

Measuring Conflict of Interest in Indonesia – European Union Trade Relation

*Monitoring of Indonesia for Global Justice (IGJ)
Indonesia-EU CEPA (IEUCEPA) to the 10th IEU CEPA Negotiation*

28 February 2020. The Indonesia-EU CEPA is one of free trade agreements which will be pushed to immediately resolve by the Government of Indonesia in 2020, after signing three agreements last year, such as Indonesia-Australia CEPA, Indonesia-EFTA, and Indonesia-Korea CEPA. The push for completion of various free trade agreements, especially bilaterally, by the Government of Indonesia is based on assumptions to improve Indonesia's export performance to improve national economic growth.

However, this assumption is still questionable about its effectiveness considering that free trade agreements will increase imports value rather than exports. Moreover, with the economic liberalization model that comprehensively regulates the entire of people economic life, or known as Mega FTA, it will certainly encourage a lot of changes in national regulations that further more facilitate multinational corporations' interests for monopolizing the authorization of natural resources and the management of public service sector which is very important for people's life.

In the 9th round of IEU CEPA negotiation in Brussels on 2-6 December 2019, Indonesia for Global Justice (IGJ), Indonesia AIDS Coalition (IAC), and BothEnds had the opportunity to have a dialogue with negotiator of the two countries. The purpose of the dialogue at the time is to gather information about the status of negotiation, including urging civil society groups' demands towards IEU CEPA.

In the dialogue that was held in Brussels, there were several important issues that showed attract in the conflict of interests between Indonesia and the European Union in this collaboration that then needed to be listened to as Indonesia's negotiating position, so it could avoid the practice swap which eventually returned will only threaten people's rights. Moreover, the discussion of Omnibus Law is believed to be one of the strategies that will be used by the Government of Indonesia to facilitate them in harmonizing national regulations with various contents of signed free trade agreements.

Nickel Conflict: Export Restrictions in Goods Chapter

Nickel issue becomes one of the enmities that arrest attention in the trade relations between Indonesia and the European Union after the counter-action carried out by both parties related to palm restriction issue. This issue heats up after on 22 November 2019 the European Union officially sent a letter of protest to the Dispute Council in WTO regarding to the export ban policy of raw minerals including local content obligations related to import duty rules.

For the European Union negotiator, rules on restriction and licensing of raw mineral exports, as well as excessive import requirements are prohibited in the WTO Agreement, so as a standard element, it should be treated as the same in the IEU CEPA. This is also expected could be discussed in the negotiation, especially in the Chapter of Goods Agreement which mentions an article concerning on prohibition of export and import restrictions.



On the contrary, Indonesian negotiator, Ni Made Ayu Marthini, Director of Bilateral Negotiation at the Ministry of Trade, stated firmly that Indonesia would not want to comply with the European Union's request to eliminate the policy of raw mineral exports ban applied by Indonesia. He emphasized that the policy's aim is to develop domestic industries and encourage price stabilization. However, the Government of Indonesia will continue to open discussion space with the European Union on this issue if they desire to reduce their level position, for example in the context of reducing the value of export tariffs.

The European Union interest in the Nickel conflict cannot be separated from its policies that want to get the widest access to the sources of industrial raw materials, especially minerals. This is outlined in the negotiating strategy that encourages the opening of maximally market access for the European Union related to energy and raw materials that are important for domestic industry needs. Therefore, in the negotiation, the European Union pushed the rule to eliminate all forms of export restrictions, including principally eliminating all forms of export duties or other actions that have the same effect. (Also read IGJ's analysis on Raw Materials Initiative: <https://igj.or.id/critical-analysis-of-indonesian-negotiations-eu-cepa-learning-from-vietnam/>)

Investment Chapter: Lawsuit of Foreign Investors in ICS Format

Another issue that is also become a tough debate from both countries is about the Investment Chapter. In the IEU CEPA, investment chapter will include investor protection provisions that are usually only regulated in bilateral investment treaty (BIT) between Indonesia and each of EU member states. Investor protection provisions in the IEU CEPA are included because Indonesia has stopped several BITs with EU member states.

