

Alternatives for the 'Energy and Raw Materials Chapters' in EU trade agreements

An inclusive approach



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Imprint

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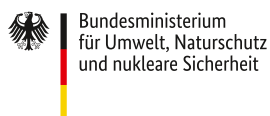
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The responsibility for the content of this publication lies with the author.

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Preface

A recent report by the United Nations Environment Programme shows that mineral extraction has steadily increased in the twentieth century. The report projects further growth in demand, *“as renewable energy sources require much greater amounts of metals [...] than energy production from fossil fuels.”*¹ Reducing raw material consumption and establishing a truly circular economy are the only ways to confront this challenge in a sustainable way. Yet, until such a transition has been achieved, it is imperative to establish a governance framework for the extractive industries that minimises environmental harm, stops human rights abuses and maximises social and economic benefits for affected communities.

The European Union is one of the largest importers of raw materials, with its companies being particularly dependent on the mining of minerals in other parts of the world. To secure a steady supply, the EU has on the one hand set up the Raw Materials Initiative, a programme to ensure access to critical raw materials, in particular minerals. On the other hand, the EU is establishing a network of free trade agreements that contain, in many cases, chapters dedicated to raw materials. These chapters aim to facilitate and protect raw materials exploitation by European companies abroad while paying scant regard to human rights or environmental protection.

This study challenges this approach and asks: What if sustainability and social welfare concerns were priority considerations for the treatment of raw materials in EU trade agreements? On this basis, the authors develop a series of recommendations how raw material chapters could contribute to making raw materials extraction, in particular mining, more sustainable. They lay out clearly and precisely what provisions could be included in a trade agreement so that the needs and wishes of those most affected by extractive activities take the centre ground. While the study addresses the issues at hand holistically, there are inevitably elements that needs further discussion, such as the treatment of artisanal mining.

What the study shows is that trade agreements could be a crucial element in moving raw material extraction towards a more sustainable path. Such a fundamental change, that would regulate rather than liberalise trade in raw materials, could at the same time contribute to the absolute reduction of raw material consumption and a move towards a circular economy in the Global North. It remains to be seen if the EU is willing to leave narrow economic interests behind to pursue a more sustainable future in the raw materials sector.



For the publishing organisations
Fabian Flues, PowerShift e.V.

Executive summary

This study investigates if and how trade and investment in raw materials can be regulated in dedicated energy and raw materials (ERM) chapters in EU trade agreements in order to promote sustainable and environmentally friendly extraction. The study provides the first initial suggestions and tools to address the shortcomings of the current EU approach. These tools and suggestions, intended to improve the drafting language, approach the ERM chapters from the perspective of interests and stakeholders other than EU industry. The perspective taken in this study is that sustainable² extraction of raw materials should be a precondition to trade and investment in those materials and not an afterthought or based on voluntary and individual efforts by the trading countries concluding such agreements. If sustainable extraction cannot be guaranteed, the EU should not enter into a trade and investment agreement with the third country in question.



There is a role for trade agreements in minimising the negative impacts of raw material extraction.

Photo: Parolan Harahap on flickr

We propose elements that would ensure:

1. that sustainable extraction of raw materials is a precondition to trade and investment in those materials;
2. that the interests of all stakeholders affected by trade and investment in the extraction of raw materials are reflected in the language of the provisions, in particular the interests of local communities, indigenous peoples, the environment, and labour;
3. that commitments by the parties are tied to, complement, and foster international efforts to make extraction of raw materials more sustainable;
4. that commitments are a floor and never a ceiling for the regulation of the extraction of raw materials;
5. that monitoring and enforcement of the provisions move away from a strictly economic rationale, towards a rationale based on compliance.

This study proposes several elements as a toolbox that can be included in raw materials chapters. These elements are:

1. provisions on the objectives of the chapter, as well as principles and rights that reflect the above goals;
2. transparency, and participatory, and domestic judicial requirements;
3. substantive standards;
4. strengthening private standards and better engaging the private sector;
5. monitoring and enforcement provisions.

Introduction

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Extraction of raw materials can be damaging for local communities and the environment.

