

EU-Myanmar/Burma Investment Protection Agreement (IPA) Comments on Sustainability Impact Assessment's Draft final Report.

Position paper - April 2016

The Sustainability Impact Assessment (SIA) draft report recommendations have several merits. They provide important inputs by requesting minimal human rights safeguards. Among them, the introduction of human rights in the spectrum of the clauses of the IPA, mechanisms to “address” human rights impacts and “effective” enforcement and monitoring mechanisms, all being expressly dedicated to human rights and lacking in the current practice for EU agreements. The SIA also proposes modifications to the clauses protecting investors, the different dispute settlement mechanisms and the right to regulate for example. These suggestions pave the way for a better consideration of human rights in the IPA and its implementation. They provide paths to avoid and remedy to the IPA's potential human rights impacts.

The draft report reveals, in consequence, a clear willingness to address certain human rights concerns. It proposes improvements compared to the EU model of the IPA. What are worryingly absent however, are the due details to remove any uncertainty.

Considering these achievements, we propose focusing our comments around them, instead of covering all issues. We will focus on the draft report's recommendations that should be maintained, specified and reflected in the 'Final report recommendations' that will be published soon (1) and make proposals to address some of the remaining gaps found in the study regarding some crucial clauses (2). Indeed, all the guidelines on impact assessments insist on the necessity for the SIAs to be precise, reaching logical conclusions from their findings.

As stated by the Commission on the 5th of April, it will probably not endorse all the recommendations. FIDH has already documented the European Commission's disregard of SIA recommendations in the past,¹ and we are aware how keen the Commission is to conclude that its traditional tools and models already address human rights concerns². In consequence, it is of major importance that the SIA provide the EU institutions with all the elements to guide their choices. It is indeed the main aim of an SIA. To that end, the SIA has to avoid all ambiguity that would allow ineffective solutions. It is of prime importance that the final recommendations duly list all the recommendations resulting from the findings of the study. Equally important is for the clauses and mechanisms proposed to be clear and concrete. All these precautions will ensure the EU institutions do not misinterpret the recommendations when the time comes to conclude the agreement.

1. Fine-tune and clarify some of the recommendations we found in the draft report:

¹ See past practices in that sense in FIDH, building trade's consistency with human rights : 15 recommendations to the EU on impact assessments, September 2014, <https://www.fidh.org/en/international-advocacy/european-union/building-trade-s-consistency-with-human-rights-15-recommendations-to>

² Civil society dialogue meeting on the sustainability impact assessment (SIA) on the EU-Myanmar investment protection agreement, 5/11/2015, Minutes, http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153981.pdf ; see also FIDH open letter dated 7 December 2015 <http://www.eu-myanmarsia.com/data/info/201604042008374595pic.pdf> and the answer given by the Commission, Ref. Ares(2016)785146 - 15/02/2016 <http://www.eu-myanmarsia.com/data/info/201604041936006232pic.pdf> ; also the reply of the European Commission to the letter of Myanmar CSOs <http://www.eu-myanmarsia.com/data/info/201604172002043593pic.pdf>. See also the position of the Commission in the EU ombudsman procedure FIDH initiated on the EU-Vietnam FTA and reflected in the ombudsman decision EU Ombudsman, Decision in case 1409/2014/MHZ on the European Commission's failure to carry out a prior human rights impact assessment of the EU-Vietnam free trade agreement, 26 February 2016, <http://www.ombudsman.europa.eu/cases/decision.faces/en/64308/html.bookmark> and our answer https://www.fidh.org/IMG/pdf/joint_fidh-vchr_observations_on_the_opinion_of_the_commission_on_the_european_ombudsman_s_draft_recommendation_ref_1409.2014.jn.pdf

The present section focuses on some of the proposals made in the SIA, especially regarding the clauses and mechanisms dedicated to human rights, (1) the clauses protecting investors, (2) the clauses on the right to regulate and the state-to-state dispute settlement, (3) and the clauses on investor-state dispute settlement (ISDS/ICS) (4). These proposals are all important inputs. Different elements should however be clarified and specified to ensure the SIA recommendations avoid any misinterpretation by the EU institutions and could then be fully effective.

Insert introductive remarks:

Before we review the different proposals of the draft final report and make recommendations in that regard, we propose that the consultant open its final recommendations with some introductive remarks. These introductive conclusions will help to clarify how the recommendations are conceived, and ensure better clarity of their intrinsic economy. They should be conceived as follows:

The introductive remarks could specify that they are built on the main findings of the report and notably, the facts that:

- Human rights are only protected and respected when Parties of an IPA fulfill their own obligations. However, the SIA has shown that it is not the case in Burma/Myanmar (serious human rights violations, a lack of independence, resources and capacities of the judiciary, corruption, a legislative framework and practice unable to protect the population against forced eviction in contravention with international law, land grabbing, a lack of access to remedies, violations of minorities and indigenous peoples' rights, inadequate legal framework and institutional capacities to protect workers' rights, repressive laws, arbitrary arrests of journalists, human rights defenders and protestors, etc.)³ The SIA recognised that business and investment in Burma is linked to serious risks of human rights violations.
- Beyond the responsibility of the Parties to the IPA, there is the responsibility of business enterprises to respect the entire spectrum of internationally recognised human rights. Specific commitments and behaviours (codes of conduct, human rights due diligence, reporting and remedies activities) aid in ensuring that business enterprises effectively comply with their responsibility to respect human rights. The SIA recognised that if “CSR may be key in ensuring net impacts are positive” “It is very difficult given available evidence to determine if current CSR initiatives are sufficient”. It adds that “While there are clearly opportunities for Myanmar to benefit from increased EU CSR activities as a result of increased investment, it is the conclusion of the project team that it is vital that the text of the IPA offer adequate protections for human rights and the environment.”⁴
- The SIA concluded that within the context, and under those conditions, “self-regulating company codes of conduct would not be adequate in Myanmar”. It proposed, in consequence, to include specific protective mechanisms and clauses, including a non-selective approach to human rights, effective enforcement mechanisms, and mechanisms to duly address the impact of the IPA, also recalling that the European Parliament argued that objectives of CSR should be binding for European companies operating abroad⁵.

An introductive remark that reflects this context in the final conclusions will avoid some misunderstandings. It clarifies that CSR provisions are insufficient. It makes clear the IPA should state that the Parties commit to respect their human rights obligations and provide dedicated and efficient mechanisms in the entire appropriate way, avoiding and addressing negative impacts on human rights. It would render more apparent that the recommendations actually address concerns that occur when IPAs are not duly adapted to duly consider human rights.