The reason for the Government of Indonesia stopped BIT is to protect national interests by revising the investor protection provisions, especially related to the mechanism of investment dispute between investor to the state or known as the Investor-State Dispute Settlement (ISDS) mechanism. This mechanism has been criticized by almost all countries in the world because of the right of investor to be able to directly sue the country in international arbitration with an unmitigated lawsuit reaching trillions of dollars. Indonesia has a lot of adverse experiences when sued by foreign investors due to the ISDS mechanism in international agreements. (Also read <https://igj.or.id/greats-isds-when-corporations-disregard-kedaulatan-negara/>)

Regarding to the criticism of BIT, especially ISDS, in the IEU CEPA, European Union submitted a proposal regarding the establishment of Investment Court System (ICS). However, for most of civil society groups, the European Union's proposal on ICS is only a package of ISDS that was replaced by another name. This is because ICS still regulates the right of investors to be able to directly sue the state. The European Union also wants the IEU CEPA can follow the agreements they had before such as with Singapore and Vietnam.

Responding to the EU proposal, Indonesian negotiators said they are still cautious on the ICS offer. This is because this rule is still very new and cannot yet recognize what are the advantages and disadvantages for Indonesia. The government claimed there is no discussion on the text of ICS, but other articles have begun to be discussed. However, they acknowledged that the ICS provisions in the investment chapter were the most difficult issues to be discussed in the negotiation due to strong interest differences level.

Intellectual Property Rights: Access to Cheap Medicine & Seed Sovereignty

Another major concern in the IEU CEPA that is also important for civil society groups in Indonesia is the regulation of intellectual property rights to medicine and seed patents. This could potentially have an impact on cheap medicine access and farmers' sovereignty over the seeds. Concerns on the impact that will arise from intellectual property rights chapter in the IEU CEPA related to the access of cheap medicine is the application of the rules regarding TRIPS Plus which has extra rules than the WTO. TRIPS Plus in IEU CEPA will regulate parallel imports, extension of patent periods, including data and market exclusivity. These three rules will certainly restrain competition for medicine production by generic medicine companies, which in the end patented drugs cannot be accessed cheaply, especially for patients with HIV, cancer, and other diseases. Moreover, with TRIPS Plus it can ultimately hamper the implementation of TRIPS flexibility by the Government both in terms of compulsory licenses and parallel imports

related to medicines. For this reason, civil society groups continue to urge negotiators to not regulate TRIPS Plus in the IEU CEPA.

Up to the 9th round of negotiation, the negotiators of both parties claimed that there had been discussion about TRIPS Plus in the IEU CEPA, but there was no text consolidation on this issue. However, Indonesian negotiators said that they have a commitment to protect the patients' interest on medicine. Patent Law No. 13 of 2016 and related national regulations will become a reference for the Government of Indonesia in negotiating this issue, although in practice it can be seen that most national regulations adopt TRIPS Plus rules.

Regarding to patent regulations on seeds, this has also become an important spotlight not only from civil society groups in Indonesia, but also in Europe. This is because the IEU CEPA will include a rule regarding insistence for Indonesia to become a member of UPOV which will certainly have a detrimental impact on small farmers. UPOV is an international convention on the protection of plant varieties that is created to strengthen the monopoly rights of large seed companies over plant and seeds varieties, and at the same time restrict the farmers' rights to cultivate plants including keeping and exchanging seeds among farmers groups.

So far the two negotiators have claimed that they have not discussed this issue in detail, so there is no updated information on seed issue negotiation. However, due to the negotiation process is very closed, including there is no text transparency, it was very difficult for civil society groups to obtain valid information.

Sustainable Development Issue in Palm Conflict

The palm debate in the IEU CEPA negotiation absorbed a lot of energy. This is because the European Union's policy that will do deletion on the use of bio-fuel sourced from Crude Palm Oil (CPO) gradually from 2020, that has an impact on the declining of Indonesia's exports value. The European Union has implemented a diversion of import tariff on subsidized biodiesel from Indonesia, currently from 8% to 18%. In response to this, Indonesia has counter-attacked at a tariff of 20% to 25% on dairy products imported from the European Union.

The discussion on palm in the IEU CEPA does not only relate to the market access, for example tariffs. But the main debate is about non-tariffs, especially regarding to the sustainability criteria. It means that the tariff for Indonesian palm could be at the level of 0%, but then it should be related to standard conditions and so on.

