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# HUMAN RIGHTS AS A KEY ISSUE IN THE INDONESIA-EU COMPREHENSIVE ECONOMIC PARTNERSHIP AGREEMENT

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# HUMAN RIGHTS AS A KEY ISSUE IN THE INDONESIA-EU COMPREHENSIVE ECONOMIC PARTNERSHIP AGREEMENT

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**With contributions from the Centre for Research on Multinational Corporations (SOMO) and the Transnational Institute (TNI)**

This briefing paper is part of a series of reports highlighting the flawed and imbalanced agenda for the proposed Indonesia-EU Comprehensive Economic Partnership Agreement (CEPA) that fails to move towards fairer trade that promotes equitable and sustainable development.

# 1. INTRODUCTION

In April 2016, the European Union (EU) and Indonesia announced their intention to conclude an EU-Indonesia Comprehensive Economic Partnership Agreement (CEPA). Negotiations were officially launched in September 2016.

This paper explores the potential impacts of an Indonesia-EU CEPA on human rights in Indonesia and the state's duty to protect human rights.

Modern trade and investment agreements like the CEPA can impact deeply on domestic policies and conflict with wider human rights obligations and the duty to protect the environment.

The CEPA negotiations deal not only with at-the-border trade in goods, but also with market access for European service providers and extensive liberalisation and protection of European investors in the Indonesian economy.

Liberalisation of services will enhance commercialisation and opportunities for cherry-picking by foreign service providers focusing on wealthy consumers in concentrated markets. This threatens to conflict with universal and affordable access to basic public services, including in poorer, outlying regions in Indonesia.

The extensive protection of foreign investor rights routinely included in the EU's free are enforceable through a binding investor-state dispute settlement mechanism, which allows transnational corporations to unilaterally sue sovereign states before an international investment tribunal if government measures threaten to impact negatively on the returns on their investment. As awards can run into hundreds of millions of dollars, even the threat of claims can 'persuade' governments to retract or water down contested measures. The proposed inclusion of an investment chapter in the CEPA threatens public authorities' freedom to regulate in the wider public interest.

The report has a special focus on the EU's interest in 'sustainable access' to raw materials[1] in the CEPA. The EU is demanding that Indonesia weakens regulation (such as export taxes, etc.) related to energy and raw materials.[2,3] Indonesia is using such measures as part of its policy to boost domestic development. Foreign investors have already used (the threat of) multi-million dollar investment claims to 'persuade' Indonesia to water down or shelve proposed measures. As an overarching problem, economic activities in the raw materials sector are frequently linked to human rights violations.

To ensure a draft agreement will not lead to incompatibility with pre-existing human rights obligations, the CEPA negotiations should be based on a human rights impact assessment (HRIA). The human rights and environmental impacts on CEPA should also be periodically assessed ex post, leading to amendments of the agreement if there are negative outcomes.


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## 2.
## SECRET NEGOTIATIONS THREATEN HUMAN RIGHTS

Negotiations on free trade and investment agreements generally take place largely behind closed doors, with little access for civil society and the millions of people who will be directly affected by these deals. This 'democratic deficit' poses a threat to the protection of human rights. In response to calls for more transparency, the European Commission has been issuing reports on the two CEPA negotiating rounds,[4] and recently published nine initial European proposals for the trade agreement under negotiation with Indonesia.[5] However, while big business was heavily involved in the EU-Indonesia Vision Group that presented its recommendations on how to strengthen EU-Indonesian trade and investment relations[6] in 2011,[7] neither civil society in Indonesia nor the Indonesian parliament have been consulted by their own government about the proceedings or about the content of the planned CEPA. In Europe, a questionnaire launched in 2016 by the European Commission's Trade Department on a Free Trade Agreement with Indonesia was targeted at industry stakeholders, to comment on the practical experience of doing business in Indonesia.[8] Civil society consultation was limited to a 'civil society dialogue' meeting organised by the European Commission.

This lack of transparency and democratic scrutiny violates fundamental human rights, most significantly the human right of every citizen to take part in the conduct of public affairs, as established in Article 25(a) of the International Covenant on Civil and Political Rights. UN independent experts and special rapporteurs have repeatedly voiced their concerns about the potential impact of trade and investment agreements on the rights to life, food, water and sanitation, health, housing, education, science and culture, improved labour standards, an independent judiciary, a clean environment and the right not to be subjected to forced resettlement.[9] They continue to strongly recommend that all current negotiations about bilateral and

multilateral trade and investment agreements should be conducted transparently with the consultation and participation of all relevant stakeholders, including labour unions, health professionals and others.