The introductive remarks could also specify that the recommendations, as proposed by the study, do not imply that the IPA is intended to solve all human rights problems in Burma. It could be clarified that instead, the recommendations offer solutions to ensure that all issues related to the implementation of the IPA that affect human rights are efficiently addressed. This would clarify that the idea under the recommendations is not to change regimes (as claimed sometimes by the Commission when it explains why it opposes the incorporation of human rights in the agreements). The recommendations propose

³ Draft Final Report of the Sustainability Impact Assessment on the EU-Myanmar Investment Protection Agreement was published online on 18 March 2016, <http://www.eu-myanmarsia.com/data/info/201603180935385856pic.pdf>, p. 129 to 144

⁴ Draft final report, p.105

⁵ Draft final report, p.150 ; In our view, EU investors should be required to take compulsory measures of enhanced due diligence, which should cover the entire supply chain, be sector-specific and elaborated in consultation with all relevant stakeholders including affected rights-holders. Particular attention should be paid to collective bargaining, land acquisition, subcontracting, discrimination against minorities and discrimination against women and sexual harassment

that the investment agreement provide efficient mechanisms to alert, prevent, mitigate and remedy the negative impacts it may have on human rights, which is, actually, a condition for the legality of the European law.

The introduction should also specify that the recommendations are all complementary. It will help to understand that all the recommendations are relevant and are not redundant. This precautionary measure will avoid a pick and choose exercise by the Commission, that we have seen in the past⁶ and that can in the end impair human rights and the right balance of the solutions proposed by the consultant team.

After this introduction, we propose passing under review some of the recommendations made in the draft SIA final report.

1. On the introduction of dedicated human rights clauses, the obligations of the investment agreement's Parties, and the human rights mechanisms to be introduced in the IPA:

On the sustainable development chapter:

The SIA draft report recommendations ask for the introduction of human rights in the spectrum of the clauses to be introduced in the sustainable development chapter of the EU-Burma/Myanmar investment agreement. This recommendation gives substance to the uncontested principle of indivisibility of human rights. It insists on the necessity to not take a selective approach and to not consider one area of human rights as less important than others. (Reco 1.5 and its text). This important recommendation paves the way for addressing one of the unconscionable shortcomings of the current EU models: the absence of provisions regarding human rights besides the ones on environmental and labour rights in the sustainability development chapter.

There is, however, and as already stated in our introductory remarks, a need to avoid anything in the recommendations that suggests human rights are sufficiently protected by simply encouraging the companies to adopt human rights codes of conduct or by a vague mention of human rights, dedicated cooperation and a dialogue. It is indeed a worrying position of the European Commission which considers that human rights are sufficiently addressed by a reference to OECD guidelines, a vague mention reaffirming attachment to human rights instruments like UDHR, that disregards the full spectrum of international human rights instruments, or by a vague reference to an unused and traditional 'human rights clause'⁷. It is imperative that the recommendations clearly ask for the IPA to provide clauses that commit the Parties to respect their human rights obligations. Recommendations should make clear in addition that this commitment should be linked concretely, clearly and effectively to the IPA and its dedicated mechanisms. Practice has shown indeed that when reference to human rights exists, it is disembodied, external to the IPA economy (see EU-Vietnam FTA for example). Moreover, the traditional clause referring to CSR by mentioning the OECD guidelines is insufficient, and an express reference should be made to the need to effectively implement UN guiding principles on business and human rights (UNGPs). They differ from CSR and OCDE guidelines. They are at the top of the EU's agenda. All States at the UN, reflecting a common consensus on the topic, have endorsed them in 2011.

The SIA draft report recommends that the sustainable development chapter be flanked by "effective enforcement measures" as well as "mechanisms to address impacts of investment agreements on human rights". (Reco 1.5 and its text). Both mechanisms are actually lacking in the current models. By making these recommendations, the SIA study offers ways to address, in part, one of the most serious concerns linked to IPA models. Indeed, an IPA that provides investors with a direct access to a dedicated recourse mechanism, giving them a real possibility to be reinstated in their rights (those created by the investment agreement), but failing to provide an efficient mechanism to protect pre-existing human rights against corporate conduct or against the other impacts of the IPA, would be an unbalanced choice. Such a choice would affect the principle of equality before the law or the non-discrimination principle that also applies on the right to access effective remedies, and be made in contravention to the human rights obligations of the Parties. Such an IPA is not in line with the human rights obligations of the Parties. At least, and in any case, it could not be considered as the most proportionate option to address, in addition to the investment protection objective, the human rights

⁶ see past practices in that sense in FIDH, building trade's consistency with human rights : 15 recommendations to the EU on impact assessments, September 2014, <https://www.fidh.org/en/international-advocacy/european-union/building-trade-s-consistency-with-human-rights-15-recommendations-to>

⁷ see FIDH Open letter: EU-Myanmar/Burma Investment agreement and its sustainability Impact Assessment - concerns on the way human rights are taken into account, 7 December 2015, <https://www.fidh.org/en/international-advocacy/european-union/eu-myanmar-burma-investment-agreement-and-its-sustainability-impact> and, for more details

concerns. To ensure the IPA complies with the principle of proportionality and to human rights requirements, the condition is that, as recommended in the SIA draft report, mechanisms efficiently address, through prevention and remediation, the negative impacts that the IPA may have on human rights. Prevention requires that the clauses of the agreement are sufficiently precise to avoid predictable negative impacts on human rights. Access to remedies should also be made available, and are clearly necessary to address the less predictable impacts. Remedies against the negative effects of the clauses of the IPA (including the impact of ISDS/ICS) and against the investments' negative effects are core. This is especially the case considering IPA and ISDS/ICS mechanisms have proven to have uncontrolled effects.

The main issue, if we consider the position of the Commission, is to convince that those mechanisms should be part of the IPA. The recommendations should clearly reflect how fundamental it is. Indeed, the mechanisms existing today to ensure companies are liable for their misconduct are clearly ineffective and insufficient. Access to remedies and shortcomings in effectiveness, are apparent both in the host Burma/Myanmar country (as the SIA concluded) and in the home EU member state countries (as several studies have proven⁸ and as the recommendations adopted by CoE on 3 march 2016 reveal⁹). Moreover, these issues are only one aspect of the IPA. There is in addition no mechanism to address all the other impacts of the IPA, despite the fact that the IPA model is creating new rules, and consequently new human rights risks. As access to effective remedies is lacking, specific guarantees should be included in the IPA itself.

The SIA recommendations on including in the IPA effective enforcement mechanisms regarding human rights aspects of the sustainable development chapter and mechanisms addressing the IPA impacts on human rights are then essential. These recommendations should however be specified, providing details on what is to be considered as an "effective enforcement mechanism" and "mechanisms to address impacts of investment agreements on human rights". Past practices have shown the limits of certain mechanisms such as the DAGs, panels instated in sustainable development chapter, or other mechanisms whose activation remains in the sole hands of the Parties. Those mechanisms have proven unable to prevent and solve problems. Adding to this incapacity is a lack of mechanism that combines accessibility (NGOs and affected populations are not allowed to seize directly dedicated mechanisms and ways are lacking to ensure enforcement mechanisms are effectively triggered when needed, they remain left to the goodwill of the Parties), specificity and legitimacy (there are no mechanisms having human rights expertise, being instated specifically in order to address human rights impacts), and effectiveness (lack of enforcement mechanisms that really ensures the reinstatement of legality by linking costs to non-compliance). Mechanisms addressing human rights impacts and providing effective enforcement should, read together, combine those three requirements.

