

Introduction

The European Union would like to thank the Vice-Chair of the Working Group on Business and Human Rights, Mr Surya Deva, for the opportunity to contribute to the upcoming thematic report on “Human Rights-compatible International Investment Agreements”. The contribution is structured on the basis of the questionnaire proposed and includes inputs from the European Union (the European Commission and the European External Action Service) and EU Member States.

Questionnaire

State duty to protect human rights

- 1. Does your State’s constitution, laws or national action plan on business and human rights require the integration of human rights provisions in IIAs concluded by your government?**

The respect for human rights is one of the founding values of the European Union (Article 2 of the Treaty on the European Union (TEU)) and underpins all aspects of the EU’s internal and external policies. The Charter of Fundamental Rights of the European Union (Charter), originally proclaimed on 7 December 2000, was given binding legal effect equal to that of the Treaties following the entry into force of the Lisbon Treaty on 1 December 2009, thus strengthening the EU’s commitment to human rights.

In its external relations, the EU upholds its values, promotes sustainable development and the protection of human rights (Article 3 TEU). The EU has developed a broad range of policy instruments and guidelines to put its commitment to human rights and democracy into practice in its external action, working together with EU Member States and the European Parliament, as well as civil society. These include for instance human rights dialogues and consultations with partner countries, human rights country strategies and human rights guidelines.

The EU is committed to promoting human rights in all areas of its external action, including in trade and investment. Article 21(1) of the TEU establishes human rights considerations as one of the principles guiding the Union’s external action, including in the context of the negotiations and conclusion of international trade and investment agreements (Article 207(1) Treaty on the Functioning of the European Union (TFEU)). The EU Action Plan on Human Rights and Democracy 2020-2024 includes as a priority to strengthen the implementation of human rights provisions in EU trade policy.¹

The European Commission, representing the EU except for the common foreign and security policy, has adopted a number of Communications over time laying out the EU’s policies and

¹ See <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020JC0005>.

priorities relating to human rights.² The Commission assesses the human rights impact of trade-related initiatives against the human rights obligations set out in the Charter of Fundamental Rights as well as other international sources such as UN human rights conventions, the European Convention on Human Rights and other regional human rights conventions.³

International investment agreements are routinely part of comprehensive Free Trade Agreements (FTA). These FTAs feature a chapter on trade and sustainable development, which includes binding obligations on the parties to ratify and effectively implement fundamental International Labour Organisation (ILO) conventions. In case of standalone investment agreements (e.g. the not yet concluded EU-China CAI), there is a separate section on investment and sustainable development.

Furthermore, the EU's bilateral agreements contain a clause on the protection of human rights as an essential element. This clause is either integrated into the FTA or made applicable to it through a reference to another agreement with the country concerned. A breach of such clause would allow the parties, pursuant to Article 60(1) of the Vienna Convention on the Law of Treaties, to suspend or terminate the agreement.

With a view to developing a more sustainable growth model, the Commission's resolve for the next decade is to ensure that trade tools accompany and support a global transition towards a climate neutral economy, including accelerating investments in clean energy, and promote value chains that are circular, responsible and sustainable. This includes promoting responsible business conduct and the respect of environmental, human rights and labour standards.⁴ For the EU, negotiating trade and investment agreements is an important tool, not only for the creation of economic opportunities, but also for the promotion of its core values and objectives. This translates into concrete provisions on, among others, the state's right to regulate in investment agreements, trade and sustainable development chapters, human rights clauses and other elements.

Finally, it is worth noting that the integration of human rights and sustainability in external actions goes hand in hand with the EU's priorities internally. Drawing on the principles of

² The European Union and the External Dimension of Human Rights Policy, COM (95) 567 final; The Inclusion of Respect for Democratic Principles and Human Rights in Agreements between the Community and Third Countries, COM (95) 216 final; Democratisation, the Rule of Law, Respect for Human Rights and Good Governance: the Challenges of the Partnership between the European Union and the ACP States, COM (98) 146 final and Countering Racism, Xenophobia and Anti-Semitism in the Candidate Countries, COM (99) 256 final. Communication on EU Election Observation and Assistance COM (2000) 191 final; The European Union's role in promoting human rights and democratization in third countries, COM (2001) 252 final; Human Rights and Democracy at the Heart of EU external action – towards a more effective approach COM(2011) 886 final; Action Plan on Human Rights and Democracy (2015-2019) “Keeping human rights at the heart of the EU agenda” JOIN(2015) 16 final; EU Action Plan on Human Rights and Democracy 2020-2024 JOIN(2020) 5 final.

