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The Position Paper on Indonesia-EU CEPA Negotiation[1]

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Transnational Institute/TNI has been working on and following the negotiation of the Indonesia-EU Comprehensive Economic Partnership Agreement (CEPA) since 2016. On this occasion, we would like to take this opportunity to share some of our views on the Indonesia-EU CEPA. This intervention is based on many years of collaboration with our partners in Indonesia, especially the Indonesia Civil Society Coalition for Economic Justice, in advocating and developing analyses including joint statements regarding the potential impact of the agreement on the people and the future of our planet.

Introduction
CEPA is a comprehensive and far-reaching economic cooperation agreement. It regulates not only tariff reduction in the context of goods liberalisation, but also the elimination of national regulations considered as non-tariff barriers. In fact, the agreement also covers the protection of multinational companies through investment protection provisions, intellectual property rights and digital trade. Unlimited market access and protection for foreign investment will lead to further concentration of markets and capital. This contributes to uneven socio-economic development within and between countries and is therefore not a sustainable way forward.

We believe that an EU-Indonesia CEPA must first of all be approached as a means to serve the public interest. 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. There are a number of concerns have been raised about certain provisions in CEPA. These must be addressed to protect people's rights and ensure the planet's sustainability.

First, The Energy and Raw Materials Chapter:
The European Union is dependent on third countries for its critical raw material supply and free trade agreements with energy and raw material chapters play a major role in securing access to critical raw materials. However, these chapters are negotiated asymmetrically with the Global South, especially in the case of Indonesia. This chapter seeks to ensure that Indonesia grants market access and eliminates 'discriminatory' treatment in the energy and raw materials sectors. This includes provisions prohibiting export restrictions, including the elimination in principle of all export duties or any measure having equivalent effect. However, this provision conflicts with Indonesia's policy of limiting raw mineral exports to fulfill domestic processing, as is exemplified by the case of Nickel.

The EU's pressure on Indonesia to remove restrictions on raw mineral exports calls into question the EU's commitment to support domestic value-added production in its partner countries. To make matters worse, the provision on performance requirements also prohibits the application of local

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content and much-needed technology transfer requirements. This prohibition will make it even more difficult for Indonesia to strengthen its downstream economic agenda around domestic value-added production. In fact, the prioritization of industrial policy within the EU, if conducted in a "business as usual" manner, will only deepen development inequality in developing countries like Indonesia.

Increasing demand for critical mineral raw materials for the green energy transition has triggered over-exploitation and extraction of natural resources, as is the case in Indonesia. However, the social and environmental impacts of mineral extraction for the green energy transition are not effectively addressed in the Energy and Raw Materials Chapter of the Indonesia-EU CEPA, as there are no legal implications for parties that fail to mitigate these impacts. The provisions under the trade and sustainable development chapter are still questionable in their effectiveness, given that there is no binding enforcement mechanism for related parties, especially corporations.

In this case, the EU's desire to guarantee the supply of essential minerals for its industrial development will only perpetuate extractive business practices. Along with the potential negative consequences for Indonesia, the EU's policy of pushing for market liberalization has in fact harmed the EU's own access to critical minerals. What the EU should therefore do is move towards a truly equal partnership with Indonesia, that does not force Indonesia to liberalize its raw materials export or give up its sovereignty to set prices but instead shows the EU's willingness to support Indonesian value addition and sustainable economic development.

Second, the Investor Protections

The EU proposal on the Investment Court System (ICS) under the investment chapter in CEPA will potentially create another controversial investor dispute, not only within the EU but also between the EU and Indonesia. The proposal came in the midst of growing public concern over the inclusion of the Investor-to-State Dispute Settlement (ISDS) mechanism found in EU trade agreements. Regardless of how it is labelled, Investor-state dispute settlement is undemocratic, dangerous, unfair, and one-sided. Most countries in the world are aware of the dangers of the Investor-to-State Dispute Settlement (ISDS) mechanism. They push for the termination of this mechanism and develop an alternative mechanism.

Indonesia has been experiencing ISDS lawsuits that undermine state sovereignty. One of the cases relates to a lawsuit filed by Newmont (Nusa Tenggara Partnership BV), a US Mining Company registered in the Netherlands as a mailbox company, through the use of the Indonesian-Dutch Bilateral Investment Treaty (BIT). Learning from this experience, the Indonesian government has terminated 67 BITs since 2013. Subsequently, it launched a new model of alternative provisions on investment treaties, including some elements to protect Indonesia from direct lawsuits from investors and the arbitrary interpretation of investment protection clauses.

The EU itself has stated that ISDS is not in accordance with its laws. Moreover, The EU has taken the final step to withdraw from the Energy Charter Treaty (ECT) due to the risks of exposing the EU Members to being sued under this treaty and hampering the EU's goals of energy sovereignty and climate neutrality. There are several cases against the Netherlands under the ECT. For example: ExxonMobil is suing the Netherlands over the closure of a gas field, and RWE has sued the Dutch government for failing to provide sufficient time and resources for the transition away from coal.