To take these elements into consideration, we suggest replacing draft recommendation 1.5 and its text by¹⁰ :

"General recommendations on sustainable development chapter: Provisions on sustainable development, should include labour and human rights. They should not take a selective approach but rather encompass all related issues. One area of human rights should not be considered less important than others. Human rights provisions should state that the Parties commit to respect all their international human rights obligations, and will develop their legislative framework, including by pursuing ratification of the relevant conventions, in order to better protect human rights. This clause should be complemented by a commitment of the Parties to the IPA to cooperate to that end. Human rights provisions should in addition recall that corporations have the responsibility to respect human

⁸ See for the protection gaps in member states for misconduct of companies abroad : the study of the University of Edinburgh requested by the European Commission, Study of the Legal Framework on human rights and the environment applicable to European enterprises operating outside the European Union, 2014, http://en.frankbold.org/sites/default/files/tema/101025_ec_study_final_report_en_0.pdf; Olivier de Schutter, Gwynne Skinner, Robert McCorquodale, The third pillar, access to judicial Remedies for human rights violations by transnational Business ; Decembre 2013, <http://icar.ngo/wp-content/uploads/2013/02/The-Third-Pillar-Access-to-Judicial-Remedies-for-Human-Rights-Violation-by-Transnational-Business.pdf>; see also for the OECD NCPs the study quote above : OECD Watch, Remedies Remain Rares, http://www.oecdwatch.org/publications-fr/Publication_4201-fr; For the ; FIDH, Corporate Accountability for Human Rights Abuses: A Guide for Victims and NGOs on Recourse Mechanisms, 2012 <https://www.fidh.org/en/issues/globalisation-human-rights/business-and-human-rights/updated-version-corporate-accountability-for-human-rights-abuses-a>

⁹ Recommendation CM/Rec(2016)3 of the Committee of Ministers to member States on human rights and business, 3 march 2016 <https://www.fidh.org/en/issues/globalisation-human-rights/business-and-human-rights/ngos-welcome-adoption-of-new-council-of-europe-recommendation-on>

¹⁰ The following recommendations would have also merit to be reformulated are in consequence less relevant reflected in the new formulation of reco 1.5. "**Chapters should be included in the IPA which encourage the adoption of international labour, environmental and human rights standards by EU and Myanmar investors**" (Reco 1.) **Objectives of CSR/RBC for European companies operating in Myanmar should be included in the text of the agreement, encouraging companies to hold to similar CSR/RBC practices as are upheld in the EU, tailored to local conditions** (reco 1.6).

rights and commit the Parties to cooperate to the implementation of the UN Guiding Principles on business and human rights, as well as all relevant international instruments related to the matter, including by encouraging investors and businesses to take the measures needed to meet their duty of care and human rights due diligence. The sustainable development chapter should be flanked with effective enforcement measures as well as mechanisms to address impacts of investment agreements on human rights,. Among the different mechanisms to address impacts of investment agreements on human rights, the IPA should provide for the establishment of a panel of experts on human rights that should abide by the principle of transparency, involve the adequate participation of human rights defenders and NGOs, and be made able to be seized on specific/individual cases and be focused on prevention and problem solving. It should be accessible to affected populations, their representatives and NGOs. Effective enforcement measures should be built on the experience of existing enforcement mechanisms and specific SD chapters dispute settlement mechanisms. Effective enforcement mechanisms to be provided in the IPA should be able to be seized by affected peoples, their representatives and other organs of the IPA, and be effective through linking costs/sanctions to non-compliance behaviour for example. In addition, while considering lessons from related international initiatives such as the US Burma Investment reporting requirements and the ILO Better Factories programme” should be considered.

Dedicated human rights committee and follow up mechanisms:

The report recommends the establishment, in the IPA, of a specific mechanism or human rights committee to be complemented by a monitoring mechanism dedicated to human rights within the limits of the impacts of the investment agreement (Reco 2)¹¹. This recommendation should be maintained and be better explained.

It should specify that it refers to the human rights obligations and commitments of the parties to the IPA (Burma/Myanmar, the EU and probably its Member States), that should be monitored globally and addressed specifically as long as they are related to the impacts that the IPA may have¹². The human rights committee could share information on the human rights context in which the IPA deploys its effects and ensure that the IPA operates properly. It should supervise and facilitate the implementation of the human rights provisions and seek appropriate ways and methods of forestalling human rights problems that might arise in areas covered by the IPA. This should be linked to the interpretation or application of the IPA. Details should also be given to distinguish the mechanism dealing with human rights in the limits of the IPA from the one recommended in the sustainable development chapter. To that end, it should be, for example, specified that the mechanism provided here (in Reco 2), will be composed by the Parties to the IPA and will address remaining problems. It will clarify that those mechanisms provide complementary ways to solve specific problems and prevent similar ones in the future. They will facilitate the dialogue among the relevant governments, including on the needed adaptations of their respective policy and legislative framework and practice. They are giving, in consequence, additional assurance that the relevant issues will be discussed, even if mechanisms such as DAG or the above proposed mechanisms to address impacts of investment agreements on human rights (such as a panel of human rights experts) did not seize the IPA Institutions, or if they do not see their recommendations followed by results for example. Affected people, their representatives and NGOs, should be allowed to seize the institutional joint party mechanisms. These institutional joint party mechanisms shall seek solutions and seize the dispute settlement mechanism, when needed.

In the text, under recommendation 2, the draft report refers to the OECD National Contact Points (NCP) qualified as a “complementary mechanism” and recommends “the parties to the IPA to discuss how existing NCPs in EU Member States could be asked to look into issues concerning the behaviour of EU companies in Myanmar”. The mention of the OECD NCPs could be justified in regard of the measures to be taken by the Member States to comply with their obligation to provide effective remedies, and by the fact it may be related to the IPA if the companies benefiting from it do not respect human rights standards. However, we propose moving this recommendation to another section of the recommendations (a section dedicated to adding flanking measures for example) to avoid misunderstanding. The recommendation should not lead to the conclusion that the proposal of having a mechanism to deal with the impacts of IPA could be sufficiently covered by OECD NCPs. Indeed, it is

¹¹ “The agreement should consider the feasibility of establishing a specific mechanism or committee for social, labour and human rights standards. This could be complemented by a monitoring mechanism that is dedicated to dealing with human rights, environmental, social and labour impacts within the limits of the impacts of the IPA agreement” (Reco 2.)

¹² The human rights committee could share information and inform on the human rights context in which the IPA deploys its effects, ensure that the IPA operates properly; supervise and facilitate the implementation of the human rights provisions, seek appropriate ways and methods of forestalling human rights problems which might arise in areas covered by this Agreement including regarding the interpretation or application of this Agreement.

clearly recognised that non-judicial grievance mechanisms like the OECD NCP cannot be seen as an alternative to judicial remedies. Member states should fill numerous protection gaps, and the Council of Europe provided several recommendations in that regard on 3 March 2016. In addition, OECD NCPs are, at this time, relatively inefficient. OECD Watch, having monitored 15 years of implementation of the OECD guidelines and assessed the functioning of the NCPs, concluded that very few lead to beneficial results¹³. Of the 250 cases submitted before the National Contact Points, a mere 1 % (so 3 complaints) succeeded in bringing a partial form of remedy to victims¹⁴. OECD NCPs cannot, in consequence, be seen or recommended to adequately address corporate abuse, even if used as a complementary mechanism to the other safeguards proposed in the study. This should appear clearly so as not to allow misunderstanding, knowing that the European Commission actually regularly refers to OECD NCPs. Finally, the OECD National Contact Points cannot address the impacts of the IPA on human rights as such. They do not have the capacity to assess how the IPA clauses affect human rights in practice. They cannot participate in providing adequate corrective measures in that regard (including the ones needed so investor-state dispute settlements do not impede the realisation of human rights). All these fall clearly outside the mandate of the OECD NCPs.

