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INDONESIA - CANADA CEPA: PROBLEMS IN THE INVESTMENT CLAUSE IN THE I-CA CEPA AGREEMENT

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I-Ca CEPA: New Deal, Old Threat

Indonesia and Canada began negotiating the Indonesia-Canada Comprehensive Economic Partnership Agreement (I-Ca CEPA) in June 2021. After 10 rounds of negotiations, the two countries announced the achievement of a substantive agreement on November 15, 2024, witnessed by President Prabowo Subianto and Canadian Prime Minister Mark Carney in Ottawa on September 24, 2025. 1 The I-Ca CEPA includes large-scale tariff liberalization (eliminating >95% of tariffs on Canadian exports and 90% of tariffs on Indonesian exports) as well as broader market access in the fields of goods, services, and investment. The government estimates that the I-Ca CEPA will boost Indonesian exports to Canada to USD 11.8 billion by 2030 and increase Indonesia's GDP growth by around 0.12%. 2

However, various groups note that the economic impact is relatively small compared to GDP (for example, the Canadian government projects an increase in their GDP of only 0.012% until 2040 due to this CEPA)3. The I-Ca CEPA Agreement is touted as a new pillar in bilateral economic relations, promising increased market access for Indonesian commodities and an inflow of Foreign Direct Investment (FDI) from Canada. Since the negotiations began, a momentum of optimism has been built by governments on both sides. However, behind this economic optimism, there is an Investment Chapter in the I-Ca CEPA that revives an “old threat” to state sovereignty, namely the Investor mechanism to sue a state to international arbitration or known as the Investor-State Dispute Settlement (ISDS) which is controversial and can strip national sovereignty.

1 Kautsar Widya Prabowo, Indonesia and Canada inaugurate ICA-CEPA, eliminating 95 percent of trade tariff barriers, MetroTVNews, 2025, https://www.metrotvnews.com/read/bD2CM6oY-indonesia-dan-kanada-resmikan-ica-cepa-hapus-95-persen-hambatan-tarif-dagang. Dewi Kurniawati, Indonesia and Canada sign comprehensive economic partnership, Reuters, 2024, https://www.reuters.com/world/indonesia-canada-sign-comprehensive-economic-partnership-2024-12-02/.

2 Tienhaara, Kyla & Trew, Stuart, Indonesia-Canada CEPA is not the rules-based trade we need, Bilaterals, 2025, https://www.isds.bilaterals.org/?indonesia-canada-cepa-is-not-the&lang=en#:~:text=Over%201%2C400%20ISDS%20cases%20have,paid%20out%20of%20public%20funds.

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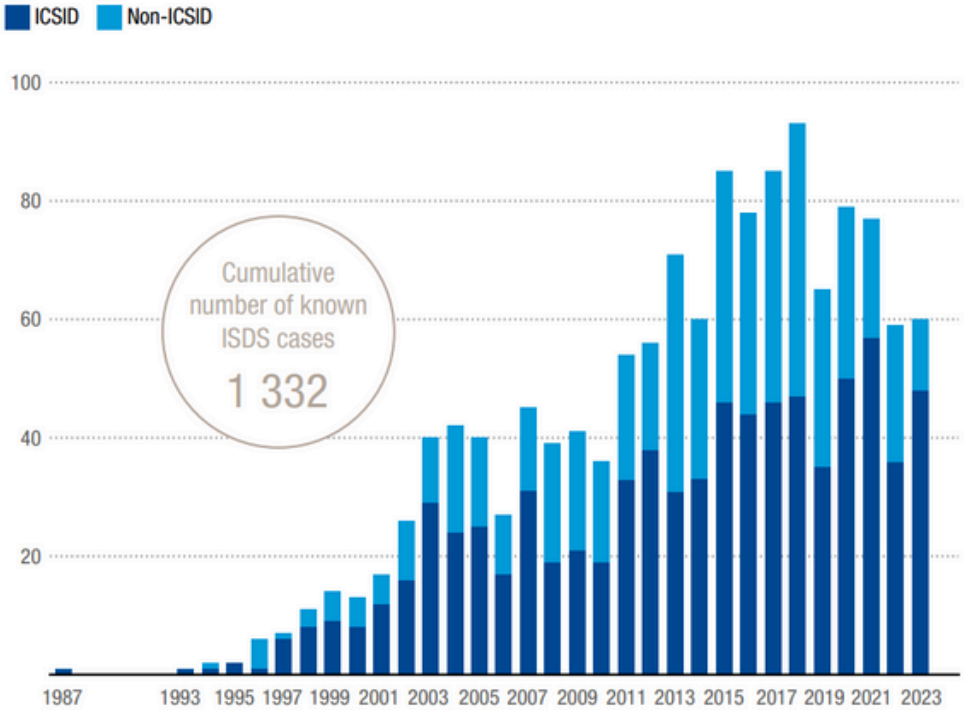

Figure 1: Graph The number of ISDS cases from 1987 to 2023 reached 1,332 cases and continued to increase to 1,401 cases in April 2025. (data source: UNCTAD Report).