Photo: Hasin Hayder on Unsplash

The European Commission's negotiating mandate for an energy and raw materials chapter in the proposed modernised trade agreement with Chile is exemplary of the shortcomings of the current approach towards the regulation of extraction of raw materials in EU trade agreements. The negotiating directives provide under the heading 'Energy and raw materials':

*'The Agreement should include provisions addressing trade and investment related aspects of energy and raw materials. Negotiations should aim at ensuring an open, transparent, non-discriminatory and predictable business environment and at limiting anti-competitive practices and tackling local content requirements in these areas. The Agreement should also include rules that support and further promote trade and investment in the renewable energy sector. Moreover, it should include provisions aimed at ensuring an unrestricted and sustainable access to raw materials.'*³

The mandate makes it clear that the EU is intent on safeguarding the interests of EU industry. What matters currently is EU market access to raw materials and EU investment opportunities in raw materials extraction.

The mandate on raw materials thus ignores other interests and stakeholders that may be negatively affected by transnational trade and investment in raw materials. These negative impacts are, however, significant. Extraction of raw materials can raise serious issues of human rights abuses, environmental pollution and biodiversity loss, and can have significant negative effects on local communities and indigenous peoples. Liberalisation requirements, in particular prohibition of local content requirements, can also have significant negative effects on sustainable development and empowerment of local communities.⁴

Typical negative environmental effects relating to mining (a very water-intensive industry) are air, soil, and water pollution and landscape alteration during mining activity but also after mines are closed. Of particular importance are issues relating to water scarcity as a result of mining activity, the use of toxic materials in the extraction process, dust, GHG emissions, and loss of biodiversity.⁵ Typical negative social impacts relating to mining are negative impacts on community relations such as tensions and even breakdown in relations between local communities and the government and extraction companies, leading to violence illegal armed groups and armed

militia, labour rights violations, negative effects of land acquisition and resettlement such as displacement and disruption and loss of livelihoods (farming for instance), forced evictions, migration, and community dependency on mining and health problems for workers.⁶ Typical human rights issues relating to mining are arbitrary detention and torture, especially by private security units or militias, negative impact on the rights of indigenous peoples in particular the right to free prior and informed consent, disappearance of people, violence against protesters and killing of members of civil society, local community and media members, violations of environmental rights, loss of land and livelihoods without negotiation or adequate compensation, forced resettlement and the destruction of ritually or culturally significant sites.⁷

These negative impacts are economically incentivized by EU demand in those raw materials and further facilitated through trade liberalization commitments.⁸ Moreover, EU investors may invest in mining projects with these negative effects.

The most obvious shortcomings of the EU's current approach to promote sustainable and environmentally friendly extraction are therefore:

1. the exclusion of interests other than that of EU industry in dedicated raw materials chapters;
2. the almost exclusive focus on trade *liberalisation* commitments over trade *regulation* in these chapters;
3. the separation of economic interests from social and environmental interests in raw materials extraction by moving the latter to more general, secondary, weak and widely criticised sustainable development chapters,⁹ instead of an integrated and dedicated approach to transnational economic activity in the mining sector.

This study investigates if and how trade and investment in raw materials can be regulated in dedicated raw materials and energy chapters in EU trade agreements in order to promote sustainable and environmentally friendly extraction. From the outset, we should emphasise that addressing the severe negative human rights, environmental, developmental, and social impacts in the extractive industry is a vast undertaking that requires extensive regulation at domestic and international level. It also requires significant amount of expertise on environmental, social, and human rights aspects of raw materials extraction. This expertise may



The EU's approach to raw materials in trade agreements has significant shortcomings.

Photo: Liber Europe on flickr

not be present within DG Trade or trade ministries of Member State governments and may require an ideological reorientation of officials working on EU trade policy. Moreover, officials of third countries the EU is engaging with may also only have expertise in trade liberalisation, rather than detailed knowledge of social, environmental and human rights aspects of mining, nor may the governments in question themselves want to address these aspects in an agreement with the EU. The government officials conducting trade negotiations are not the same individuals as indigenous and local communities, marginalised groups, trade unions or civil society organisations. More often than not, government interests are not aligned with these groups.¹⁰ From a purely legal point of view however, there is nothing to prevent the EU and the Member States to incorporate extensive provisions in international agreements with third countries that would regulate transnational business activities in the raw materials sector. In fact, with some neighbouring countries to the EU, association agreements regulating trade incorporate large amounts of EU internal legislation relevant to the extractive industry, including parts of the EU Mining Waste Directive.¹¹

This study's aim is to provide the first initial suggestions and tools to address the shortcomings above. These tools and suggestions

are made to improve drafting of the language of these chapters compared to the current approach from the perspective of interests and stakeholders other than EU industry. They are not meant to be exhaustive nor do all elements need to be included in every single agreement with a third country. In fact, each trading partner of the EU is different and therefore some provisions matter more in one agreement than in another. The study's aim is to take a first step in the reorientation of the thinking on this aspect of EU trade policy, rather than providing an exhaustive and final blueprint of raw materials chapters in EU trade agreements.