The OECD NCPs cannot be seen as an efficient mechanism to provide effective access to remedies and to address the human rights impacts of an IPA. The related recommendation should be reflected in the report to be understood in that sense. It should in consequence be incorporated in the adequate and dedicated section (flanked and adding measures to be considered beyond the IPA clauses and mechanisms).

On ex-post human rights impact assessments

The draft report recommendation 3 states that “Planned EC funded ex-post social, labour and human rights impact assessments conducted with regard to this IPA should focus on sensitivities identified by the SIA team. The EC is committed to conducting ex-post evaluation of its trade and investment agreements; including of their human rights and related impacts. When conducting these assessments, the analysts should remain vigilant in chapters of the assessment which focus on sectors where investment projects involve land acquisition, due to a history of land-grabbing and the customary nature of land-holding that is prevalent in Myanmar. Sensitivities in this regard lie in ensuring that land acquired has been transferred from its owner on a voluntary basis, and with regards to ensuring enforcement of adequate compensation according to the market value of the land. Should there be any documented cases of the occurrence of abuses tied to EU company investment, the ex-post evaluation team should consider them”.

We welcome this conclusion of the study that should be maintained in the Final Report recommendations. For this proposal to be effective however, we suggest also recommending the insertion in the IPA of a dedicated clause. This clause should oblige the Parties to conduct this ex-post assessment on human rights regularly, and to carry out a full and comprehensive impact assessment on human rights every 5 years. The clause should state that ex-post human rights assessments have to be conducted by an independent body with appropriate expertise in the subject of human rights, and in close cooperation with independent civil society. The clause should finally oblige the Parties to adapt the interpretation given to the IPA, amend its provisions and adjust their application as recommended by the review of the Agreement.

2. On protection against expropriation and other protections

The considerations we found p. 149 of the draft report on expropriation are not duly reflected in the final conclusion¹⁵. To ensure coherence, clarity and efficiency of the study, we insist that they are introduced in extenso in the final recommendations of the final report:

Introduce in the final recommendations the conclusion we found p. 149 “The provision on expropriation should contain an express mention of human rights to encourage a tribunal to consider human rights as falling within the measure that can benefit from the presumption of legality provided by the text on indirect expropriation. Furthermore, an express mention that some measures are not indirect expropriation “regardless of their adverse impact on investments” should be preferred. Lastly, the list of factors to take into account to qualify indirect expropriations should avoid vague reference to “legitimate/ reasonable expectations” of investors, and “character” of the measure, and introduce a

¹³ OECD Watch, Remedies Remain Rares, http://www.oecdwatch.org/publications-fr/Publication_4201-fr

¹⁴ ibidem

¹⁵ “The scope of the investment dispute resolution mechanism should be carefully limited and the right to regulate clause should be designed to give Myanmar freedom to engage in legitimate regulatory actions without facing claims for ‘indirect expropriation’”. (reco 1.1)

hierarchy of criteria that may be otherwise irreconcilable (like the economic effect and character of the measure)".

The specific remark on the necessity to expressly mention human rights to ensure they are taken into account by the investor-state dispute settlement mechanism is key, as studies and investment arbitral tribunals' cases clearly demonstrate. These recommendations should be maintained as reflecting the conclusions of all the relevant literature having assessed the protection of investors against expropriation and its concrete link to the protection of human rights. We suggest enriching the text of the study with a direct referral to these studies.

We believe, however, that this kind of consideration cannot be seen as irrelevant with regard to the other clauses, whether on the right to regulate or others like Fair and equitable treatment (FET). We recommend that the SIA adapt its conclusion in consequence (see below).

3. On the right to regulate and state-to-state dispute settlement

On the recognition of the right to regulate, the SIA draft report suggests that more should be done compared to the existing clauses in current EU models. The draft report recommendations recognises the necessity for the clause to be "strong enough" to allow Myanmar to enact legitimate policy and legislative measures, "especially those taken for the protection of human rights", and this, "without risking facing claims". This recommendation should be maintained. However, this recommendation as such remains too vague to effectively inform on what would be the most relevant wording in order to duly consider and protect human rights.

For the same reasons as those stated in the SIA draft report about expropriation (to ensure that the tribunals consider human rights), it is not sufficient to professionalise judges. First, there is a need to insert an express reference to human rights in the examples given about what could be considered legitimate policy objectives. Indeed, there is absolutely no reason not to explicitly refer to human rights in a clause that recognises public morals as a legitimate objective for example¹⁶. Human rights are international obligations and should be clearly recognised as legitimate objectives also. They are, in addition, better defined and provide more legal certainty. Second, there is a need to detail what the report understands by "strong enough". As the report stated, the aim is to avoid facing claims (not only awards). We ask, in consequence, that the report's recommendations suggest dissuasive measures to prevent abusive or frivolous ISDS claims (like condemnation of the investor to pay for the cost of litigation, to provide compensation, etc.) Indeed, it is reported that arbitration procedures have already been used to threaten and inflict States' willingness and capacity to regulate. To be strong enough, it should clearly recommend that the 'right to regulate' clause explicitly requires that the tribunal cannot consider investment law and human rights law to be two different (and unrelated) sets of norms to be interpreted in isolation from each other (see our letter dated 7 December 2015 for illustrative cases). Such a position favours an interpretation of investment treaties that participates in impeding the capacity of States to meet their obligation to protect human rights including by protecting against human rights violations by private actors, and fulfilling human rights by adopting relevant policies and measures. Express wording in the IPA should ensure the disqualification of this position. A simple reference to the Vienna convention has been proven insufficient. In consequence, we recommend proposing a relevant clause requiring preliminary questions to the human rights treaties' monitoring bodies, or clauses such as "nothing in this Agreement shall be construed as preventing the adoption or enforcement by the parties of measures undertaken for the purpose of respecting, protecting or fulfilling human rights and respecting democratic principles and the rule of law in their internal and international policies or as requiring that Party to compensate the investor therefore". Also, clauses from UN experts¹⁷ reaffirming that human rights prevail could be envisaged.

We suggest that the project team consider the following revised recommendation to be presented in its final report's conclusions:

Replace the draft recommendation (text under reco 1.1) by "Provisions in the 'right to regulate' clause, described in more detail in the background section, need to be strong enough to allow the Myanmar

¹⁶ See in the Vietnam FTA : "The Parties reaffirm the right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, environment or public morals, social or consumer protection or promotion and protection of cultural diversity".

