**Questionnaire on Human Rights-compatible International Investment Agreements (IIAs)**

**Feedback of the Government of Malta**

**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?*

Human rights are enshrined in Malta’s constitution and in its national laws and any international bilateral treaty will be enforced on the Maltese in line with the laws. The respect for human rights is also one of the founding values of the European Union of which Malta is a member state. By virtue of the Grandfathering Regulation (Regulation (EU) No 1219/2012), any BIT negotiated after the regulation came into force, has to ensure that it is consistent with the EU’s principles and objectives for external action and the EU’s investment policy, through the inclusion of clauses that are intended to protect and promote human rights.

1. *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?*

During negotiations of our existing BITs with third countries, Maltese negotiators conduct internal governmental consultations to assess various aspects of a future agreement. The existing BITs, that are currently in force, do not have in-built mechanisms or processes, such as an inter-ministerial committee or an ex-ante human rights impact assessment, to assess and ensure that IIAs are compatible with international human rights obligations of Malta. Nevertheless, investments that may be covered by an IIA are subject to all Maltese legislation, monitoring, enforcement, and legal processes available to the Government, including on human rights obligations. Furthermore, in the ongoing reform of the Maltese model BIT, a major consideration is being given on how to include such assessment processes.

1. *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?*

The more modern Maltese IIAs contain a domestic regulation clause ensuring a requirement by investors to comply with domestic laws and regulation for investors to be in a position to benefit from the IIA protections.

In the ongoing process of the reform of the model BIT, Malta aims to strengthen the Governments right to regulate and to ensure its ability to put in place policies that can, among other issues, address gender equality, protect the environment, mitigate climate change and implement SDGs. The process follows the developments in the EU investment policy reform framework over the past 7 years and in line with the Grandfathering Regulation (Regulation (EU) No.1219/2012). In the reform process of the model IIA specific consideration is being given to the following:

a. contain circumscribed investment protection standards that embed the necessary public policy space as in the EU agreements (FET, expropriation etc).

b. safeguard the state’s right to pursue legitimate public policy objectives such as social, environmental, human rights, security, public health and safety;

c. prohibit the enhancement of investment by lowering or relaxing domestic environmental or labour legislation and standards, or by failing to effectively enforce such legislation and standards;

d. promote internationally recognized standards of corporate social responsibility.

e. provide for the transparency of regulations affecting investment and investors;

f. provide for the effective investor-to-state dispute settlement mechanism incorporating either the UNCITRAL Rules on Transparency for Investor State Arbitration, or rules ensuring a comparable level of transparency which allows for submissions by third parties.

1. *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?*

In line with EU policy Malta 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 across the board and be of the highest level regardless of the circumstances. The EU embeds public policy considerations (including the protection of human rights) in its trade and investment agreements, through a carefully crafted set of provisions that ensure the protection of investments form arbitrary or discriminatory state conduct while securing the necessary policy space for the pursuit of public policy objectives.

1. *Is your Government considering to reform or replace the Investor-State Dispute Settlement (ISDS) mechanism in your old or new IIAs? If so, please provide details about the proposed alternatives.*

The Government is currently considering how to reform the ISDS in the overall reform process for the new model IIA. A major consideration is how to reduce conflict of interest of arbitrators within the process of ISDS. For this purpose, consideration is being given to the use of the EU’s codes of conduct for arbitrators which were adopted in its most recently negotiated and finalised Investment Protection Agreements. Another important aspect is the inclusion of a provision for the Parties to revert to the Multilateral Investment Court system (MIC) should this be realized in the future and should both Parties to the IIA be members of the MIC.

1. *Has the Covid-19 pandemic affected your Government’s approach to IIAs and/or ISDS?*

The Covid-19 pandemic has not had any specific implications on the Government’s approach to the IIAs and/or the ISDS. However, it is important to note that within the reform process a number of changes to the model IIA would be important in serving the government’s interest in reacting quickly through public policy measures, including in the health sector, in the interest of citizens and society as a whole.

**Investors’ responsibility to respect human rights**

1. *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?*

As indicated above, the most recent IIAs concluded by Malta that are currently in force contain provisions on domestic regulation, which sets the national standards for investors and investment from the partner country. Within the Maltese and the partner country territory, investment protection can only apply to investment made in accordance with their national laws and regulations, including those relating to human rights. Investors are not exonerated from complying 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.