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A close analysis of each case shows that every one of these controversial disputes could still be launched and likely prosper under ICS. We believe that the EU proposal for ICS is only a rebranding exercise of the previously existing ISDS mechanism. Therefore, The EU and Indonesian government should avoid all provisions under the investment chapter of Indonesia-EU CEPA that may give priority to investor protection rather than prioritizing the rights of the people.

Third, The IPRs Protection

In the chapter on Intellectual Property Rights (IPR), there are two crucial issues that concern us in relation to the potential monopoly of multinational corporations over people's essential needs. **First, on the Patent rights on essential medicines**. The TRIPS-Plus provision that has been pushed by the EU will have a huge impact on the access to affordable essential medicines, both in Indonesia and the EU. These provisions -the extension of the patent protection period, data and market exclusivity, as well as restrictions on parallel imports- will only benefit pharmaceutical companies and not the people. Furthermore, it burdens the state budget. In Indonesia, the government funds treatments for TB and HIV-AIDS through a national program that serves approximately 1.6 million people. Extending patent monopolies makes next-generation medicines unaffordable or available only in limited quantities, failing to meet demand. A case in point is the BPaLM regimen for drug-resistant tuberculosis (DR-TB). Covid19 also has shown that patent monopolies by corporations have prioritised profits over human lives. All the leading vaccine developers have benefited from billions of dollars in public subsidies, such as the Oxford/AstraZeneca vaccine, which was 97.6% funded through public and philanthropic means. Granting monopolies over essential medicines is unjustifiable, especially when public funds contribute to their development. According to findings from a hearing with Indonesia's Coalition for Economic Justice, it was revealed that the I-EU CEPA IP Chapter would not be committed and would instead refer to "existing provisions." However, there is ambiguity regarding what these "existing provisions" entail—whether they refer to Indonesia's Patent Law or the IP chapters of other FTAs. Further clarification on this matter is crucial.

Second, on the protection of plant variety. The EU has proposed to adopt plant variety protection laws in line with UPOV 91 under the Indonesia-EU CEPA. Furthermore, the European Union's requires Indonesia to join or implement UPOV 1991 or impose any other obligation, and/or limitation in accordance on UPOV 1991. The UPOV Convention contains protection standards on plant variety protection that favour corporations over farmers. UPOV works exclusively to promote the privatisation of seeds worldwide through seed uniformity and patenting. UPOV1991 promotes the restriction of farmers' rights to develop, save, and exchange seeds. The protection of farmers' rights over seeds is not recognised in the UPOV regime. As a result, there are many cases of criminalisation of farmers. The provision on plant variety protection will not only affect the seed sovereignty of farmers in Indonesia but also farmers in Europe countries.

Moreover, UPOV rules also deny farmers access to manage and use their own local seeds. This has led to the erosion of biodiversity. In fact, the ability and right of farmers to save and develop seeds from one crop season to the next is key to food biodiversity. The UPOV Convention has confirmed that corporate seed uniformity has eliminated the world's biodiversity. The Special Rapporteur on the Right to Food, Michael Fakhri, in its last report *"Seeds, right to life and farmers' rights"* where he recommends that being a party to that Convention should no longer be required as part of bilateral or regional agreements and UN Member States are strongly encouraged to remove such requirements from current trade agreements.

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Fourth, on Digital Trade

The digital trade chapter in Indonesia-EU CEPA provides broad and unlimited opportunities for cross-border data flows and gives big tech more freedom and protection. This freedom is reinforced by restrictions on the requirements to store data locally, process data locally, and by protecting the software (source code/algorithm) they use. This situation creates an opportunity for Big Tech companies that seek to profit from data extraction. Data extraction and control become tools for dominating information, knowledge, and markets.

The clauses of the Indonesia-EU CEPA indicate that the burden of data protection rules is placed on individual countries. There is no provision that guarantees protection for individuals and nations regarding the collection, processing and transmission of their data. Generally, developing and underdeveloped countries also lag behind in providing protection, in terms of anticipating the gap or lag between regulations and the capabilities of digital facilities. Moreover, considering the rapid development and highly adaptive nature of digital technology, both the Indonesian Personal Data Protection (PDP) law and the General Data Protection Regulation (GDPR) in the European Union are still inadequate in providing protection.

The EU's digital trade agenda amounts to an agenda of extractivism. Mining raw material (data) from the global South without paying anything for it and taking it to the countries where they are based in order to process it and sell that technology back to Global South. It is also a strategy for the deliberate structural underdevelopment of low-income countries, as it seeks to put in rules that prevent them from capitalising on the potential income and profits from technological development. What is needed now is a rule that can limit the domination and monopoly of big tech companies over data. We need global data governance that provides protections for developing countries against the domination of our economies by Big Tech. And this cannot be regulated in a free trade agreement. An international legal framework regarding global data governance must be discussed in an appropriate and legitimate international institution based on the principles of protecting human rights.

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Rachmi Hertanti is a lawyer with a background in International Trade Law from the Master School of Law at the University of Indonesia. She is currently a Ph.D. candidate in Political Science at Philipps-Universitat Marburg. Since 2011, she has been at the forefront of advocacy and campaigns for just trade policies, with a focus on intellectual property rights in seeds and medicines, investment treaties and corporate lawsuits, and digital trade, including its trade-related impacts on energy and raw materials.