³ See 2015 Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives at https://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153591.pdf

⁴ See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 18 February 2021 “Trade Policy Review – An Open, Sustainable and Assertive Trade Policy”, https://trade.ec.europa.eu/doclib/docs/2021/february/tradoc_159438.pdf.

sustainability enshrined in the EU Treaties, the current Commission (2020-2025) has promulgated the European Green Deal, which is aimed at reducing the footprint of the EU's economy by 2050.⁵ A safe, clean, healthy and sustainable environment is integral to the full enjoyment of a wide range of human rights, including the rights to life, health, food, water and sanitation. Additionally, the EU Action Plan on Human Rights and Democracy 2020-2024⁶ commits the EU to engage with the business sector on upholding and promoting human rights and best practices on Responsible Business Conduct (RBC), Corporate Social Responsibility (CSR), due diligence, accountability and access to remedies in a participative manner. It also provides for the EU's commitment to work on a new comprehensive EU framework for a coherent implementation of the UN Guiding Principles on Business and Human Rights, including through national action plans and relevant due diligence guidelines.

2. Are there any mechanisms or processes (e.g., inter-ministerial committee, ex ante human rights impact assessment) to assess and ensure that IIAs are compatible with international human rights obligations of your country?

The European Commission conducts four types of formal, published policy analyses during the life cycle (i.e., negotiation and implementation) of trade and investment agreements. Three of these are “integrated” assessments: that is to say, they aim to identify and analyse all the significant potential impacts of a proposed agreement (i.e. whether economic, social, human rights, or environmental), or all the significant actual impacts in the case of an agreement that is actually in force.⁷

In the lead-up to negotiations of an EU trade or investment agreement, the Commission conducts an Impact Assessment (IA) that seeks to identify and provide an initial assessment of significant potential impacts of a proposed agreement – including any significant potential impacts on human rights. This informs the EU Council of Ministers' decision on whether to approve the launch of a new trade negotiation, to be conducted by the Commission.

During the negotiations, a Sustainability Impact Assessment (SIA) is carried out. This provides the Commission with a more in-depth analysis of the potential economic, social, human rights, and environmental impacts of the agreement under negotiation, together with extensive stakeholder consultation.

Once negotiations of the quantifiable elements of the agreement are finalised, the Commission carries out an Economic Analysis of the Negotiated Outcome (EANO). The EANO helps the Council, the European Parliament and eventually legislative bodies in EU Member States in their subsequent approval processes. However, the scope of the analysis is strictly economic; it does

⁵ See https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en

⁶ See <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020JC0005>

⁷ For more information see: <https://ec.europa.eu/trade/policy/policy-making/analysis/policy-evaluation/>.

not include further analysis of human rights aspects.

After the trade deal has been implemented and enough time has passed to gather sufficient evidence, the Commission conducts an ex post evaluation into the effects of the agreement between the EU and the partner country or region. Once again, this is an integrated policy analysis: it aims to identify and analyse all the significant actual impacts (i.e. economic, social, human rights, or environmental) of the agreement since its entry into force. The results of this evaluation allow the Commission to understand whether trade and investment agreements have worked as expected in achieving their objectives. This evaluation can then be used to improve future trade and investment agreements.

Besides those evaluation tools, the compliance of the EU's trade and investment agreements with human rights is also achieved through other mechanisms, notably the checks performed by the EU legislative bodies. For instance, the inclusion of human rights related provisions, usually as part of the Trade and Sustainable Development chapters of a free trade agreement (FTA), or the respect of a state's right to regulate in the public interest in investment agreements form ordinarily part of the negotiating directives that the Council gives to the Commission for the negotiation of trade and investment agreements. Similarly, the European Parliament often adopts resolutions that indicate the desirable content of the EU's agreements. In many instances, the European Parliament has supported the inclusion of robust and ambitious trade and sustainable development chapters in the EU's agreements. In this regard, the compliance of the EU's trade and investment agreements with human rights is *de facto* assessed throughout the negotiation process and, importantly, at the approval stage.

3. How does your Government ensure that IIAs do not impact negatively on the realization of other important policy objectives such as achieving gender equality, protection of the environment, mitigation of climate change and implementation of the Sustainable Development Goals.