ISDS is essentially a mechanism for foreign investors to sue host governments in international arbitration for claims of losses resulting from host-state policies. This system has essentially given rise to numerous investor-state disputes globally. According to a report by the United Nations Trade and Development (UNCTAD), more than 1,400 ISDS cases have been filed worldwide. [4] In Canada alone, there have been 36 ISDS lawsuits filed, many of which challenge legitimate policies aimed at protecting the environment or managing natural resources. Investors in these cases are seeking hundreds of millions to billions of dollars in damages imposed on public funds. Various studies have highlighted that ISDS can erode national policy space and leave public finances vulnerable to large-scale investor lawsuits. This criticism is reinforced by David R. Boyd, the UN Special Rapporteur on the right to the environment, who believes that the structure and practices of ISDS often create obstacles to human rights protection and slow down climate action needed to achieve the targets of the Paris Agreement. [5]

4 UNCTAD, 1,401 cases now available in the Investment Dispute Settlement Navigator, UNCTAD Investment Policy Hub website, 2025, https://investmentpolicy.unctad.org/news/hub/1768/20250415-1-401-cases-now-available-in-the-investment-dispute-settlement-navigator.

5 OHCHR / David R. Boyd, Paying polluters: the catastrophic consequences of investor-State dispute settlement for climate and environment action and human rights, OHCHR website, 2023, https://www.ohchr.org/en/documents/thematic-reports/a78168-paying-polluters-catastrophic-consequences-investor-state-dispute?.

For Indonesia, concerns about ISDS are nothing new. Indonesia has faced lawsuits from foreign investors in the mining sector (for example, the Churchill Mining vs. Indonesia case of 2012-2016), which prompted the government to review old investment agreements. Even Law No. 25 of 2007 concerning Investment (hereinafter referred to as the "Investment Law") mandates dispute resolution through national mechanisms, and is inconsistent with ISDS, which gives foreign investors the right to sue the government directly through arbitration without government approval. 6 Accordingly, in 2014, Indonesia took steps to terminate or renegotiate many bilateral investment treaties (BITs) to protect its national interests. However, through new CEPAs such as the I-Ca CEPA, these previously contested ISDS clauses have resurfaced, potentially re-emerging old threats to Indonesia's regulatory sovereignty.

The Beginning of the Problem: A Closed and Non-Transparent Negotiation Process

From the outset, the I-Ca CEPA negotiation process has drawn scrutiny for its lack of transparency. Negotiations began in 2021 and proceeded rapidly, lasting only about 2.5 years, with the agreement's final announcement at the end of 2024. During that time, the draft text of the agreement was barely made public for broad input. This is similar to other free trade agreement negotiations, which have been criticized for being closed-door and lacking public participation.

The Executive Director of Indonesia for Global Justice (IGJ), Rahmat Maulana Sidik, stated that the I-Ca CEPA negotiations were conducted without meaningful public participation. "This was evident during the negotiations, as there were no official documents accessible to the public. This document, in the form of negotiating text, is crucial for the public to analyze the extent to which this trade agreement will impact the community," Maulana said. IGJ even sent an official letter to the Indonesian government requesting information or a copy of the text after the trade agreement was signed, but the Indonesian government did not provide it. Therefore, transparency in trade agreements is always an issue, due to the closed nature of the negotiation process and the text being negotiated within the agreement.

6 Indonesia for Global Justice (IGJ), "Indonesia and the Trans-Pacific Partnership Treaty", igj.or.id, 2015, https://igj.or.id/2015/10/17/indonesia-dan-traktat-kemitraan-trans-pasifik/#:~:text=Isu%20hukum%20lainnya%20adalah%20persoalan,tahun%202007%20tentang%20Penanaman%20Modal.