# 3. CALL TO ASSESS HUMAN RIGHTS IMPACTS OF THE CEPA

In order to ensure that free trade agreements adhere to the highest standards of human rights and democracy, there has been a growing demand for governments to conduct human rights impact assessments (HRIAs) prior to adopting and implementing trade and investment agreements to identify, predict and respond to potential human rights impacts.

Trade and investment agreements can have significant human rights impacts on, for example, the right to health or the right to food. The influx of imports can lead to a crowding out of small farmers. Extension of intellectual property rights that benefit large pharmaceutical companies can impact negatively on the availability of cheaper, generic medicines. Also, big investment projects involving foreign investors, including in mining, agro-industry and infrastructure, have been associated with land-grabbing and displacement of local communities and indigenous peoples[10] and pollution that impacts on the right to food and the right to health.[11]

When a state decides to endorse a human rights treaty, the obligations on the protection and promotion of human rights enshrined in the treaty become legally binding. Some human rights are legally binding regardless of ratifications, such as freedom from slavery. Human rights cannot be traded off as part of a trade deal.[12] States should therefore take the utmost care that they do not conclude trade and investment agreements that make it more difficult for themselves or other parties to comply with their human right obligations. Human rights bodies have stressed that a continuous process of impact assessment is required to ensure that all provisions of human rights treaties are respected. These bodies have occasionally urged individual states to perform assessments of the trade and investment agreements that they are entering into.[13] Thus, states are highly recommended, or even legally required, to perform HRIAs in order to comply with their international human rights obligations.

The EU has been assessing its free trade and investment agreements for their impacts on sustainable development since 1999. However, a standard Sustainability Impact Assessment covers only certain aspects of the impact of such agreements on social rights and cannot be regarded as a substitute for a human rights impact assessment.[14]

A HRIA is especially designed to map the potential human rights effects of trade and investment agreements, and is ideally carried out not just ex ante, but also periodically ex post, to evaluate and remedy any adverse human rights impacts occurring as a result of trade and investment agreements after their implementation.

## Guiding principles on HRIAs

A dedicated HRIA is designed to determine whether a trade and investment agreement harbours potential conflicts with the normative framework of human rights. 'Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements' were outlined by Olivier De Schutter, UN Special Rapporteur on the Right to Food, in a report to the Human Rights Council in 2011. The report provides states with instructions about how to ensure that trade and investment agreements are consistent with their human

rights obligations. It offers a set of principles that provide a comprehensive methodology for HRIAs. While these principles are universally applicable, the report stresses that the way in which they are implemented will depend on national contexts and capacities.[15]

The Guiding Principles on HRIAs provide a comprehensive guide for developing a sound methodology for conducting an HRIA. In combination with the UN Guiding Principles on Business and Human Rights, these can be used as a global standard for preventing and resolving threats and violations of human rights in relation to trade and investment. However, the Guiding Principles are non-binding and have so far not lead to a change in treaty practice to ensure the primacy of human rights over trade and investment policy.

In 2014, the Human Rights Council adopted a resolution "to establish an open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, whose mandate shall be to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises."[16] Recent research suggests that this proposed Binding Treaty on Business and Human Rights could be used "as an instrument to establish binding obligations on States to reform trade and investment agreements, to mitigate the potential negative impact of trade and investment agreements on the full enjoyment of human rights and to regulate the relationship between the two regimes in case of a conflict".[17]

## Transparent and democratic process

HRIAs seek to measure the positive and negative impacts of a free trade agreement (FTA) on human rights in countries that will adopt the agreement. Transparency is a crucial condition of the guiding principles on how to conduct a HRIA, requiring the assessment to be based on sources of information that are made public, and to be open to receiving submissions.

