherlands, September 2016. http://politi.co/2dL2gZC and https://www.government.nl/latest/news/2016/06/01/ploumen-time-for-a-free-trade-%E2%80%98reset%E2%80%99, https://www.government.nl/latest/news/2016/06/01/ploumen-time-for-a-free-trade-%E2%80%98reset%E2%80%99

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42. EU-Vietnam Free Trade Agreement, Chapter 8, Article 6. The Agreed text of the EU-Vietnam Free Trade Agreement as of January 2016 can be found at: http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437 Chapter 8 on Trade in Services, Investment and E-Commerce is accessible via: http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154210.pdf (accessed 23 November 2011).

43. European Commission, Report of the 3rd round of negotiations for a Free Trade Agreement between the European Union and Indonesia, 11-15 September 2017, Brussels. http://trade.ec.europa.eu/doclib/docs/2017/september/tradoc_156114.pdf

44. 'Understanding Indonesia's new trade law'. Global Business Guide Indonesia. http://www.gbgindonesia.com/en/main/business_updates/2014/upd_understanding_indonesia_s_new_trade_law.php (accessed 16 January 2018).

45. 'Indonesia Foreign Investment – The 2016 Negative List'. Global Business Guide Indonesia. http://www.gbgindonesia.com/en/main/legal_updates/indonesia_foreign_investment_the_2016_negative_list.php (accessed 12 February 2018).

46. A recent TNI report (https://www.tni.org/en/publication/investment-court-system-put-to-the-test) has analysed five highly controversial investment claims, concluding that under the new ICS system the EU advocates as an improved version of ISDS, these cases would still prosper. The cases examined include:
    - Philip Morris vs Uruguay for the introduction of graphic warnings on cigarette packages and other tobacco-control measures in order to promote public health;
    - TransCanada vs the US for President Barak Obama's decision to reject the Keystone XL pipeline as part of US commitment to tackling climate change;
    - Lone Pine vs Canada for a precautionary fracking moratorium enacted in Quebec;
    - Vattenfall vs Germany for Hamburg city's imposition of environmental standards for water use at a coal-fired power plant;
    - Bilcon vs Canada for an environmental impact assessment that prevented the construction of a large quarry and marine terminal in an ecologically sensitive coastal area.

47. The investment case brought by Newmont against Indonesia is a case in point. It is described in: van der Pas, H. & Damanik, R. (2014) https://www.tni.org/en/briefing/netherlands-indonesia-bit-rolls-back-implementation-new-indonesian-mining-law See also: Eberhardt, P. & Olivet, C. (2012) https://www.tni.org/files/download/profitingfrominjustice.pdf

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54. http://www.ombudsman.europa.eu/en/cases/decision.faces/en/64308/html.bookmark

55. Ibid.

56. https://eeas.europa.eu/human_rights/docs/eu_action_plan_on_human_rights_and_democracy_en.pdf, p. 39/40

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60. ECOWAS Common Investment Market Vision, Appendix 3: Supplementary Act A/Sa.3/12/08 adopting community rules on investment and the modalities for their implementation with ECOWAS, Art. 16 on Corporate Social Responsibility. http://investmentpolicyhub.unctad.org/Download/TreatyFile/3266

61. Ibid., art. 16.

62. Ibid., art. 14.

63. SADC Model Bilateral Investment Treaty with commentary, Southern African Development Community, July 2012, art. 13, http://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf

64. Ibid. art. 15.

65. Ibid., art 17.

66. Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria, December 2016. https://www.bilaterals.org/IMG/pdf/5409.pdf

67. FET is a highly problematic concept and scholars highlight the standard's absence of fixed content, flexibility, and an evolutionary character (for example, Iona Tudor (2008) The Fair and Equitable Treatment Standard in the International Law of Foreign Investment. http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199235063.001.0001/acprof-9780199235063). Whether the Morocco-Nigeria BIT actually succeeds in its intention to narrow down its scope will remains to be seen .