Box 1

The Impact of UPOV on Farmers in Europe



IGJ and BothEnds Discussion on UPOV in IEU CEPA, La Via Campesina Europe Office, Brussels, 3 December 2019

Indonesia for Global Justice (IGJ) together with Both Ends visited the Via Campesina Europe office (3/12), in order to respond the 9th round of Indonesia-EU (IEU) CEPA in Brussels on 2-7 December 2019. The discussion with Via Campesina Europe is very important to do in order to jointly raise the debate about the impact of the UPOV Convention on Farmers' Rights to Seeds. This is because the IEU CEPA collaboration will include rules that require countries to adopt the contents of UPOV convention in their national regulations.

During the visit IGJ met Guy Kastler, a member of La Via Campesina in France, and Raluca Dan, a member of La Via Campesina in Romania. Discussions were held to share knowledge about how the UPOV Convention had an impact on farmers in Europe.

For farmers in Europe, the UPOV system forces farmers to buy industrial seeds that are very close to the green revolution practice, such as: the use of pesticides and planting in a monoculture method. If farmers want to do agro ecological farming, it needs seeds that can truly adapt to natural conditions and are not homogeneous. Seeds also need variable so that they can adapt to the climate change. But that means the seeds become unstable, so with UPOV they force farmers to use industrial agriculture rather than agro ecological agriculture, and require seeds to be stable and homogeneous.

The government is unable to check, so farmers continue to exchange seeds and continue traditional practices. But if farmers work for industry and sell their crops to industry, the company will only buy products using industrial seeds. But if only sell to the

local market, then no need the rule.

How do farmers in Europe protect themselves from UPOV?

In some countries in Europe, for example in France, with the support from NGOs and local consumers they have succeeded in developing laws, for example in France they have laws where farmers have the right to exchange seeds. They can do that because they have the support of citizens and consumers and civil society. In Romania they do not have such a law but they have informal system.

In Romania there are many farmers who traditionally have propagated seeds, exchanged and sold seeds in the local market. However, if Romanian farmers want to sell to supermarkets, the seeds should meet UPOV requirements, which can only use industrial seeds. In the long term this is really harmful because in Romania farmers do not have laws that are owned by farmers in France, so the Romanian Government will say that farmers are illegal. ****

One of the tough debates is in the discussion of trade and sustainable development chapter (TSD). This chapter is proposal from European Union adopted from EU Trade for All document in order to show the commitment of European Union to achieving Sustainable Development Goals (SDGs).

The TSD chapter wants to ensure that global trade continues to provide protection against environmental and social aspects that refer to the applicable international standards including various international instruments such as multilateral labor standards and agreements (including ILO Conventions), multilateral environmental agreements including ratification of the UNFCCC, Forest Law Enforcement Governance and Trade ("FLEGT") Voluntary Partnership Agreement; The convention of Biological diversity; eliminating illegal, unreported and unregulated (IUU) fishing.

The interesting thing is, the current debate on palm is greatly strengthened in the discussion of the TSD chapter. This is because there is a tendency that the Government of Indonesia wants to push the TSD chapter as a tool to protect palm from Indonesia. Indonesian negotiators stated that Indonesia will bring a concrete proposal into the TSD chapter. Indonesia wants a stronger TSD mechanism than the EU proposal offered to Vietnam. In this case, Indonesia agreed to produce a sustainable trade commodity, and is ready to implement it, including encouraging a strong disciplinary mechanism.

In the TSD chapter, Indonesia wants to push for a remedy mechanism related to sustainable goods trade. It means, on one side, the fulfillment of sustainable criteria should indeed be done, but when in its practice there is still discriminatory treatment against sustainable products from Indonesia, then the disciplinary mechanism should be applied. One example of the mechanism is about compensation. However, the European Union negotiators consider that proposals from

Indonesia cannot yet be agreed because they still have important conceptual differences, especially regarding to compensation rules, including Indonesia's proposal to add a specific regulation article on vegetable oil. This issue makes the negotiation on TSD chapter more complicated and still far from being resolved.

Another Indonesia's ambition position that has not yet been responded by the European Union is on trade and climate change issues. In the explanation, Indonesian negotiators stated that the Government of Indonesia is ready to work seriously with the European Union to resolve deforestation and forest degradation, specifically related to the adaptation and mitigation agenda that can be linked to green bonds launching, sukuk and blue bonds.

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