The perspective taken in this study is that sustainable extraction of raw materials should be a precondition to trade and investment in those materials and not an afterthought or based on voluntary and individual efforts by the trading countries concluding such agreements. If sustainable extraction cannot be guaranteed, the EU should not enter into a trade and investment agreement with the third country in question. However, the exact details of such arrangements should be considered and negotiated on a case-by-case basis.

In essence, the key objectives of this study are to propose elements that would ensure:

1. that sustainable¹² extraction of raw materials is a precondition to trade and investment in those materials;
2. that the interests of all stakeholders affected by trade and investment in the extraction of raw materials are reflected in the language of the provisions, in particular the interests of local communities, indigenous peoples, the environment, and labour;
3. that commitments by the parties are tied to, complement, and foster international efforts to make extraction of raw materials more sustainable;
4. that commitments are a floor and never a ceiling for the regulation of the extraction of raw materials;
5. that monitoring and enforcement of the provisions move away from a strictly economic rationale, towards a rationale based on compliance.

After discussing the ineffective proposed legal framework of EU FTAs, this study proposes several elements as a toolbox that can be included in raw materials chapters. These elements are:

1. provisions on the objectives of the chapter, as well as principles and rights that reflects the above goals;
2. transparency, participatory, domestic judicial requirements;
3. substantive standards;
4. strengthening standards and better engaging the private sector;
5. monitoring and enforcement provisions.

1. The ineffective legal framework of EU FTAs

In recent years the European Commission has been engaging in discussion and negotiations with some trading partners concerning dedicated Energy and Raw Materials Chapters in EU FTAs. These chapters will be forming integral parts of agreements with countries with which the EU has not yet entered into a FTA, as well as be part of revised texts of agreements already signed. It should be noted from the outset that the practice of the Commission is not fully consistent. For example, no separate Energy and Raw Materials Chapters have been introduced in CETA or in the recently concluded EU-Japan and EU-Vietnam agreements.¹³ This section critically analyses two sets of draft texts made public by the Commission, and will focus exclusively on the provisions pertaining to raw materials, their trade and possible impact on social and environmental conditions. It will thus discuss both the Energy and Raw Materials (ERM) and Trade and Sustainable Development (TSD) Chapters. In light of the similarities between the texts currently under negotiation, this contribution will focus on the Agreements with Chile and Australia given the relative importance of trade in raw materials and commodities between the EU and these two countries.

1.1 Renegotiation of the EU-Chile FTA

In November 2017 the EU and Chile began negotiations on a modernised EU-Chile Association Agreement. The original trade deal was signed in 2002 and entered into force between 2003 and 2005. The modernisation negotiations aim at addressing a number of shortcomings identified by a Commission impact assessment which include the lack of modern investment protection standards, the lack of comprehensive investment liberalisation provisions, the lack of sustainable development provisions, and the lack of tools to facilitate trade and investment for small and medium enterprises.¹⁴ Other shortcomings which should not be left unnoticed include the lack of binding and enforceable labour standard provisions, which were merely covered in a chapter on social cooperation.¹⁵ Among an ambitious list of negotiation objectives, the EU aims at promoting 'smart, sustainable and inclusive growth through the expansion of trade', and 'contributing to the shared objective of promoting sustainable development and EU values such as human

rights, inter alia by including trade-related provisions on labour, environment and gender'.¹⁶ Before the beginning of the negotiations for modernisation, the Commission made public a draft proposal for both an ERM Chapter¹⁷ and a TSD Chapter,¹⁸ which are analysed in the following sections. It should be emphasised that these proposals represent the EU's intentions in these negotiations, drafted in precise legal language, and not the final agreement between the negotiation partners.

1.1.1 EU textual proposal for an Energy and Raw Materials Chapter

The objective of the Chapter is laid out in Art. 1 as to facilitate trade and investment for energy and raw materials, while at the same time improving environmental sustainability. In terms of scope, the raw materials currently falling under the proposal are illustrated in Annex 1. While many of the raw materials with potential negative social and environmental implications are included, such as gold and other precious metals, wood and derivatives products, cotton, copper and other minerals, the scope excludes livestock and general agricultural commodities.