Another key aspect of conducting a comprehensive HRIA is to ensure that all stakeholders are involved and fully informed. This requires equality and non-discrimination, inclusive participation and the interdependence of rights. Moreover, the assessment process should not exclude any individuals or groups from its scope; all stakeholders and those affected should be at the centre of the process, and the scrutiny cannot be limited to one right but should also investigate impacts on related rights.[18]

Individual states can decide for themselves whom they will entrust with conducting a HRIA. It is recommended, however, that the HRIA procedure should be stipulated in national legislations, and should not be left to the ad hoc choices of government officials.[19] The HRIA's findings must also be submitted to parliaments before they ratify the relevant agreement.[20]

**"A HUMAN RIGHTS IMPACT ASSESSMENT (HRIA) IS IMPORTANT AND OUGHT TO BE A MANDATORY ELEMENT IN ANY FTA NEGOTIATING PROCESS."**

Indonesian MP Mercy Chriesty Barends


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## Civil society impact assessments

In the absence of an official, mandatory HRIA framework to accompany the negotiation of trade and investment agreements, civil society has been conducting its own (partial) impact studies. An example is a study from 2007 conducted by the Ecumenical Advocacy Alliance on the impact of trade liberalisation on the right to food. EEA's methodology was applied to case studies of rice-farming communities in Indonesia, as well as in Honduras and Ghana. EEA's HRIA results confirmed that trade liberalisation has directly led to the violation of the right to food of small-scale rice producers, and that external actors, including governments, have prevented states from fulfilling the rights of their citizens.[21]
SOMO also conducted several studies into the human rights impacts of the liberalisation of services in the context of the World Trade Organization(WTO)/General Agreement on Trade in Services (GATS) negotiations, including for India, Colombia and Kenya.[22] In 2016, TNI published an ex post assessment of the impacts of the EU-Colombia FTA, including recommendations for further effective follow-up and monitoring.[23]

## European Commission: weak commitment to human rights protection?

The ongoing negotiations between Indonesia and the EU should be based on the human rights requirements established in the 2014 Partnership and Cooperation Agreement between the two parties. Both Indonesia and the EU decided in this agreement to support the implementation of the Indonesian National Plan of Action on Human Rights as well as other international human rights instruments. However, the recent developments in the negotiations regarding an FTA between the EU and Vietnam raise concerns about the commitment of the former to human rights protection.

In August 2014, the European Ombudsman received complaints from the International Federation for Human Rights and the Vietnam Committee on Human Rights, concerning the failure of the European Commission to carry out a human rights impact assessment as part of the preparations for the EU-Vietnam FTA. While the Commission argued that a HRIA was not necessary, the Ombudsman concluded that the failure to conduct the HRIA constituted 'maladministration'. In March 2015, the Ombudsman recommended that the Commission should carry out a HRIA without further delay, and stressed that ensuring fundamental rights is vital for good administration.

The European Commission refused to embrace the Ombudsman's decision.[24] This is a worrying development with regard to the EU-Indonesia trade negotiations. As there are serious concerns regarding the protection of human rights in Indonesia, it is crucial to ensure that a CEPA does not make the situation worse. Conducting an HRIA is a necessity, as supported by public international law and the conclusion by the European Ombudsman.

# 4. NATURAL RESOURCE EXPLOITATION AND HUMAN RIGHTS VIOLATIONS

The EU is highly dependent on industrial raw materials, including rare earth minerals. In order to guarantee sufficient resources to ensure energy security for its industries, the EU is pursuing a strategy outlined in its Energy and Raw Materials Policy Initiative, which includes minimising barriers to trade and investment.[25] An integral part of this strategy is the inclusion of a set of specific rules relating to energy and raw materials in all FTAs that are being negotiated by the EU with various countries, including Indonesia.[26] Raw materials and energy will be a key issue in the CEPA negotiations. The EU's report on the first round of negotiations indicates that the EU will be pushing for elimination of trade restrictions in this field. The EU is aiming for, inter alia, "disciplines on export restrictions, the elimination of export duties and the prohibition of new export duties".[27]

The EU's demand for unrestricted access to partner countries' natural resources conflicts with Indonesia's own policy choices. The Indonesian Constitution requires that the State must manage Indonesia's natural resources for the greatest prosperity of its people.[28] In this context, Indonesia recently adopted a new Mining Law,[29] which bans the unlimited export of raw materials and requires domestic processing in order to increase their economic value for the State. The legality of these measures was confirmed by Indonesia's Constitutional Court.[30] In the context of the IEU CEPA negotiations, the EU is targeting Indonesia's new policy to prohibit the export of concentrates (raw minerals). The EU sees these measures as an impediment to EU expansion in the energy and mining sector (minerals and metals), with negative impacts on the EU's domestic and international competitiveness.

The EU has also flagged Indonesia's policies on local content requirements and energy subsidies, as well as Indonesia's reliance on state-owned enterprises, as barriers to trade.