As explained in our reply to Q2, the EU resorts to a wide range of evaluation tools to assess the human rights and environmental impact of EU trade and investment agreements with a view to minimising any negative effects of those agreements on other important policy objectives. These evaluation tools are deployed throughout the life of the trade and investment negotiations and apply also after the entry into force of the agreements, during the implementation stage.

Importantly, the EU's investment agreements contain a number of safeguards that ensure that public authorities can pursue their public policy objectives, including the protection of human rights and of the environment. In addition to references to international human rights in the preamble, EU investment agreements reaffirm, by means of a standalone clause, the right to regulate in the public interest, which informs the content of the investment protection standards. A non-stabilisation clause, that clarifies that investment protection should not be understood as a commitment that the regulatory environment for investment would not change, ensures that the

necessary policy space for human rights and other policy actions is further preserved. Additionally, the investment protection standards are drafted in a way that ensures the incorporation of public policy considerations. For instance, the provision on expropriation provides that a government would normally not have to pay compensation if it took non-discriminatory measures in the public interest, except where a measure is manifestly excessive. Moreover, a security exception clause that applies horizontally ensures that Parties cannot be prevented from taking actions for the fulfilment of their international obligations under the UN Charter for the purpose of maintaining international peace and security, including UN sanctions on human rights. Additionally, non-discrimination obligations (national treatment and most-favoured nation treatment) are subject to GATT-style general exceptions that cover, among others, environmental measures that are necessary to protect human, animal or plant life or health and measures for the conservation of living and non-living exhaustible natural resources.

The inclusion of robust Trade and Sustainable Development Chapters in the EU's trade agreements, of which investment agreements normally form part, further ensures that sustainability considerations are embedded in the EU's trade and investment policy. These chapters contain rules that require the Parties to follow international labour and environment standards and agreements; to effectively enforce environmental and labour laws; to not deviate from environmental or labour laws in order to encourage trade or investment, thereby preventing a 'race to the bottom'; to sustainably trade natural resources, such as timber and fish; to combat illegal trade in threatened and endangered species of fauna and flora; to encourage trade that supports tackling climate change; and to promote practices such as corporate social responsibility.

On gender equality, the Trade and Sustainable Development chapters include binding commitments to ratify and effectively implement the fundamental Conventions of the International Labour Organisation, including the Conventions on equal remuneration (No 100) and discrimination (No 111). In addition to the existing provisions on non-discrimination in the ILO Fundamental Conventions, the EU has been negotiating trade and gender provisions as part of a pilot project with Chile, and has also committed to introducing trade and gender provisions in all ongoing and future negotiations. Amongst these provisions, there is also a commitment to effectively implement the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW).

The EU's agreements further institutionalise Domestic Advisory Groups (DAGs) and joint civil society meetings which enable civil society actors to contribute to the monitoring and implementation of trade and investment agreements. Disputes arising from the implementation of those chapters are subject to a specifically tailored enforcement mechanism that involves an independent panel of experts and a high degree of transparency, including the participation of civil society (open hearings, amicus curiae submissions).

Moreover, the EU trade and investment agreements contain transparency provisions whereby the Parties undertake to ensure that their laws, regulations, procedures and administrative rulings,

including investment-related measures, are promptly published or made available in such a manner as to enable interested persons and the other Party to become acquainted with them. The Parties further undertake, to the extent possible, to publish in advance any proposed measures and provide interested persons and the other Party a reasonable opportunity to comment on such proposed measures. This ensures that those affected by measures, including such measures that may have an impact on human rights, can flag their concerns and input into the policy making.

Last but not least, the EU pursues the realisation of the trade-human rights nexus through the inclusion of human rights provisions in its international agreements, which are designated as essential elements of the agreements and hence allow the Parties to partially or fully suspend an agreement in case the provisions are breached.

4. How does your Government ensure that IIAs provide adequate human rights safeguards in cases where investments may take place in special economic zones or in conflict and post-conflict settings?

The EU takes a horizontal approach to investment protection in that it does not distinguish between investments in non-conflict or post-conflict settings, or in special economic zones, as adherence to human rights should apply in a universal manner and be of the highest level regardless of the circumstances. The EU embeds public policy considerations (including the protection of human rights) in its investment agreements, through a carefully crafted set of provisions that ensure the protection of investments from arbitrary or discriminatory state conduct while securing the necessary policy space for the pursuit of public policy objectives.