¹⁷ See notably HRC report Human rights, trade and investment (E/CN.4/Sub.2/2003/9), 2 July 2003, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G03/148/47/PDF/G0314847.pdf?OpenElement>; /HRC/19/59/5, Report of the Special Rapporteur on the Right to Food, Olivier De Schutter, *Addendum, Guiding Principles On Human Rights Impact Assessments of Trade and Investment Agreements*, December 2011 ; Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover, UN Doc A/69/299, 11 August 2014, paras 48 to 59. ; Report of the Independent Expert on the promotion of a democratic and equitable international order on the impact of investor-State-dispute-settlement on a democratic and equitable international order (A/70/285), "In particular in the **extractives sector, land tenure and land grabbing** issues remain

government to enact legitimate legislation without facing claims. The Parties should reaffirm the right to regulate to achieve legitimate policy objectives, and an express mention to human rights should be made when providing examples of these legitimate policy objectives. The consequences that this clause may have concretely should also be specified. Given the demonstrated past reluctance of arbitration tribunals to duly consider human rights law when judging on investor claims, the “right to regulate” clause should expressly recognise that the protection given to investors cannot have for effect to impede, even in practice, the capacity of States to protect human rights by controlling and regulating the activity of businesses, and to fulfil human rights by taking relevant policies and measures in accordance to international human rights law. Among the options of available clauses there is: “nothing in this Agreement shall be construed as preventing the adoption or enforcement by the parties of measures undertaken for the purpose of respecting, protecting or fulfilling human rights and respecting democratic principles and the rule of law in their internal and international policies or as requiring that Party to compensate the investor therefore”. The system of preliminary questions can also be envisaged. In addition, dissuasive measures and sanctions should be set up to prevent abusive or frivolous ISDS claims. The dispute resolution mechanism clauses should be clearly confined to investment protection obligations, excluding investor protection and compensation while States take legitimate policy actions, especially those taken for protection of human rights, labour rights or environmental protection”. (additions in bold)

Finally, elements found on p. 150 of the SIA should also be reflected in the final recommendations. It is stated that: “As mentioned above, if Myanmar’s right to regulate is not sufficiently safeguarded, this provision could potentially have a negative impact on all human rights. Nevertheless, investment dispute resolution also provides an opportunity for Myanmar. It is important that failure to respect human rights and implement international human rights standards should be subject to appropriate dispute settlement mechanisms. It should allow Amicus Curiae and state to state dispute settlement mechanisms to guarantee the crucial role of the government to determine and protect the public interest”. It is an important recommendation. Even if it is uncertain that Myanmar will use the State-to-State dispute settlement to protect its right to regulate in the field of human rights, and even if this proposal does not offer affected populations and their representatives the right to directly seize this mechanism, if used, it could help to remedy some problematic interpretation or application of the IPA. The recommendation to allow Amicus Curiae is essential and should be maintained. However, if no direct access to the dispute settlement mechanism is given to affected people and their representatives, it should at least be added that they can seize the institutional committee on human rights or the joint party mechanisms put in place to address the impacts of the IPA and that those joint party institutional mechanisms shall seek solutions and seize the state-to-state dispute settlement for the issue, when needed. In consequence, we suggest adding, in the final recommendation of the SIA report:

The study reveals that if Myanmar’s right to regulate is not sufficiently safeguarded, the IPA could potentially have a negative impact on all human rights. Nevertheless, investment dispute resolution also provides an opportunity for Myanmar. It is important that failure to respect human rights and implement international human rights standards should be subject to appropriate dispute settlement mechanisms. It should allow Amicus Curiae and State-to-State dispute settlement mechanisms to guarantee the crucial role of the government to determine and protect the public interest. If no direct access to the dispute settlement mechanism is given to affected people and their representatives, it should at least be added in the relevant provisions of the IPA creating a committee on human rights and the joint Parties’ mechanisms put in place to address the impacts of the IPA, that affected peoples, their representatives and NGOs can seize them of the issue. Clauses should additionally ensure that these IPA institutions shall seek solutions and seize the state-to-state dispute settlement if needed.

4. On investor-state dispute settlement (ISDS/ICS):

The SIA draft final report proposes that the ISDS/ICS are equipped with due human rights expertise (recommendation 1.2). Given the current reluctance of investment tribunals to duly take human rights into account and their lack of adequate interpretation of the IPA clauses in that regard (tribunals adopting restrictive interpretations not compatible with human rights laws and requirements), this recommendation is essential. To be effective, it should be added that the advice of human rights experts shall be requested even if the parties to the IPA did not raise a human rights objection, exception, or issue. Indeed, practice reveals that parties to the IPA rarely raise human rights in investment cases despite the implication the cases may have for human rights. In addition, because

human rights are a matter of international obligation and international public order, their respect cannot afford to rely exclusively on the fact that by chance, NGOs, academics, experts or affected people submit Amicus Curiae observations. Finally, it should be ensured that the provision of the IPA on 'applicable law' expressly refers to international human rights law. In consequence, we suggest completing the text under recommendation 1.2 as follows:

"To ensure that arbitration tribunals do not disregard human rights, Arbitration panels should include human rights, labour rights and environmental experts. Advice from human rights experts shall be requested even if the parties or third parties to a case did not raise a human rights objection, exception, or issue. The provision of the IPA on 'applicable law' should in addition expressly refer to international human rights law."

Also, the explicit proposal on Amicus Curiae is essential. We suggest maintaining the text found under recommendation 1.2 and completing it as follows:

"The dispute resolution mechanism adopted should be open to third parties (trade unions, affected communities, NGOs) to submit evidence or arguments before the mechanism. To be efficient and to correct the shortcomings of past practice, the clause should oblige the arbitrators to accept Amicus Curiae without making it dependent on direct interest in the case or presenting new arguments. The Parties to the case cannot oppose, the third party should have access to all relevant information and the tribunal should be obliged to duly consider and answer the arguments submitted".

Other proposals found in the text could be usefully reflected in the conclusions (for example, those on performance requirements, those on the extractives sector, land tenure and land grabbing¹⁸, the ones on energy and the telecommunications sector¹⁹). On land grabbing issues recommendations should be clarified. Businesses should, as part of their HRDD measures, take into consideration historical abuse linked to land acquisition and at a minimum require guarantees and cross-check through engaging with relevant CSO actors.

Finally, we regret that some essential issues have not been fully analysed and addressed. Without claiming to be exhaustive, we would like to discuss some of them below in point 2.