### European corporations risk association with human rights violations

The exploitation of natural resources in Indonesia is very much associated with human rights violations. Research by the JATAM Mining Advocacy Network shows that trade and investment activities in the mining sector, in particular in mineral commodities, are associated with a variety of crimes and human rights violations, including land grabbing and displacement of indigenous peoples, environmental destruction and resulting losses to the State budget (see box below).[31]

The State is permitting mining crimes against humanity when it fails to control corruption among local government officials, who are issuing mining permits that lead to the dispossession of indigenous lands. Condoning corruption also leads to budget losses for the State – funds that could be used to tackle poverty or environmental damage.

Enhanced access for European multinationals to Indonesia's energy and raw materials markets will further escalate commercialisation of Indonesia's domestic mining and energy sector in the pursuit of unsustainable economic growth and financial revenue.

### HUMAN RIGHTS VIOLATIONS IN WEST PAPUA AND KALIMANTAN

European energy corporations like BP (UK), Total E&P (France), GDF Suez (France), Lundin (Sweden), Repsol (Spain) and ENI (Italy) have joined partnerships for the exploration and exploitation of oil and gas concessions in West Papua.[32] The Indonesia-EU CEPA stands to provide even greater access for EU corporations to the natural resources in the area.

Since the 1960s, the foreign exploitation of natural resources in West Papua has gone hand in hand with a variety of human right violations by the Indonesian state apparatus. Over the years, Indonesia has been repeatedly accused of murder, torture and other crimes in West Papua.[33] Since Indonesia captured the sovereignty over West-Papua in 1969, it is estimated that tens or maybe hundreds of thousands of people have lost their lives as a result of violence by Indonesian forces.[34] Mining licences and concessions have resulted in the dispossession of public land in Kalimantan and genocide against ethnic Dayak tribes inhabiting the Meratus mountains in South Kalimantan.

In 2008, 280 companies held mining permits in South Kalimantan, involving land concessions to a total of 553,812 hectares. The records for the coal mining business permits show a further 50,278hectares of forest lands are in the process of being leased out. In 2010, JATAM reported[35] that large-scale forest clearing in relation to mining activities had resulted in deforestation and environmental degradation, leading to floods and forest fires. Data from the Kalimantan Provincial Forestry Office corroborate that more than 187,384 hectares of the Meratus Protected Forest areas have become critically damaged.[36]

The activities of U.S. mining giant Freeport, currently threatening Indonesia with a multi-million dollar investment claim in an attempt to exempt itself from Indonesia's mining reforms,[37] have been long associated with human rights violations and environmental damage and pollution.[38]

There have been long-standing campaigns against the operations of British energy corporation BP in West Papua, denouncing the company's track record in relation to its corporate social responsibilities and urging the company to stop these activities because of the ongoing human rights violations.[39]

Under the current political circumstances, future operations of EU transnational corporations in the area facilitated by an IEU CEPA could result in more human rights abuses. Conducting an HRIA would be an important instrument to map this risk.

# 5.
# INFRASTRUCTURE DEVELOPMENT: ANOTHER SOURCE OF CONFLICT

The Indonesian government's National Mid-Term Development Plan (RPJMN) outlines large-scale infrastructure development projects that will lead to a large-scale change in land use. Forests will be cleared to make way for airports, highways, power plants, ports and other infrastructure. Two airport construction projects alone, out of a total of 149 infrastructure projects, will affect some 11,000 hectares of land.[40]

There is considerable interest in Europe when it comes to investing in Indonesia. In the wake of President Jokowi's recent state visit to Europe, business agreements to invest in Indonesia were signed for a total amount of US$ 20.5 billion.[41]

However, infrastructure investments also carry a significant human rights risk, as they impact directly on the environment and the social and economic rights of local communities. Figures from the Agrarian Reform Consortium (KPA) for 2015 show that infrastructure development has caused an increased number of agrarian conflicts in Indonesia.

As many as 70 conflicts – or 28 per cent of the 252 reported incidents – pertain to the infrastructure sector.[42] If the negotiations on the Indonesia-EU CEPA succeed, investments from Europe are expected to flood in to implement president Jokowi's ambitious plans for infrastructure development. However, EU investments contain the risk of deteriorating the habitat and livelihood of local communities. This in itself already constitutes a human right violation, but may also stir up local conflicts and violence. All the more reason to conduct a HRIA without further delay.