68. Colin Brown, a high-level DG Trade official, said in a press conference in October 2017: 'If a treaty foresees that a counter claim can be made by the state alleging that the investor has acted incorrectly, then the Multilateral Investment Court could cover those claims'. Simon McKeagney (2017) 'Multilateral Investment Court: Commission suggests counter-claims by states may be possible', 12 October. http://ttip2016.eu/blog/MIC%20Counter%20claims.html

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72. '...a BIT is not a necessary condition to receive FDI. There are many source-host pairs with substantial FDI that do not have a BIT. Japan, the second largest source of FDI has only concluded 4 BITs. The US does not have a BIT with China, its largest developing country destination. Brazil, one of the top receivers of FDI has not ratified a single BIT. In addition, there are also numerous examples of countries that have concluded many BITs and yet have received only moderate inflows. Sub-Saharan Africa, for instance, has had difficulties in attracting FDI, though it has tried to improve the environment for FDI by entering into various agreements to protect the interests of investors.' Hallward-Driemeier, M. (2003) Do Bilateral Investment Treaties Attract Foreign Direct Investment? Only a Bit...And They Could Bite. World Bank Policy Research Working Paper No. 3121, p. 9. Available at SSRN: https://ssrn.com/abstract=636541

73. UNCTAD (2016) 'Global Investment Prospects Assessment'. Global Investment Trends Monitor, no. 24, October. http://unctad.org/en/PublicationsLibrary/webdiaeia2016d3_en.pdf

74. In the IEU-CEPA, the composition of the Vision Group preparing the recommendations for the negotiations is a case in point.

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76. http://trade.ec.europa.eu/doclib/docs/2017/september/tradoc_156114.pdf

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80. IMFA v.Indonesia (2015), brought under the terminated Indonesia-India BIT; and Oleovest v. Indonesia (2016), brought under the terminated Indonesia Singapore BIT.
See: http://investmentpolicyhub.unctad.org/ISDS/CountryCases/97?partyRole=2

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ANNEX I

Indonesia’s bilateral investment agreements (BITs) and treaties with investment protection (TIPS)

Indonesia still has 21 BITs in force that contain ISDS:[77]

Country	Entry into force	Initial treaty term	Automatic renewal	Options for termination	Modalities for re-negotiation/ amendent	Sunset clause
Australia	July 1993	15 years	15 years	unilateral termination on one year’s notice	Yes	15 years
Bangladesh	April 1999	10 years	10 years	unilateral termination on one year’s notice	No	10 years
Cuba	September 1999	10 years	10 years	unilateral termination on one year’s notice	Yes	10 years
Czech Republic	June 1999	10 years	10 years	unilateral termination on one year’s notice	Yes	10 years
Finland	August 2008	10 years	indefinite term	unilateral termination on one year’s notice	Yes	10 years
Jordan	February 1999	10 years	10 years	unilateral termination on one year’s notice	Yes	10 years
Republic of Korea	March 1994	10 years	10 years	unilateral termination on one year’s notice	Yes	no
Kyrgyzstan	March 1997	10 years	10 years	unilateral termination on one year’s notice	No	10 years
Mauritius	March 2000	10 years	10 years	unilateral termination on one year’s notice	Yes	10 years
Mongolia	April 1999	10 years	10 years	unilateral termination on one year’s notice	Yes	10 years
Morocco	March 2002	10 years	10 years	unilateral termination on 6 months’ notice	Yes	10 years
Mozambique	July 2000	10 years	10 years	unilateral termination on one year’s notice	Yes	10 years
Russia	October 2009	10 years	indefinite term	unilateral termination on one year’s notice	Yes	10 years
Sri Lanka	July 1997	10 years	indefinite term	unilateral termination on one year’s notice	Yes	10 years
Sweden	February 1993	10 years	indefinite term	unilateral termination on one year’s notice	Yes	15 years
Syria	February 2000	10 years	indefinite term	unilateral termination on one year’s notice	Yes	10 years
Thailand	November 1998	10 years	10 years	unilateral termination on one year’s notice	Yes	10 years
Tunisia	September 1992	10 years	10 years	unilateral termination on one year notice	No	10 years
Ukraine	June 1997	10 years	10 years	unilateral termination on one year’s notice	Yes	10 years
United Kingdom	March 1977	10 years	5 years	unilateral termination on 6 months’ notice	No	20 years
Uzbekistan	April 1997	Indefinite	Indefinite term	No	Yes	10 years

In fact, two new investment claims brought against Indonesia in 2015 and 2016 were brought under BITs that were already terminated by Indonesia, with India and Singapore respectively.[80]

Indonesia has thus far been on the receiving end of seven treaty-based investment arbitration cases.