2. Address the gaps we found in the study and the lack of assessment of some crucial clauses, and adapt the recommendations in consequence

Investments protected by the treaty, obligation of investors to comply with international human rights law and the calculation of the amount of compensation. The agreement should provide an obligation for the investor to respect not only the domestic law and only at the time of the investment, but to respect all international human rights standards, at the time of the investment and for the entire duration of the investment. The reference to sole domestic law, and certainly when the legislative framework, such as for Myanmar, has been proven not to be in line with international human rights law, not protecting human rights and leading in practice to many violations, is clearly unjustifiable. It is clearly not acceptable to induce that investors are only bound to comply with failing standards. By not expressly recognising that they should comply with international law and that they otherwise encounter financial risks, despite knowing how Myanmar is characterized by an absence of rule of law and lack of access to effective remedies, the IPA fails to duly prevent and avoid irreparable damages. In addition, while States have obligations to respect both sets of rules (investment law and human rights law), it makes sense that the compensation given to investors is calculated in order to take into account the costs of seeking remedy if needed. We think for example of the costs to put the distribution of water in line with sanitary requirements (see the tribunal cases related to this topic where FET compensation have been awarded despite the lack of due investment made by the investor to ensure quality of the water), the costs to ensure fair and equitable compensation to (forcibly) evicted populations (examples were the investor invests in land seized through land-grabbing or that has been obtained through discriminatory land tenure policy existing under apartheid), the costs to compensate the environmental damages

¹⁸ "In particular in the **extractives sector, land tenure and land grabbing** issues remain high risk incidents in the absence of clear land regulatory frameworks in place within Myanmar. This is especially true in conflict areas". "Big development projects have a particularly negative impact on indigenous and vulnerable groups. Forced resettlement and land confiscation along with issues of job insecurity, lack of information sharing (about investment projects as well as new policies) and absence of proper impact assessment could affect communities' entitlement to basic rights. There is therefore a strong need to take adequate measures to protect the rights of indigenous communities. Particular attention should be paid to this issue when purchasing land or operating in conflict affected areas." p. 144

¹⁹ "Assuming that the IPA will lead to greater investment from European companies, the trend will be greater investment across several sectors. **In some sectors, such as** the energy and the telecommunications sector, the risks of serious human rights **concerns are higher**. This could lead to a worsening of the current situation when no sufficient safeguards are present. The IPA should therefore pay specific attention to the risks in these sectors" p. 148

affecting the human rights of local communities, the costs to ensure water is accessible to vulnerable people, etc.²⁰ Those examples may justify that the compensation awarded to the investor is not only calculated by reference to the market value of an investment, but takes into account the costs for the State and/or for the investor to remedy the negative impacts of the IPA, to remedy the negative investment or to remedy the effects of the investor's misconduct on human rights.

Fair and equitable treatment (FET): Studies have documented the negative effect that FET clauses may have on human rights²¹. The SIA appears to have not comprehensively addressed the issue. Assessments should be made on several issues: how the legitimate expectations or representations are defined, the condition in which the contracts that benefit investors may create those legitimate expectations even if they are concluded in contravention of international human rights law, the physical security aspects of the FET in the Burmese militarised context, etc.

The wording of the 'Exceptions clauses': An assessment of their wording and the relevant illustrative arbitral tribunal cases is lacking despite the fact that consulted stakeholders documented how their restrictive wording and interpretation could impair human rights (undue necessity test²², undue intervention in the State's margin of appreciation of the balance of their own national system²³ for example)

Exhaustion of local remedies and 'Fork in the Road' clause : The SIA rejected the recommendation made by the stakeholders on the exhaustion of local remedies. The consultant team argues the Fork-in-the-road clause. However, we have not seen an assessment of the real efficiency of this clause in regard to its concrete wording, the context in Myanmar, and the problematic precedents we can find in investment arbitral tribunals decisions²⁴.

Lack of assessment on the impacts that the agreement may have in the EU is problematic

3. Final and concluding remarks

The recommendations we make in the present note are duly argued, and largely echo the preoccupations that arose during the consultations. For the SIA to reject them it should justify its position by demonstrating that the recommendations it makes effectively conciliate the twin objective of protecting the investor and respecting human rights requirements. The SIA report should be convincing in its reasoning. It should then argue based on all relevant elements, and compare the different options available assessing the concrete wording of the clause, the relevant case law and the specific context in which the IPA will deploy effects (namely the problematic legislative framework, practices and institutional setting in Myanmar with regard to human rights).

These requirements are indeed today clearly established. It is demanded because of the main object of human rights assessments: "By preparing human rights impact assessments prior to the conclusion of trade and investment agreements, States are addressing their obligations under the human rights treaties"²⁵. This applies from a European legal perspective also. According to articles 3, 6 and 21 TEU and article 207 TFEU, trade and investment policies have to be defined and pursued in order to respect, consolidate and support the rule of law, human rights and the principles of international law. To ensure that the EU complies with its obligations, the European Court of Justice (ECJ) actually requires that the EU proves "that the measures it proposes are necessary". It requires, from a human rights perspective, that the EU institutions prove "that they have carefully considered different policy options and have chosen the most proportionate response to a given problem"²⁶. It is to that end that human

²⁰ *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, procedural order n°2, 26 June 2012 ; *Aguas del Tunari v. Bolivia*; *Piero Foresti v. South Africa*

²¹ Dr Joshua Curtis and Dr John Reynolds, "TTIP, ISDS and the Implications for Irish Public Health Policy", July 2015, http://www.cancer.ie/sites/default/files/content-attachments/ttip_full_final_web_160715.pdf

²² EDF-Saur v. Argentina, 2012 ;

²³ See for example Argentina cases and compare to CEDH cases : for example *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentina*, ICSID ARB/03/19, Decision on Liability, 30 July 2010, v.s Dennis GRAINGER and others against the United Kingdom 10 July 2012 : <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-112312>

²⁴ see for example *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 2009-23,, Third Interim Award on Jurisdiction and Admissibility, 27 février 2012, <http://www.italaw.com/sites/default/files/case-documents/ita0175.pdf>,

²⁵ A/HRC/19/59/&dd.5, Report of the Special Rapporteur on the Right to Food, Olivier De Schutter, Addendum, Guiding Principles On Human Rights Impact Assessments of Trade and Investment Agreements, December 2011, p. 7

²⁶ ECJ, C-310/04, Spain v Council ECR I-7318, paras 133-5 ; Commission Staff Working Paper, "Operational Guidance on taking account of Fundamental Rights in Commission Impact Assessments", SEC(2011)567, 6 May 2011, www.fidh.org

rights impact assessments are required prior to concluding trade and investment agreements. Human rights impacts assessments must “support sound policy-making” by analysing “the advantages and disadvantages of available solutions”, leading to the “insertion of safeguards in the agreement” when needed and being transparent and convincing in their thinking²⁷.

The EU Ombudsman, Ms O'Reilly, clearly recalled these principles in her decision dated 26 February 2016 after a complaint submitted by FIDH and its member organisation for Vietnam regarding the EU-Vietnam free trade agreement. She stated that: “As rightly argued by the complainants, the human rights impact assessment is not a collection of data or a response to public opposition, but rather an analytical tool for demonstrating that all necessary factors and circumstances have been taken into account in framing a policy. The human rights impact assessment tool identifies the sources of risks and the human rights impacts on the affected stakeholders at each stage of the implementation of the agreement concerned. Its role is preventive in the first place because when negative impacts are identified, either the negotiated provisions need to be modified or mitigating measures have to be decided upon before the agreement is entered into. [...] As matters stand, it would indeed appear, as argued by the complainants, that the Commission's approach involves concluding the Free Trade Agreement whatever its impact may be, promoting human rights by using traditional policies and tools, and then, where human rights have been negatively affected, carrying out a retrospective human rights impact assessment. Clearly, prior human rights impact assessments are aimed at anticipating and eliminating or avoiding such negative effects on human rights.”²⁸.