7 Bilaterals, Indonesia finalizes first North American CEPA with Canada, Bilaterals.org, 2025, https://isds.bilaterals.org/?indonesia-finalizes-first-north&lang=en#:~:text=Negotiations%20for%20the%20ICA,September%20or%20October%20this%20year.

If it is not open to the public, then who is this trade agreement open to?

We see indications that these negotiations tend to accommodate the interests of foreign corporations. During the ICa-CEPA consultation process, the Mining Association of Canada (MAC) appeared to be actively pushing for the inclusion of investment protection clauses, including access to the ISDS mechanism. One signal of this was a statement by Ben Chalmers (Senior Vice-President, MAC), who stated that his association regularly interacts with the Canadian government to ensure ISDS clauses are included in the new trade agreement. Conversely, labor organizations, human rights activists, and environmentalists who urged the CEPA to include strong protections for workers, local communities, and the environment were less accommodated. The final agreement demonstrated an asymmetry (imbalance) of interests between local communities and foreign investors. It is therefore not surprising that the investment chapter of the ICa-CEPA provides strong and enforceable legal protections for foreign investors, but does not provide maximum protection for the rights of workers, indigenous peoples, or the environment.

This is the problem when trade agreements are not transparent to the public, preventing us from determining their impact. In short, the closed negotiation process allows the imbalances in the agreement's contents to escape scrutiny until the very end. Yet, the decisions made will have long-term implications for the lives of many. This lack of democratic transparency is the root of the problems that have now sparked strong criticism of the Investment Chapter I-Ca CEPA.

Red Carpet for Foreign Investors through Investment Chapter I-Ca CEPA

The Investment Chapter I-Ca CEPA essentially rolls out the red carpet for foreign investors, guaranteeing various privileges and robust enforcement mechanisms for foreign investment, while potentially limiting national policy space. Consequently, the government's policymaking space (regarding social and environmental standards) could be limited. Under this chapter, investors are promised various protections, such as non-discriminatory treatment (including equal market access for Canadian investors in Indonesia and vice versa), fair treatment in accordance with minimum international legal standards, security guarantees, a prohibition on certain performance requirements (e.g., local content obligations), and protection from expropriation of assets without fair compensation. 9 All of these rights are enforceable.

8 Sustainable Views, "Clean energy boom is fuelling mineral-related investor-state disputes", Sustainable Views, 2024, https://www.sustainableviews.com/clean-energy-boom-is-fuelling-mineral-related-investor-state-disputes-ad98954b/.

9 UNCTAD, Investment Chapter (Chapter 13) of the Canada-Indonesia Comprehensive Economic Partnership Agreement, UNCTAD Investment Policy Hub website, 2023, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/8658/download#:~:text=Article%2013,their%20covered%20investment%20treatment%20in.

foreign investors through the ISDS forum, which binds arbitration decisions to the state. In other words, foreign investors (in this case, Canadian investors) will have special rights to seek damages and compensation for Indonesian government policies deemed to violate investor rights under this agreement, if they go beyond Indonesia's domestic legal channels.

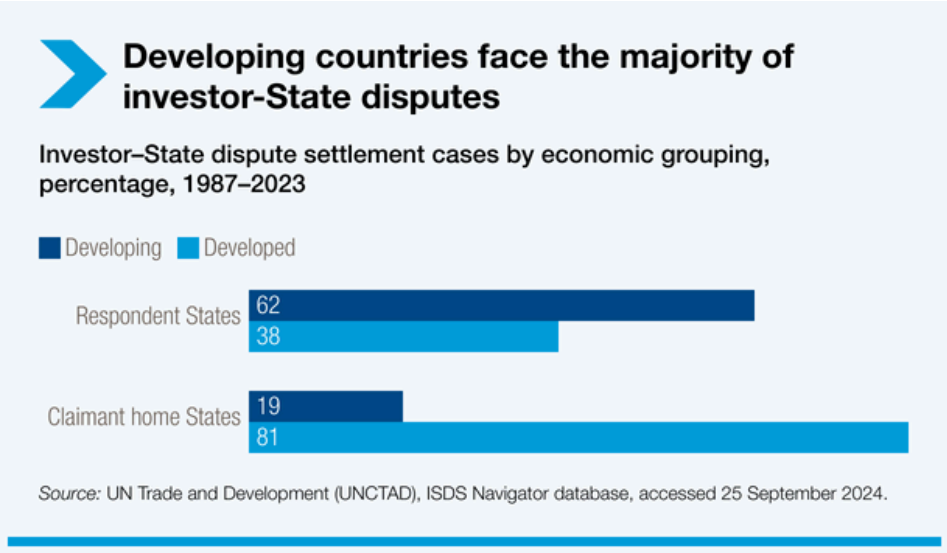

Figure 2: Comparison of investor lawsuits between developed and developing countries in ISDS cases. This graph shows that developing countries are the most frequently sued parties (62%), and investors from developed countries are the majority of plaintiffs (81%).