From the outset it is clear that the facilitation of trade in raw materials is couched in much more precise and extensive obligations than environmental sustainability. For example, there is a clear and non-justifiable prohibition of import and export monopoly in Art. 4 and export pricing practices (Art. 5), and detailed provisions concerning markets with regulated prices (Art. 6). Here, the only possible derogation from a system based on supply and demand would be via the imposition of a general economic interest obligation on certain economic operators. Furthermore, Art. 7 contains provisions concerning authorisation for exploration and production of raw materials. Where required, authorisations shall be granted in accordance with domestic law, and with a host of transparency provisions aiming at facilitating access to information and the submission of applications for exploration and production. The Chapter also reiterates in Art. 2 the international law principle of sovereignty over natural resources in a State's territory, including the right to determine which areas are available for production and/or extraction of raw materials.



In November 2017 the EU and Chile began negotiations to modernise their free trade agreement.

Photo: Cissa Ferreira on flickr

While several binding provisions concern energy – in particular transit, interference and unauthorised taking, third-party access to energy infrastructure, regulatory authorities, safety and integrity of equipment and infrastructure, as well as promotion of renewable energy – the provisions in Section IV more specifically applying to raw material are contained in a Section on cooperation. In Art. 15, the parties commit to cooperate on the reduction of trade and investment distorting measures in third countries affecting raw materials, coordinate their positions in international fora in trade and investment issues related to the subject matter of the Chapter, foster exchange of market data, promote research, development and innovation, and foster exchange of information and best practices on domestic policy developments. Point (f) of Art. 15 is the only provision in the Chapter where social and environmental standards are mentioned. The parties commit to ‘promote internationally high standards of safety and environmental protection for offshore oil, gas and mining operations, by increasing transparency, sharing information, including on industry safety and environmental performance’.

In general, the Chapter is extraordinary tilted in favour of trade facilitation and trade liberalisation provisions rather than aiming at the promotion of practices that could lessen negative social and environmental impacts connected to extraction and production of raw materials. There are actually no real provisions addressing sustainability features of raw materials, not even an obligation of environmental impact assessment. The only obligation addressing (vague and unspecified) safety and environmental standards is contained in a hortative provision in the section on ‘Cooperation on Energy and Raw Materials’,

and it is limited to ‘offshore oil, gas and mining operations’ thereby excluding many of the raw materials listed in Annex 1, i.e. those not connected to such operation – such as fertilisers, timber and wooden products, cotton, rubbers and chemicals. It should also be noted that no social standards concerning labour and human rights are mentioned in the Chapter.

1.1.2 EU textual proposal for a Trade and Sustainable Development Chapter

In light of the across-the-board application of the TSD Chapters, an analysis of the potential impact of ERM chapters must include also an analysis of TSD provisions. The proposed TSD Chapter for the EU-Chile FTA contains a list of commitments entered into by the parties concerning sustainable development, social development and environmental protection. Noting that these three goals are intertwined and mutually reinforcing, Art. 1.3 defines the purpose of the Chapter as ‘to enhance the development of the parties’ trade and investment relationship in a way which contributes to sustainable development, notably by establishing principles and identifying actions concerning labour and environmental aspects of sustainable development relevant to trade and investment.’ As in other EU FTAs, the Chapter begins by affirming the parties’ right to regulate, in particular to establish the level of social and environmental protection deemed fit. In Art. 2, parties ‘strive to ensure’ a high level of environmental and labour protection, and not to weaken or reduce the level of protection in order to encourage trade or investment.

Art. 3 addresses international labour standards, which parties shall respect as provided for in the ILO Constitution and ILO Declaration on Fundamental Principles and Rights at Work, with an obligation to implement all ILO Conventions entered into by the other Party. Less mandatory provisions concern the *promotion* of the Decent Work Agenda as set out in the 2008 Declaration on Social Justice for a Fair Globalisation adopted at the 97th Session of the International Labour Conference, and a general and unspecified commitment to ‘adopt and implement measures and policies regarding occupational health and safety’.

Art. 4 covers multilateral environmental governance and agreements. Both parties stress the importance of the United Nations Environment Assembly (UNEA) of the United Nations Environment Programme (UNEP) and a commitment to multilateralism in the response to global or regional environmental challenges. Mutual supportiveness between trade and environment policies is thereby reiterated.