### JAKARTA BAY PROJECT

The 'National Capital Integrated Coastal Development' (NCICD) project is a multi-billion flood protection-land development plan for Jakarta Bay. Dutch transnational corporations with expertise in dredging, land reclamation and water management are strongly involved in the NCICD. However, the project is also associated with forced, unlawful evictions of local communities.[43]

# 6.
# SERVICES LIBERALISATION: IMPACTS ON HEALTH CARE

Services liberalisation can impact on the provision of universal, affordable public services. In Indonesia, access to medicine is a case in point.

The EU is the biggest exporter of pharmaceutical products to Indonesia, and Indonesia's pharmaceutical sector ranks third in terms of incoming EU investment. Only the transportation and communications sectors attract more EU capital. Large pharmaceutical companies of EU origin – such as GlaxoSmithKline, Bayer, Roche and Novartis – dominate the market for pharmaceutical activities, both in Indonesia and at the global level.[44]


Given its interests in the pharmaceutical sector, in the IEU CEPA the EU will be pushing for the liberalisation of the trade in pharmaceutical products, but also of investment and the provision of services in the health sector. This will include the establishment of clinics or foreign hospitals, and enabling an influx of foreign workers into medical professions in Indonesia, including doctors, nurses, therapists and other foreign health workers.[45]

In the interest of its big pharmaceutical companies, the EU can also be expected to aim for an extension of patent protection under the intellectual property rights chapter in the IEU CEPA. This would conflict with Indonesia's efforts to build a national pharmaceutical industry to boost the production of cheap generic medicines for its population, including vulnerable and marginalised groups in society. Patent protection is not only responsible for rising drugs prices, but the extension of patents to the patent holder is creating conditions that hamper the availability of generic drugs.[46]

The EU-Vietnam FTA,[47] which has been put forward as a template for the IEU CEPA, prohibits imposing performance requirements on foreign investors, banning technology transfers and local content requirements. If this is copied into the IEU CEPA, this will further hamper the efforts of Indonesia to build its own national pharmaceutical industry.

The EU-Vietnam FTA also demands national treatment of foreign investors and prohibits any privileging of state-owned enterprises (SOEs, known as BUMN in Indonesia). This will weaken policies to boost BUMNs in the pharmaceutical sector and limit their role in rolling out the national pharmaceutical industry roadmap.

An HRIA, ex ante and ex post, could map the potential impacts of an IEU CEPA on the human right to health in Indonesia.

# 7.
# INVESTMENT PROTECTION: CONFLICT WITH POLICY SPACE TO MEET HUMAN RIGHTS OBLIGATIONS

The EU's free trade and investment agreements routinely offer far-reaching treaty-based protection of foreign investor rights, which exceed the protections offered under national legal systems. Clauses like the ones on fair and equitable treatment and indirect expropriation allow foreign investors to challenge virtually every government measure that threatens to impact negatively on their investment before an international investment tribunal. Under the binding investor- state dispute settlement mechanism they can demand compensation, including for lost future profits. Awards can run into hundreds of millions of dollars, payable from public budgets.

Investor-state dispute settlement can conflict with UN Guiding Principle 9, which states that "*States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts*". The threat of multi-million investment claims has, in the case of Indonesia, already led to 'regulatory chill', where the government has decided to shelve or water down proposed regulations. In 2014, Newmont Mining, one of the largest mining corporations in the world, filed an investment claim against Indonesia, challenging Indonesia's new mining law that requires mining companies to refine and process minerals in Indonesia prior to export and seeks to limit foreign ownership. Newmont used the claim to exact exemptions from the new law from the Indonesian government, which included a much-reduced export tax rate and a postponement of obligations to build mineral refinery plants in Indonesia.[48] The case of Newmont Mining vs Indonesia is a powerful example of how investment agreements are used by companies to get exemptions from government regulations and legislation, undermining democracy and development.[49] The threat of investment claims had already caused Indonesia to exempt established mining companies, including Freeport and Newmont, from the working of the 2002 Forestry Act, forbidding mining operations in protected forest areas.[50]

The amounts claimed and awarded in investment arbitration suits can have a severe impact on a country's finances, including its budgets for social spending, with knock-on effects for human rights. For example, in 2012 Churchill Mining sued the Government of Indonesia for US$ 1.2 billion – equivalent to IDR14.4 trillion.[51] The value of the lawsuit is almost equivalent to the allocation of subsidies for food in the 2015 Indonesia State budget (IDR 18.9 trillion) and exceeds the IDR 0.9 trillion in seed subsidies for farmers, the IDR 2.5 trillion interest subsidies for small- and medium-sized enterprises and the IDR 8.7 trillion allocated for public transportation subsidies.