These principles require that if the consultant does not keep the recommendations compiled below, specific and convincing arguments should be given explaining why the solution it proposes instead effectively meets the human rights imperatives. Our recommendations are however not to be taken as comprehensive. The draft final report proposed other recommendations that could be maintained. In addition, some others should be refined. Among them we identified calculation of the amount of compensation, Fair and equitable treatment (FET), the ‘Exceptions clauses’, or the Exhaustion of local remedies and ‘Fork in the Road’ clause. Also, other stakeholders consulted made concrete proposals that could be better envisaged in the final report. In consequence, our comments and proposals on the SIA draft final report cannot be read as our recognition that the proposals we made are the most adequate way to protect, respect, fulfill and promote human rights. Probably more respectful alternatives could yet be found and more comprehensive recommendations be made. We choose instead to build our comments on the several merits of the SIA study, with the concrete aim of trying to identify the elements of the SIA that should be better specified to ensure all the EU institutions are fully informed and to avoid misunderstanding.

Based on the SIA findings, we propose that the recommendations to be made in the final report to be published be as follows:

Introductory remark:

Human rights are only protected and respected when Parties of an IPA fulfil their own obligations. However, the SIA has shown that it is not the case in Burma/Myanmar²⁹ and that Burma faces dire situations regarding business related human rights issues. Beyond the responsibility of the Parties to the IPA, there is the responsibility of business enterprises to respect the entire spectrum of internationally recognised human rights. Specific commitments and behaviours (codes of conduct, human rights due diligence, reporting and remedies activities) aid in ensuring that business enterprises effectively comply with their responsibility to

http://ec.europa.eu/justice/fundamental-rights/files/operational-guidance_en.pdf; COM(2010) 543 final, Smart Regulation in the European Union, 8 October 2010, p. 6, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0543:FIN:EN:PDF>

²⁷ Commission Staff Working Paper, “Operational Guidance on taking account of Fundamental Rights in Commission Impact Assessments”, SEC(2011)567, 6 May 2011, http://ec.europa.eu/justice/fundamental-rights/files/operational-guidance_en.pdf; Commission Staff Working Document, “Better Regulation Guidelines”, SWD(2015) 111 final, 19 May 2015, http://ec.europa.eu/smart-regulation/guidelines/docs/swd_br_guidelines_en.pdf; European Commission, DG Trade, “Guidelines on the analysis of human rights impacts in impact assessment for trade-related policy initiatives”, 2 July 2015 http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153591.pdf; Handbook for Trade Sustainability Impact Assessment, Draft 2015; A/HRC/19/59/Annex, Report of the Special Rapporteur on the Right to Food, Olivier De Schutter, Addendum, Guiding Principles On Human Rights Impact Assessments of Trade and Investment Agreements, December 2011

²⁸ EU Ombudsman, Decision in case 1409/2014/MHZ on the European Commission's failure to carry out a prior human rights impact assessment of the EU-Vietnam free trade agreement, 26 February 2016, http://www.ombudsman.europa.eu/cases/decision_faces/en/64308/html.bookmark

²⁹ p. 129 to 144

respect human rights. The SIA recognised that if “CSR may be key in ensuring net impacts are positive” “It is very difficult given available evidence to determine if current CSR initiatives are sufficient” It adds that “While there are clearly opportunities for Myanmar to benefit from increased EU CSR activities as a result of increased investment, it is the conclusion of the project team that it is vital that the text of the IPA offer adequate protections for human rights and the environment.” (p. 105). The SIA concluded that with the context, and under those conditions, “self-regulating company codes of conduct would not be adequate in Myanmar”. It proposed, in consequence, specific protective mechanisms and clauses, including a non-selective approach to human rights, effective enforcement mechanisms, and mechanisms to duly address the impact of the IPA, also recalling that the European Parliament argued that objectives of CSR should be binding for European companies operating abroad (p. 150).

Our recommendations do not imply that the IPA has to solve all human rights problems in Burma, but propose instead ways to ensure that all issues related to the implementation of the IPA that affect human rights are efficiently addressed. The investment agreement should provide efficient mechanisms to alert, prevent, mitigate and remedy the negative impacts it may have on human rights. The clauses protecting investors should be defined in such a way that they protect human rights, provide efficient mechanisms of remediation for unexpected effects of the IPA’s provisions, ensure the investments that it facilitates are implemented in the respect of human rights and that remedies are available and efficient if the investments finally are prejudicial to human rights. Our recommendation should be read as being all complementary relevant and are not redundant

1. On the introduction of dedicated human rights clauses, the obligations of the investment agreement’s Parties, and the human rights mechanisms to be introduced in the IPA:

General recommendations on sustainable development chapter: Provisions on sustainable development, should include labour and human rights. They should not take a selective approach but rather encompass all related issues. One area of human rights should not be considered less important than others. Human rights provisions should state that the parties commit to respect all their international human rights obligations, and will develop their legislative framework, including by pursuing ratification of the relevant conventions, in order to better protect human rights. This clause should be complemented by a commitment of the Parties to the IPA to cooperate to that end. Human rights provisions should in addition recall that corporations have the responsibility to respect human rights and commit the Parties to cooperate to the implementation of the UN Guiding principles on business and human rights, as well as all relevant international instruments related to the matter, including by encouraging the investors and businesses to take the measures needed to meet their duty of care and human rights due diligence. The sustainable development chapter should be flanked with effective enforcement measures as well as mechanisms to address impacts of investment agreements on human rights. Among the different mechanisms to address impacts of investment agreements on human rights, the IPA , the IPA should provide for the establishment of a panel of experts on human rights that should abide by the principle of transparency, involve the adequate participation of human rights defenders and NGOs, and be made able to be seized on specific/individual cases and be focused on prevention and problem solving. It should be accessible to affected population their representatives and NGOs. The effective enforcement measures should be built on the experience of existing enforcement mechanisms of and specific SD chapters dispute settlement mechanisms. The effective enforcement mechanisms to be provided in the IPA should be able to be seized by affected peoples, their representatives and other organs of the IPA, and be effective through linking costs/sanctions to non-compliance behaviour for example. In addition, lessons from related international initiatives such as the US Burma Investment reporting requirements and the ILO Better Factories programme should be considered.