In addition, there are several key articles in the Investment Chapter I-Ca CEPA that are worth noting in the following table:

Article Chapter Investment I-Ca CEPA	Critical Analysis
Article 13.20 (1) *"Without prejudice to the rights and obligations of the Parties under Chapter 24 (Dispute Settlement), the Parties establish in this Section a mechanism for the settlement of investment disputes."*	This article (Article 13.22 (1)) provides an entry point for investors to sue a state in international arbitration. The phrase "Without prejudice... (without prejudice)" emphasizes that the state-to-state lawsuit mechanism in Chapter 24 remains intact, even though at the same time the parties establish an investment dispute mechanism (investor-to-state). The impact is that the state has the potential to face double lawsuits through two dispute channels at once, namely: investor and state. double lawsuits through two dispute channels at once, namely: investor and state.

10 Government of Canada, Canada-Indonesia CEPA: Summary of benefits and negotiated outcomes, international.gc.ca, 2025, https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/indonesia-indonesie/cepa-apeg/summary-negotiated-resume-negociations.aspx?lang=eng

Article 13.22(2) *"Under this Section, an investor of a Party may submit a claim that the other Party has breached an obligation under Section B (Investment Protections), other than Article 13.5 (Regulatory Objectives), Article 13.12 (Performance Requirements), or Article 13.13 (Senior Management and Boards of Directors)."*	This article (Article 13.22 (2)) opens up significant opportunities for foreign investors to challenge almost all forms of state regulations through the ISDS mechanism, except for three specific articles. This provides unequal legal force and marginalizes state regulatory sovereignty.
Article 13.10(1) *"A Party shall not expropriate a covered investment either directly or indirectly, except:* 1. *for a public purpose;* 2. *in accordance with due process of law;* 3. *in a nondiscriminatory manner; and* 4. *on payment of compensation in accordance with paragraph 5."*	This formulation appears balanced, but it actually opens up ample scope for lawsuits against public policies with economic impacts, as 'indirect expropriation' encompasses regulations that reduce the value or profitability of investments. The state can be forced to pay compensation even if its policies are legitimate.
Article 13.10(3) *"A non-discriminatory measure of a Party that is adopted and maintained in good faith to protect legitimate public welfare objectives, such as health, safety, the environment, does not constitute an expropriation."*	This exception appears to provide regulatory protection, but in practice remains open to debate in ISDS forums. Investors often sue, arguing that public policies harm their profits and create regulatory chill.

Several provisions of the above Article demonstrate how the Investment Chapter is designed to be pro-investor. Article 13.22 (2) grants foreign investors the right to bring disputes to ISDS arbitration for violations of investment protection obligations (except for three specific articles that are exempt). This means that Indonesian government policies deemed to violate investors' rights regarding non-discrimination, fair treatment, protection from expropriation, etc., can be directly challenged by investors in international forums.

Meanwhile, Article 13.10 of the agreement prohibits expropriation except for public purposes and under strict conditions (including full compensation). This clause is often interpreted broadly by foreign investors, where expropriation includes not only the formal takeover of assets but also government policies that significantly impact investor profits (indirect expropriation), for example, the revocation of mining permits or

Environmental regulations that make an investment worthless can be claimed as “indirect expropriation.” Although there is an exception in Article 13.10(3) which states: regulations for welfare purposes (health, safety, environment) do not constitute expropriation. However, in practice, investor arbitration often argues otherwise. As a result, governments can face costly lawsuits if they issue public policies deemed detrimental to foreign investors, even if the policies are intended to protect the public interest.

The existence of the ISDS mechanism has the potential to suppress policy space (regulatory chill) because the Indonesian Government will be more cautious in establishing progressive regulations in the areas of the environment, health, or local economic empowerment for fear of being sued by foreign investors through international arbitration. For example, in the dispute between Canadian investors and local residents on Sangihe Island, North Sulawesi, regarding gold mining activities by PT. Tambang Mas Sangihe (PT. TMS), which is majority-owned by the Canadian mining company, Baru Gold.11 Through Supreme Court (MA) Decision Number 650/K/TUN/2022, PT. TMS's permit has been revoked and confirmed that the environmental permit related to PT. TMS's mining operations on Sangihe Island is no longer valid.12 However, if the I-Ca CEPA comes into effect (2026), then in theory, foreign investors can try to take advantage of investment protection to sue for losses they believe arise from project restrictions or terminations. Such lawsuits not only have the potential to threaten environmental policy but also burden state finances to pay compensation.