Indonesia – Continuing protection for existing investors under terminated treaties with ISDS[78]

Treaty partner	Terminated	Sunset clause	Duration of treaty protections remaining in force for existing foreign investors
Argentina	2016	Made non-operational upon termination[79]	None
Bulgaria	2015	10 years	2025
Cambodia	2016	10 years	2026
China	2015	10 years	2025
Egypt	2014	10 years	2024
Germany	2015	10 years	2025
Hungary	2016	10 years	2026
India	2016	15 years	2031
Italy	2015	10 years	2025
Lao	2015	10 years	2025
Malaysia	2015	10 years	2025
Netherlands	2015	15 years	2030
Pakistan	2016	10 years	2026
Romania	2016	10 years	2026
Singapore	2016	10 years	2026
Slovakia	2016	10 years	2026
Spain	2016	10 years	2026
Turkey	2016	10 years	2026
Vietnam	2016	15 years	2031

Indonesia – treaties with investment provisions[81]

Treaty	Parties	Status	Investment protection	Investor-state dispute settlement
Hong Kong, China SAR - ASEAN (Association of South-East Asian Nations) Investment Agreement (2017)	Hong Kong, China SAR	Signed: November 2017	Yes	Chapter 13 (Consultations and dispute settlement) of the ASEAN Hong Kong, China FTA apply
ASEAN - India	India	Signed: November 2014	Yes	Yes
ASEAN-China Investment Agreement	China	In force: January 2010	Yes	Yes
ASEAN-Korea Investment Agreement	Republic of Korea	In force: September 2009	Yes	Yes
AANZFTA	Australia, New Zealand	In force: January 2010	Yes	Yes
ASEAN Comprehensive Investment Agreement		In force: February 2012	Yes	Yes
ASEAN-Japan FTA	Japan	In force: December 2008	No	No
Indonesia-Japan EPA	Japan	In force: July 2008	Yes	Yes
ASEAN-US TIFA	USA	In force: August 2006	No	No
ASEAN-Korea Framework Agreement	Republic of Korea	In force: July 2006	Commitment to conclude a separate agreement for the liberalisation, facilitation and protection of investments (art. 2.3)	
ASEAN-India Framework Agreement	India	In force: July 2004	Treaty text not available (on UNCTAD website)	
ASEAN-Japan Framework Agreement	Japan	In force: October 2003	Commitment to consultations on liberalisation of investment in the context of an ASEAN-Japan CEP.	
ASEAN-China Framework Agreement	China	In force: July 2003	Treaty text not available (on UNCTAD website)	
ASEAN Framework Agreement on Services		In force: December 1998	No	No
Agreement on Promotion, Protection and Guarantee of Investments amongst the Member States of the Organization of the Islamic Conference[82]		In force: February 1988	Yes	Yes
ASEAN-EU Cooperation Agreement	European Union	In force:October 1980	No	No
Regional Comprehensive Economic Partnership (RCEP)	ASEAN Australia China India Japan Republic of Korea New Zealand	Under negotiation since 2012		Agreement to include ISDS in principle; ISDS proposals reportedly tabled by Korea and Japan[83]
Indonesia-EU Comprehensive Economic Partnership Agreement (I-EU CEPA)	Indonesia European Union	Under negotiation since 2016	Ambition to include	Ambition to include; EU promotes Investment Court System
Trans-Pacific Partnership (TPP)	Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, Vietnam There were reports that Indonesia was interested in joining TPP,[84] but the latest reports say it has lost interest after the withdrawal of the US from the TPP.[85]	Originally signed: 2016. After US withdrawal, partial agreement reached between remaining members 2017	Yes	Yes

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The Centre for Research on Multinational Corporations (SOMO) is an independent, not-for-profit research and network organisation working on social, ecological and economic issues related to sustainable development. Since 1973, the organisation investigates multinational corporations and the consequences of their activities for people and the environment around the world.

www.somo.nl

Indonesia for Global Justice addresses global trade liberalisation issues and works towards just trade system through developing critical awareness and empowering strategic groups of civil society.

www.igj.or.id