At the same time, the EU recognises that conflict zones may create challenges for businesses in respecting human rights as they have to operate in difficult environments. Conflict zones often host armed groups, fuel forced labour and other human rights abuses, and provide fertile ground for corruption and money laundering. Of note in this regard is Regulation (EU) 2017/821 on chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas (also known as ‘Responsible Minerals Regulation’).⁸ The Regulation aims to ensure that EU importers of 3TG (tin, tungsten, tantalum and gold) meet international responsible sourcing standards set by the OECD; ensure that global and EU smelters and refiners of 3TG source responsibly; help break the link between conflict and the illegal exploitation of minerals; and help put an end to the exploitation and abuse of local communities, including mine workers, and support local development. While the Regulation only applies directly to EU-based importers of 3TG, it is intended to indirectly promote the responsible sourcing of smelters and refiners of the said minerals, and by extension the ethical mining of such minerals.

5. Is your Government considering to reform or replace the Investor-State Dispute

⁸ See <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32017R0821>.

Settlement (ISDS) mechanism in your old or new IIAs? If so, please provide details about the proposed alternatives.

Following the 2014 public consultation on the EU's approach to investment protection and investment dispute settlement,⁹ the EU agreed in 2015 on a reformed bilateral approach on investment dispute settlement (Investment Court System) to be included in EU trade and investment agreements. The Investment Court System (ICS) has been so far included in the Comprehensive Economic and Trade Agreement between the EU and Canada (CETA), the EU-Singapore and the EU-Viet Nam Investment Protection Agreements and the EU-Mexico Agreement.

The ICS institutionalises the resolution of disputes between investors and states in a given treaty and clarifies procedural aspects of the dispute. The ICS is composed of a First Instance Tribunal and an Appeal Tribunal composed by adjudicators who are appointed for long fixed terms of office by the Treaty Parties. ICS adjudicators must either possess the qualifications required in their respective countries for appointment to high judicial offices or be jurists of recognised competence, and have demonstrated expertise in public international law. EU IIAs provide for high standards of transparency in ICS proceedings and allow civil society transitions or affected individuals and communities to participate in the proceedings.

In parallel, the EU supports efforts towards a multilateral reform of ISDS by engaging in the ongoing negotiations in Working Group III of the United Nations Commission on International Trade Law (UNCITRAL). In these negotiations, the European Union and its Member States support the creation of a permanent Multilateral Investment Court, which would settle investment disputes under existing and future treaties and would, once operational, replace the Investment Court Systems included in the EU's bilateral agreements and the ISDS mechanisms in EU Member States bilateral investment treaties with third countries.¹⁰ The EU and its Member States will promote that the Multilateral Investment Court would also apply high transparency standards and allow third parties to make submissions.

6. Has the COVID-19 pandemic affected your Government's approach to IIAs and/or ISDS?

The COVID-19 pandemic has brought unprecedented challenges to the economic and public health systems worldwide, including in the EU, and has threatened gains on gender equality. States had to take extensive measures to respond to the public health emergency and its economic consequences, such as shutting down or limiting economic activities, reorganising public health systems or restricting exports. The COVID-19 pandemic has highlighted the

⁹ See http://trade.ec.europa.eu/consultations/index.cfm?consul_id=179.

¹⁰ For more details, see <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1608> and the European Union and Member States' submission to UNCITRAL on a standing mechanisms for the settlement of international investment disputes <http://undocs.org/en/A/CN.9/WG.III/WP.159/Add.1>.

importance of maintaining the necessary policy space to adopt measures in the public interest, while making sure that the necessary protections are in place to guarantee against arbitrary or discriminatory state conduct. The EU's approach has always been that investment agreements should strike a balance between protecting investors and safeguarding a state's right to regulate in the public interest, including by taking measures to protect public health and safety or the environment as public good, and the suitability of this approach has been further evidenced by events such as the COVID-19 pandemic.