The investment chapter of the I-Ca CEPA also has broad implications for the national economic development strategy. On the one hand, the Indonesian government is actively promoting downstream mineral processing to increase domestic added value. However, on the other hand, strong protection for foreign investors in the mining sector could be used as a weapon to undermine the national industrialization policy. The I-Ca CEPA itself, despite including several exceptions in its annexes to protect Indonesia's resource policy, still risks triggering deindustrialization: Canadian mining investors and their service companies could use the threat of ISDS as a cudgel to prevent the Indonesian government from prioritizing local companies or domestic workers in resource development. In other words, any affirmative action or regulation that benefits national businesses could be accused of violating non-discrimination obligations or fair treatment of foreign investors.

11 *A. Asnawi, Gold Mining Companies Still Threaten Sangihe Island?, Mongabay Indonesia, 2025, https://mongabay.co.id/2025/02/06/perusahaan-tambang-emas-masih-ancam-pulau-sangihe-1/.*

12 *CNN Indonesia, “Supreme Court Wins Sangihe Islands Residents, Mining Permit Cancelled”, CNN Indonesia, 2023, https://www.cnnindonesia.com/nasional/20230116191353-12-901154/ma-menenang-warga-kepulauan-sangihe-izin-tambang-dibatalkan.*

Ironically, while Indonesia and Canada are reviving ISDS in the I-Ca CEPA, many countries are moving away from this mechanism. A number of European countries (including the UK) unanimously withdrew from the Energy Charter Treaty (ECT) in 2024 because ISDS was considered to hinder efforts to address the climate crisis in accordance with the Paris Agreement.13 The European Union recently concluded negotiations on the IEU-CEPA with Indonesia in 2025, without including ISDS (at least temporarily) in response to public criticism of the system. Canada itself had previously distanced itself from ISDS. In the NAFTA agreement, which was updated to become the USMCA (Canada–US–Mexico Agreement 2018), the ISDS Article was removed due to concerns about regulatory sovereignty in the environmental and health sectors.14 In fact, according to a Canadian government study, the I-Ca CEPA is estimated to only add 0.012% to Canada's GDP until 2040,15 a barely noticeable economic impact for both countries. With such small economic benefits, the stakes seem unequal if they must be paid at the risk of losing sovereignty and public policy flexibility.

GDP Impact Table of the I-Ca CEPA Agreement assuming full economic liberalization.

Country	Value ($M)	%
Canada	$328.0	0.012%
Indonesia	$1,382.1	0.037%

(sumber data: Office of the Chief Economist, Global Affairs Canada)

The Investment Chapter of the I-Ca CEPA is essentially a double-edged sword. On the one hand, it guarantees legal protection for foreign investors (read: to attract investment), but on the other hand, it carries a significant risk of "mortgaging" the country's sovereignty in protecting social, economic, and environmental interests. The Indonesian government needs to be very careful in implementing this agreement. There are necessary mitigating measures as a solution, such as an interpretative declaration (official statement) to avoid misinterpretation, additional exceptions in ratification, or even a review of the ISDS clause to ensure that national interests are not sacrificed for the benefit of foreign investors.

13 *The Guardian, "UK quits treaty that lets fossil fuel firms sue governments over climate policies", The Guardian, 2024, https://www.theguardian.com/environment/2024/feb/22/uk-quits-treaty-that-lets-fossil-fuel-firms-sue-governments-over-climate-policies.*

14 *Congressional Research Service (Kyla H. Kitamura; Danielle M. Trachtenberg & M. Angeles Villarreal), "U.S.-Mexico-Canada (USMCA) Trade Agreement" (CRS In Focus IF10997), Congress.gov (CRS Products), 2024, https://www.congress.gov/crs-product/IF10997.*

15 *Government of Canada (Global Affairs Canada), "Initial Environmental Assessment of the Canada–Indonesia Comprehensive Economic Partnership Agreement (CEPA)", international.gc.ca, 2025, https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/indonesia-indonesie/cepa-apeg/enviro-assessment-evaluation.aspx?lang=eng.*

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