In the process for reforming the model IIA for Malta, discussions are ongoing to include specific corporate social responsibility provisions as part of the Trade and Sustainable Development section with the objective for the Parties to promote responsible business conduct. Consideration will be given on how to encourage the voluntary uptake of relevant practices by businesses and how to address any disputes that may arise between the parties on CSR provisions. While it is not foreseen to impose these obligations on the investors, they are intended to promote the conditions for the development of relevant domestic legislation.

1. *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 indicated above, the latest Maltese IIAs contain a general domestic regulation provision/s that specifically require investments of investors from the partner country to abide by the respective domestic laws. The laws of Malta provide for the protection of human rights, labour rights and the environment. Such protections stem from international obligations that Malta incurs due to its membership in international treaties on environment and human rights, by virtue of its Constitutions, civil and criminal laws, and, of course, by virtue of the membership to the EU.

For instance, EU Directives on public procurement require Member States to ensure compliance with national, EU and international social and labour standards in the performance of procurement contracts, including human rights obligations and the core ILO conventions. When such laws are not complied with, 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).

1. *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?*

Within the existing Maltese IIAs, there is no specific provisions for investors to conduct human rights due diligence or environmental and human rights impact assessments prior to their investments. However, investors are bound to comply with the Maltese law, on matters such as human rights, environmental protection, labour rights, health and safety laws, etc. Regulatory entities / authorities are involved in 1. establishing the standards for businesses to set up in Malta; 2. monitoring businesses on these matters; and 3. enforcing those laws in a non-discriminatory manner. With regard to the latter, the State through public entities / authorities enforced national law through administrative or judicial action to remedy any failure from investors through their investments in Malta (whether or not these are covered by an IIA).

Furthermore, 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 (and affected Member States) must be informed and consulted. The competent authority decides after having taken into consideration the results of 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. 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 Conflict 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.

At the EU work is ongoing on a legislative initiative on horizontal due diligence for European companies. The proposal could introduce mandatory human rights, social and environmental due diligence, based on existing international due diligence principles 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.

1. *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?*

The Government and its regulatory entities / authorities are responsible to monitor and enforce national laws on equality and to ensure meaningful participation of communities, including marginalized groups and individuals. It is also engaged in providing training and awareness raising in companies on equality rights which are enshrined in the laws of Malta. Corporate Social Responsibility within companies has increasingly become an important image aspect for companies in Malta.

As indicated in our reply to Q9, there is EU legislation in place which applies 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. Under this legislation, such impact assessments should involve meaningful public participation. The requirement for public participation, which traces its origins in the Aarhus Convention, is implemented by Directive 2003/35/EC (known as “the Public Participation Directive”), which contains provisions for a general public participation procedure and 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.

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.

**Access to remedy**

1. *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?*

In case of unlawful or harmful activities, public bodies and aggrieved parties have sufficient legal instruments to:

1. Lodge complaints against investors in front of the relevant public regulatory entities / authorities; and
2. Seek judicial redress or seek remedial action against investors through the competent entity / authority or directly through the Maltese legal system.

The provision of domestic regulation in the IIAs also strengthens the possibilities for affected individuals or communities to seek remedies against investors for human rights abuses linked to investment-related projects, in the host or home countries. However, regulatory standards and the level of protection for individuals or communities country might vary significantly between that offered in Malta and that offered in the IIA partner.

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

To date the Maltese Government has not pursued counterclaims against an investor for human rights abuses linked to their investments.

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

The existing Maltese IIAs that are currently in force do not allow for individuals or communities to file amicus briefs before ISDS or another dispute settlement process. One of the objectives of the revision of the Maltese model BIT is to include a provision on amicus brief in the dispute settlement section of the IIA model.

1. *Does your Government require - under IIAs or otherwise – investors to establish consultations with affected communities, operational level grievance mechanisms that are effective in terms of process and remedial outcome? If so, please provide details.*

As a general rule, mechanisms that address and resolve grievances for affected communities are essential elements in the Maltese legislation.

Malta is also bound by the EU Responsible Minerals Regulation which 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.

**Good Practices**

1. *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.*

As pointed out in replies to other questions, the reform of the Maltese investment policy will be modelled on the EU’s investment policy which 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 for 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 the introduction of carefully crafted provisions that secure, on the one hand, a state’s domestic policy space to regulate in the public interest, while ensuring, on the other hand, the protection of investments, notably the right to property and compensation in case of expropriation or access to remedy, which are also human rights enshrined in the 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 which should provide for effective protections, including impact assessments and effective public participation.

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