Importantly, the IIAs will have a role to play in enhancing investment in the post-COVID era. Their contribution will be key to help economies increase FDI flows, as these have been significantly curtailed during the pandemic, while allowing for the adoption of measures to "build back better" towards a more inclusive, sustainable, just and resilient future for all.¹¹ This means doing more than getting economies and livelihoods quickly back on their feet. Recovery policies should trigger investment and behavioural changes that will reduce the likelihood of future shocks and increase society's resilience to them when they do occur.¹² In this regard, the recovery plan that the European Commission, the European Parliament and the European Council have agreed to provides for a large stimulus package that will support modernisation through, among others, fair climate transitions, concrete steps to fight climate change and the protection of biodiversity and gender equality.¹³

Investors Responsibility to respect Human Rights

7. Do IIAs concluded by your Government (including your Model Bilateral Investment Treaty) include human rights provisions addressed directly to investors and their investments? Are these provisions soft law recommendations or legally binding?

Specific corporate social responsibility provisions are included in the Trade and Sustainable Development provisions of EU free trade agreements or investment agreements. Therein, the Parties undertake to promote responsible business practices, including by encouraging the voluntary uptake of such practices by businesses. These chapters further contain a special dispute resolution mechanism that consists of a Panel of Experts to which a Party to the agreement may have recourse if there are disagreements on the interpretation or application of the chapter. While these obligations are not imposed on the investors per se, they purport to create the conditions for the development of relevant domestic legislation.

Importantly, investment protection provisions in EU investment agreements only apply to investments made in accordance with the laws and regulations of the host country. This

¹¹ See Delivering on the UN's Sustainable Development Goals – A comprehensive approach SWD(2020) 400 final.

¹² See OECD Policy Responses to Coronavirus (COVID-19) Building back better: A sustainable, resilient recovery after COVID-19 <https://www.oecd.org/coronavirus/policy-responses/building-back-better-a-sustainable-resilient-recovery-after-covid-19-52b869f5/>.

¹³ See Recovery Plan for Europe available at: https://ec.europa.eu/info/strategy/recovery-plan-europe_en#background

essentially creates an obligation on investors to comply with the relevant human rights legislation that is in place in the host state if they wish to benefit from the protection of the agreements.

8. Does IIAs concluded by your Government expressly require foreign investors to comply with domestic laws relating to human rights, labour rights and the environment?

As noted above, investment protection provisions in EU investment agreements only apply to investments made in accordance with the laws and regulations of the host country. EU Member States' constitutions and domestic laws overwhelmingly provide for the protection of human rights, labour rights and the environment. Such protections stem from international obligations that EU Member States incur due to them being members of international treaties on environment and human rights, by virtue of their Constitutions, civil and criminal laws, and, of course, by virtue of their membership to the EU. For instance, there is EU legislation in place applicable to all Member States that requires the conduct of impact assessments for private or public projects that may have an adverse impact on the environment.. When such laws are not complied with at the making of the investment, an investor may not benefit from the protection of the investment agreement, including from recourse to investment dispute settlement (the investment is not "covered" and therefore it falls outside of the scope of the dispute settlement mechanism). Additionally, under EU IIAs, investors cannot submit to dispute settlement claims relating to investments made through corruptive, abusive or deceptive means.

9. Does your Government require – under IIAs or otherwise – investors to conduct human rights due diligence (HRDD) or environmental and human rights impact assessments prior to their investment? If so, what mechanisms exist to ensure that investors comply with this obligation?

As noted above, the EU's IIAs contain a requirement that investments should be made in accordance with domestic laws. Legislation that has been enacted at EU level and applies on Member States requires the conduct of impact assessments in a number of fields. For instance, Directive 2011/92/EU (known as the 'Environmental Impact Assessment' (EIA) Directive) requires the assessment of the environmental effects of those public and private projects, which are likely to have significant effects on the environment. Similarly, Directive 2001/42/EC (known as the 'Strategic Environmental Assessment' Directive) ensures that plans, programmes and projects likely to have significant effects on the environment are made subject to an environmental assessment, prior to their approval or authorisation. Developers, under the directives, must provide information on the environmental impact (EIA report) and the environmental authorities and the public (including affected Member States where relevant) must be informed and consulted. The competent authority decides after having taken into

consideration the results of the consultations. The public is informed of the decision afterwards and can challenge the decision before the courts.

Additionally, the EU has adopted legislation on due diligence in supply chains in specific sectors. The EU Timber Regulation (Regulation (EU) No 995/2010) prohibits the placing on the EU market of illegal timber and requires operators to set up and implement a due diligence system to minimise the risk that the timber might have been harvested in violation of applicable laws. Moreover, the EU Responsible Minerals Regulation (Regulation (EU) 821/2017) lays down supply chain due diligence obligations for EU importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas with the aim to break the nexus between mineral trade, armed conflict and human rights abuses.