The potential impacts of investor-state dispute settlement on policy space and public budgets has led Indonesia to decide to terminate all of its existing investment agreements, including with European member states, to replace them with agreements that limit the scope for foreign investors to challenge measures taken by the state.[52] The European Commission will be pushing hard to include an investment chapter with far-reaching protections for foreign investors, enforceable through its revised form of investor-state dispute settlement: the Investment Court System (ICS).

ICS – as included in the EU-Vietnam FTA[53] concluded in December 2015 – does contain some procedural improvements as opposed to the 'old' ISDS. However, the reforms do not extend to limiting the provisions investors can invoke to bring claims and do not balance investor rights with any kind of investor obligations.[54] In the interest of conformity in its trade agreements with the ASEAN countries, the EU will likely be pushing hard to include a comparable investment chapter in its CEPA with Indonesia – which may leave very little room for Indonesia to achieve acceptance of its own proposals for investment protection reform.

## Sustainable development issues associated with the EU-Indonesia CEPA

In its report on the first round of the negotiations for an EU-Indonesia CEPA, the European Commission highlights the ambition on both sides to include a comprehensive trade and sustainable development chapter in the agreement. The scope of the chapter, according to the European Commission, should include international labour and environmental conventions, climate change, civil society involvement and natural resources such as timber, fisheries and vegetable oils.[55] However, the problem with sustainable development chapters in trade agreements is that they tend to rely on voluntary guidelines and initiatives and lack an adequate monitoring and enforcement mechanism. In terms of the overall architecture of trade and investment agreements, the removal of trade barriers in FTAs affects the policy space of the state. Harmonising national regulations with the FTA rules can directly impact on the state's responsibility to protect human rights. The experience with investment dispute settlement (ISDS) in FTAs shows that regulatory freedom and the state's ability to legislate in the public interest are put at risk.

The protections for foreign investors are highly enforceable through the inclusion of effective investor-state dispute settlement. But in the context of trade and investment agreements the need for access to remedy for victims of corporate abuses – as recognised in the UN Guiding Principles on Business and Human Rights – continues to be overlooked and in some cases actively undermined.[56]

Any trade and investment treaty aimed at contributing to equitable and sustainable development, should include a public complaints mechanism where civil society stakeholders can bring complaints regarding the human rights impacts of the treaty's implementation. Such complaints should be independently assessed. The CEPA might institute independent panel of experts (not only trade lawyers, but labour/climate/human rights experts) investigates the eligibility of complaints. Alternatively, this could be left to the domestic legal system, whereby, in Indonesia, the Constitutional Court could take up this role. In Europe, this would be the European Court of Justice.

Should the CEPA be found to structurally hinder the international human rights obligations of the signatory parties, remedy must also include amendment of the treaty, in respect of human rights as *jus cogens*, the fundamental principles of international law, accepted by the international community of states as norms from which no derogation is permitted. The Maastricht Principles, which clarify extraterritorial obligations (ETOs) of States on the basis of standing international law,[57] state that 'States must elaborate, interpret and apply relevant international agreements and standards in a manner consistent with their human rights obligations' (ETO 17). The list of obligations includes, inter alia, those pertaining to international trade and investment. The Maastricht principles also underscore that 'States must take deliberate, concrete and targeted steps, separately, and jointly through international cooperation, to create an international enabling environment conducive to the universal fulfilment of economic, social and cultural rights, including in matters relating to bilateral and multilateral trade [and] investment…' and stresses that 'he compliance with this obligation is to be achieved through, inter alia, [the] elaboration, interpretation, application and regular review of multilateral and bilateral agreements as well as international standards' (ETO 29).

# 8.
# RECOMMENDATIONS

To ensure the protection and promotion of human rights, it is vital that an in-depth assessment of the IEU CEPA's impact on human rights is conducted prior to the start of the negotiations. This should involve not just the Indonesian government and the European Commission, but also the parliaments of Indonesia, the EU and its member states, academia, communities and civil society organisations. This human rights impact study should be completed in time to form the basis of the negotiations between Indonesia and the EU. The HRIA's findings must also be submitted to parliaments before they ratify the relevant agreement.