Adding dedicated human rights committee and follow up mechanisms: The agreement should consider the feasibility of establishing a specific mechanism or committee for social, labour and human rights standards. This could be complemented by a monitoring mechanism that is dedicated to dealing with human rights, environmental, social and labour impacts within the limits of the impacts of the IPA agreement. The human rights obligations and commitments of the parties to the IPA (Burma/Myanmar, the EU and probably its Member States), that should be monitored globally and addressed specifically as long as they are related to the impacts that the IPA may have. The human rights committee could be in charge of sharing information and inform on the human rights context in which the IPA deploys its effects, ensure that the IPA

operates properly; supervise and facilitate the implementation of the human rights provisions, seek appropriate ways and methods of forestalling human rights problems which might arise in areas covered by the IPA including regarding the interpretation or application of the IPA. The mechanism dealing with human rights in the limits of the IPA differ from the one recommended in the sustainable development chapter. Composed by the Parties to the IPA and it should notably address the remaining problems (like inadequate legislative framework, policies, practices and others that are participating to put human rights under pressure in the context of the IPA, the clauses of IPA themselves, etc.) The specific mechanism or committee and the mechanism dedicated to dealing with human rights impacts of the IPA, should ensure the relevant issues will be discussed, even if mechanisms such as DAG or the above proposed mechanisms to address impacts of investment agreements on human rights (such as a panel of human rights experts) did not seize the IPA Institutions, or did not see their recommendations followed by results for example. Affected people, their representatives and NGOs, should be allowed seize the institutional committee on human rights or the joint party mechanisms put in place to address the impacts of the IPA. Those joint party institutional mechanisms shall seek solutions and seize the state-to-state dispute settlement for the issue, when needed.

On ex-post human rights impact assessments: Planned EC funded ex-post social, labour and human rights impact assessments conducted with regard this IPA should focus on sensitivities identified by the SIA team. The EC is committed to conducting ex post evaluation of its trade and investment agreements; including of their human rights and related impacts. When conducting these assessments, the analysts should remain vigilant in chapters of the assessment which focus on sectors where investment projects involve land acquisition, due to a history of land-grabbing and the customary nature of land-holding that is prevalent in Myanmar. Sensitivities in this regard lie in ensuring that land acquired has been transferred from its owner on a voluntary basis, and with regards to ensuring enforcement of adequate compensation according to the market value of the land. Should there be any documented cases of the occurrence of abuses tied to EU company investment, the ex-post evaluation team should consider them.

Should also be inserted in the IPA of a dedicated clause that obliges the Parties to conduct this ex-post assessment on human rights regularly, and to carry out a full and comprehensive impact assessment on human rights every 5 years, adding that it has to be done by an independent body with appropriate expertise in the subject of human rights impact assessments, and in consultation with civil society. The clause should also oblige the Parties to adapt the interpretation given to the IPA, amend its provisions and adjust their application as recommended by the review of the Agreement.

2. On the other clauses of the IPA:

With the aim that they are duly taken into account by the investor-state dispute settlement mechanisms, human rights consideration should be better reflected in the different clauses of the IPA including in those dedicated to investor protection

The provision on expropriation should contain an express mention of human rights to encourage a tribunal to consider human rights as falling within the measure that can benefit from the presumption of legality provided by the text on indirect expropriation. Furthermore, an express mention that some measures are not indirect expropriation "regardless of their adverse impact on investments" should be preferred. Lastly, the list of factors to take into account to qualify indirect expropriations should avoid vague reference to "legitimate/ reasonable expectations" of investors, and "character" of the measure, and introduce a hierarchy of criteria that may be otherwise irreconcilable (like the economic effect and character of the measure.

On the right to regulate and state-to-state dispute settlement

Provisions in the 'right to regulate' clause, described in more detail in the background section, need to be strong enough to allow the Myanmar government to enact legitimate legislation without facing claims. The Parties should reaffirm the right to regulate to achieve legitimate policy objectives, and an express mention to human rights should be made when providing examples of these legitimate policy objectives. The consequences that this clause may have concretely should also be specified. Given the demonstrated past reluctance of arbitration tribunals to duly consider human rights law when judging on investor claims, the right to regulate clause should expressly recognise that the protection given to investors cannot have for effect to impede, even in practice, the capacity of States to protect human rights by

controlling and regulating the activity of businesses, and to fulfil human rights by taking relevant policies and measures in accordance to international human rights law. Among the options of available clauses there is “nothing in this Agreement shall be construed as preventing the adoption or enforcement by the parties of measures undertaken for the purpose of respecting, protecting or fulfilling human rights and respecting democratic principles and the rule of law in their internal and international policies or as requiring that Party to compensate the investor therefore” In addition, dissuasive measures and sanctions should be set up to prevent abusive or frivolous ISDS claims. The system of preliminary questions can also be envisaged. The dispute resolution mechanism clauses should clearly exclude investor protection and compensation while States take legitimate policy actions, especially those taken for protection of human rights, labour rights or environmental protection

The study reveals that if Myanmar’s right to regulate is not sufficiently safeguarded, the IPA could potentially have a negative impact on all human rights. Nevertheless, investment dispute resolution also provides an opportunity for Myanmar. It is important that failure to respect human rights and implement international human rights standards should be subject to appropriate dispute settlement mechanisms. It should allow Amicus Curiae and State-to-State dispute settlement mechanisms to guarantee the crucial role of the government to determine and protect the public interest. If no direct access to the dispute settlement mechanism is given to affected people and their representatives, it should at least be added in the relevant provisions of the IPA creating a committee on human rights and the joint Parties’ mechanisms put in place to address the impacts of the IPA, that affected peoples, their representatives and NGOs can seize them of the issue. Clauses should additionally ensure that these IPA institutions shall seek solutions and seize the state-to-state dispute settlement if needed

On investor-state dispute settlement (ISDS/ICS): To ensure that arbitration tribunals do not disregard human rights Arbitration panels should include human rights, labour rights and environmental experts. Advice from human rights experts shall be requested even if the parties or third parties to case did not raise a human rights objection, exception, or issue. The provision of the IPA on ‘applicable law’ should in addition expressly refer to international human rights law. The dispute resolution mechanism adopted should be open to third parties (trade unions, affected communities, NGOs) to submit evidence or arguments before the mechanism. To be efficient and to correct the shortcomings of the past practice, the clause should oblige the arbitrator to accept Amicus Curiae without making it dependent of direct interest in the case or presenting new arguments. The parties to the case cannot oppose, the third party should have access to all relevant information and the tribunal should be obliged to duly consider and answer the arguments submitted

On flanking measures:

The parties to the IPA should discuss all the measure that can help to set up an enabling environment for investment being respectful and supportive to human rights. Among them:

- It should be discussed to discuss how existing NCPs in EU Member States could be asked to look into issues concerning the behaviour of EU companies in Myanmar.
- In particular in the extractives sector, land tenure and land grabbing issues remain high risk incidents in the absence of clear land regulatory frameworks in place within Myanmar. This is especially true in conflict areas”. “Big development projects have a particularly negative impact on indigenous and vulnerable groups. Forced resettlement and land confiscation along with issues of job insecurity, lack of information sharing (about investment projects as well as new policies) and absence of proper impact assessment could affect communities’ entitlement to basic rights. There is therefore a strong need to take adequate measures to protect the rights of indigenous communities. Particular attention should be paid to this issue when purchasing land or operating in conflict affected areas (p.144)

Signatories:

- FIDH
- ALTSEAN-BURMA

FIDH is an international human rights NGO federating 178 organizations from close to 120 countries. Since 1922, FIDH has been defending all civil, political, economic, social and cultural rights as set out in the Universal Declaration for Human Rights. FIDH's headquarters are in Paris and the organization has offices in Abidjan, Bamako, Brussels, Conakry, Geneva, The Hague, New-York, Pretoria and Tunis.