In order to ensure compliance, EU due diligence legislation requires the establishment of penalties in case of infringement. The EU Timber Regulation requires EU Member States to lay down rules to ensure that infringements are sanctioned by effective, proportionate and dissuasive penalties and to take all measures necessary to ensure that those sanctions are implemented.¹⁴ The EU Responsible Minerals Regulation provides that EU Member States must lay down the rules applicable to infringements and issue a notice describing the remedial action to be adopted by Union importers that commit the infringement.

In the field of human rights due diligence, the EU-Directive on Non-Financial reporting 2014/95/EU lays down the rules on disclosure of certain information on the way large companies (more than 500 employees) manage social and environmental challenges. While it does not create an obligation on business to conduct human rights due diligence, it indirectly encourages companies to develop a responsible approach to business as it allows investors, consumers, policy makers and other stakeholders to evaluate the non-financial performance of those companies.

Finally yet importantly, the European Commission is currently working on a legislative initiative on horizontal due diligence for European companies. The proposal could introduce mandatory human rights and environmental due diligence based on existing international due diligence standards and guidelines, such as the UN Guiding Principles on Business and Human Rights, the ILO Declaration of Principles concerning Multinational Enterprises and Social Policy (MNE Declaration), the OECD Guidelines for Multinational Enterprises and the OECD Due Diligence Guidance for Responsible Business Conduct.

10. What measures exist to ensure that HRDD or impact assessments conducted by investors are gender-responsive and involve a meaningful participation of impacted communities, particularly marginalized groups and individuals?

As indicated in our reply to Q9, there is EU legislation in place applicable to all Member States that requires the conduct of impact assessments for private or public projects that may have an

¹⁴ See Report on EU Timber Regulation COM(2016) 74 final.

adverse impact on the environment. Under this legislation, such impact assessments should involve meaningful public participation. The requirement for public participation on environmental matters, which originates in the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, is implemented by Directive 2003/35/EC (known as “the Public Participation Directive”), which contains provisions for a general public participation procedure including access to information. It also amends the Environmental Impact Assessment (EIA) Directive and Integrated Pollution Prevention and Control (IPPC) Directive in order to improve the public participation as part of those directives.

A series of plans and programmes are subject to the public participation requirement such as the Waste management plans and prevention programmes pursuant to the Waste Framework Directive (Article 31 of the Waste Framework Directive); the Packaging waste management plans pursuant to Article 14 of the Packaging Waste Directive 94/62/EC; the Air quality plans for zones where the air quality exceeds the limit values pursuant to Directive 2008/50/EC; Programmes for vulnerable zones pursuant to Article 5(1) the Nitrates Directive 91/676/EEC. Provisions on public consultation can also be found in the field of genetically modified organism (GMO) legislation.

The obligation to allow for public participation applies only to natural and legal persons and, but only insofar as the national law allows for this, associations of groups of natural and legal persons (Article 2(1) of Directive 2003/35/EC). The first stage of public participation involves informing the public about the proposals and the possibility of participation (Article 2(2)(a) of Directive 2003/35/EC). After this, there must be the possibility for effective participation, which refers to the stage in the decision-making process when the options are still open. The central obligation under Article 2(2)(c) of Directive 2003/35/EC is to take due account of the views of the results of the public consultation. The public must be informed of the final decision and public participation process (Article 2(2)(d) of Directive 2003/35/EC).

The EIA and IPPC Directives further provide for cross-border public participation where the impact of a project is transboundary. They also provide that members of the public concerned having a sufficient interest, or maintaining the impairment of a right, have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions. Such procedures must be fair, equitable, timely and not prohibitively expensive.

11. Do IIAs concluded by your Government include processes or mechanisms to allow affected individuals or communities to seek remedies, in host or home countries, against investors for human rights abuses linked to investment-related projects?

The majority of EU Member States have set up National Contact Points under the OECD Guidelines for Multinational Enterprises (the MNEs Guidelines) that provide for a non-judicial

grievance mechanism. This mechanism allows affected stakeholders to address and remedy adverse social and environmental impacts caused by corporate conduct. The MNE Guidelines contain concrete recommendations regarding the respect of human rights, environmental and consumer protection or anti-bribery rules. As noted above, the TSD chapters in the EU trade and investment agreements, provide that the Parties undertake to promote responsible business conduct, including by encouraging the voluntary uptake of responsible practices by businesses, taking into account relevant internationally recognized guidelines and principles including the MNE Guidelines. Parties also undertake to exchange information and experience with regard to methodologies and indicators for impact assessments on trade sustainability.