*Ex post* monitoring of the impacts of the IEU CEPA is also essential to map the impact of the agreement on the capacity of the Indonesian state to fulfil its human rights obligations, as well as the environmental impacts of the CEPA; adverse impacts should lead to a review of the agreement, and, if necessary, to cancellation of (part of) the agreement.

To ensure the primacy of human rights over trade and investment regimes, trade and investment agreements, including the Indonesia-EU CEPA, should include a supremacy clause to establish a clear hierarchy between human rights and trade law. In case of conflicts, human rights must take precedence. Civil society stakeholders and affected groups and individuals must have recourse to an effective, independent complaints mechanism, ultimately backed by appropriate sanctions and compensations, and/or amendment, or even termination, of the treaty.

States have a duty to regulate in the interest of promoting human rights and protecting the environment. This duty is recognised in customary international law and reflected in states' extraterritorial obligations. Hence, a CEPA that would undermine the parties' policy space and flexibility to pursue domestic development objectives aimed at promoting a fairer income distribution; strong public social security; high-quality public services, in particular in areas such as health, education, housing and social protection; and protection of the environment should be considered illegitimate. In the same vein, under no circumstances must an Indonesia - EU CEPA be allowed to adversely impact on all parties' obligations to meet the Paris agreement on climate.

In the interest of equitable and sustainable development, the EU should, in the Indonesia-EU CEPA negotiations, refrain from targeting both Indonesian export measures aimed at promoting domestic processing of raw materials with a view to enhancing domestic value addition, and local content requirements aimed at the promotion of equality, social and environmental protection and human rights.

Regulatory chill must be avoided. Investment chapters must not be allowed to become a tool to exert political pressure on governments to shelve or abandon public interest regulation. In fact, treaty-based investor-state dispute settlement should be abandoned altogether because it conflicts with governments' overriding obligation to protect human rights.

The ICS 'solution' the EU will propose for the IEU CEPA does not solve the systemic problems associated with investment protection and investor-state dispute settlement. At the very least, the substantive clauses on the basis of which investors can bring a claim, must be severely curtailed. Damages should be limited to real losses and never include future lost profits.

And any system that protects the property rights of (foreign) investors, should also include substantive investor responsibilities and obligations, as well as expeditious access to remedy for victims of corporate human rights abuses. Current reform proposals for treaty-based investment protection continue to guarantee enforceable rights for foreign investors, while keeping corporate social responsibility on a voluntary basis.

Binding responsibilities and full accountability for corporate human rights violations must be ensured. This includes a mechanism guaranteeing access to remedy for victims of corporate human rights abuse. The current process for a binding instrument on business and human rights at the UN forms a promising starting point, that merits positive engagement.

Last, but not least: in order to allow all interested and/or potentially affected parties to provide meaningful inputs into the negotiating process, the government of Indonesia and the EU should provide full transparency in the Indonesia-EU CEPA negotiating process. All negotiating documents should be made publicly available. The role of the parliaments in monitoring the Indonesia-EU CEPA negotiations should be strengthened, both in Indonesia and EU, to ensure that the CEPA does not violate the Indonesian Constitution, the European Treaties or the signatories' obligations under the body of international human rights law.

# PROFILES

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***Indonesia for Global Justice – IGJ*** (formerly known as the Institute for Global Justice) was founded on 7 August 2001 in order to address the issue of global trade liberalisation. IGJ's Mission is "to change the world trading system to be more equitable through the development of critical awareness and the empowerment of strategic civil society organizations". Since its foundation, IGJ has performed many studies and carried out research into the issue of globalisation and market liberalisation and its impact on Indonesia. This research aims to produce policy recommendations and alternatives that may be used for public education, policy advocacy and legal materials, as well as campaigning.[58]

# NOTES

1 European Commission website on sustainable supply from global markets, https://ec.europa.eu/growth/sectors/raw-materials/policy-strategy/sustainable-supply-global_en

2 Report from the first round of negotiations for a Comprehensive Economic Partnership Agreement (CEPA) between the EU and Indonesia, 20-21 September 2016, http://trade.ec.europa.eu/doclib/docs/2016/september/tradoc_154982.pdf

3 See https://ec.europa.eu/growth/sectors/raw-materials/policy-strategy/sustainable-supply-global_en

4 European Commission, Report of the second round of negotiations for a Free Trade Agreement between the European Union and Indonesia, 24-27 January 2017, Indonesia, Bali.

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