In recent years, the EU has been very active, in particular through the European Instrument for Democracy and Human Rights, in the field of development cooperation, notably by empowering vulnerable individuals, communities and civil society organisations to claim and advocate for their rights when facing human rights abuses that emerge from particular investment-related projects. Actions on this front aim, *inter alia*, to support active monitoring of abuses, help those affected to pursue legal claims and outreach to government with a view to improving access to remedies.

Of course, in case of unlawful or harmful activities, public bodies and affected third parties can also initiate legal proceedings against investors before the competent national courts.

12. Has your Government pursued counterclaims against investors for human rights abuses linked to their investments? If yes, please provide details.

To date, the European Union has only acted as a respondent in one ISDS case and has so far not pursued any counterclaims against investors for human right abuses in an international investment dispute.

13. Do IIAs concluded by your Government allow affected individuals or communities to file amicus briefs before ISDS or another dispute settlement process?

Yes. All EU trade and investment agreements include high standards of transparency building on the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (UNCITRAL Transparency Rules). These rules allow interested third persons (such as individuals, civil society organisations, trade unions, consumer organisations and other types of affected communities) to intervene in investment dispute settlement proceedings before the Tribunal and the Appellate Tribunal.

14. Does your Government require – under IIAs or otherwise – investors to establish, in meaningful consultation with affected communities, operational

level grievance mechanisms that are effective in terms of process and remedial outcomes? If so, please provide details.

As a general rule, grievance mechanisms for affected communities are foreseen in EU Member States legislation and in the OECD Guidelines for Multinational Enterprises, which provide for the set-up of National Contact Points (NCPs) whose core duty is to advance the effectiveness of the OECD Guidelines, including by providing for a non-judicial grievance mechanism. The EU promotes the OECD Due Diligence Guidance for Responsible Business Conduct, which provides practical support to enterprises on the implementation of the OECD Guidelines for Multinational Enterprises and recommends the establishment of grievance mechanisms by companies as a means of performing due diligence that helps them prevent or mitigate adverse impacts of their conduct on RBC issues. A number of European companies have put in place such mechanisms.

In addition, the EU Responsible Minerals Regulation requires Union importers of minerals and metals covered under its scope to establish a grievance mechanism as an early-warning risk-awareness system or provide such mechanism through collaborative arrangements with other economic operators or organisations, or by facilitating recourse to an external expert or body, such as an ombudsman.¹⁵

15. Are there any good practices regarding the integration of human rights issues in IIAs that you would like to share with the Working Group? Any other comments or suggestions are also welcome.

The EU's investment policy aims to promote investment that supports sustainable development, respect for human rights and high labour and environmental standards. It does so by encouraging corporate social responsibility and responsible business practices and by preserving the policy space that is necessary to take measures in the public interest, including the protection of human rights.

The EU considers that the integration of human rights issues in investment agreements can be best achieved through provisions that ensure both a state's domestic policy space to regulate in the public interest and the protection of investments by arbitrary or discriminatory state conduct, notably by guaranteeing the rights to property and compensation in case of expropriation or access to effective remedy (which are also human rights enshrined in the EU Charter of Fundamental Rights and the European Convention of Human Rights).

Importantly, the EU considers that any efforts to address the likely impact of investments on human rights through investment agreements should be supplemented by robust domestic policies and laws that provide for effective protections, including impact assessments and effective public participation. To this effect, the EU is developing new tools and modernises the existing ones with a view to increasing their efficiency in light of the new issues that emerge

¹⁵ See Article 4(e) of the EU Responsible Minerals Regulation: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32017R0821>.

from contemporary challenges (pandemics, environmental degradation etc.) For instance, the European Commission is currently in the process of reviewing the Non-Financial Reporting Directive 2014/95/EU with a view to improving disclosure of the social and environmental impact of companies. This shall in turn allow investors to be better informed about the sustainability of their investments. Better access to data on the impact of such companies is not only important from a due diligence viewpoint, but also informs policy-making both in home and host countries as it allows to track the trends and adjust policies accordingly.