Among the obligations in Art. 4, each Party is required to effectively implement multilateral environmental agreements (MEAs), protocols and amendments to which it is a party. The parties also commit to regularly exchange information regarding ratifications of MEAs, and acknowledge the right to adopt or maintain measures to further the objectives of MEAs to which it is a party. More specifically, Art. 5 addresses climate change-related challenges and the goals set by the United Nations Framework Convention on Climate Change and the Paris Agreement. Parties shall effectively implement the UNFCCC and the Paris Agreement, promote the mutual supportiveness of trade and climate policies, and facilitate the removal of obstacles to trade and investment concerning goods and services of particular relevance for climate change mitigation. The parties also commit to cooperate on trade-related aspects of climate change in the relevant fora.

Art. 6 covers issues of biological diversity in the context of the Convention on Biological Diversity and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), which both parties shall implement effectively. Art. 7 addresses sustainable forestal management. In particular, parties shall implement measures to combat illegal logging and its trade. Less mandatory provisions include the *encouragement* of conservation and sustainable management of forests and consumption of timber. Art. 8 addresses sustainable management of marine biological resources and aquaculture and illegal, unreported and unregulated (IUU) fishing. Parties shall implement long-term conservation and management measures and sustainable use of marine living resources in accordance to relevant UN and FAO instruments and the UN Convention on the Law of the Sea. Less precise obligations provide, generally, for the implementation of effective measures to combat IUU fishing, and the promotion of responsible aquaculture.

Art. 9 contains provisions on trade and responsible supply chain management. In light of the potential of supply chain governance to yield positive social and environmental impact especially in raw materials value chains, the lack of precise and binding language in the Chapter is disappointing. While both parties recognise the importance of responsible management practices, their obligations are limited to the *promotion of corporate social responsibility* via a supportive policy framework and the encouragement of industry uptake of best practice, as well as the *support* of dissemination and use of international standards such as the OECD Guidelines for Multinational Enterprises, the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy,

the UN Global Compact and the UN Guiding Principles on Business and Human Rights.

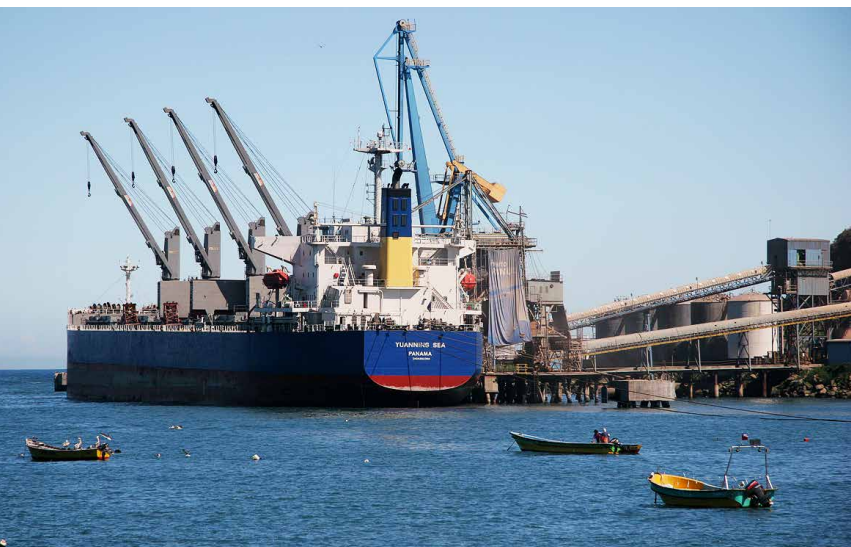
Finally, the need for science-based measures is invoked in Art. 10, as well as the use of precaution in the lack of scientific certainty in connection to a potential threat. Provisions in Art. 11 provide for transparency in the implementation of measures aimed at protecting the environment and labour conditions that may affect trade or investment, as well as trade or investment measures that may affect the protection of the environment or labour conditions.

The most problematic elements in the TSD Chapter, with profound repercussions for a possible social and environmental framework for raw materials, concern dispute settlement. It seems clear that the main strategy for enforcing sustainable development provisions in the FTA is limited to cooperation, societal monitoring, dialogue and, eventually, naming and shaming by means of a Sub-Committee on Trade and Sustainable Development (Art. 13). Art. 14 removes dispute settlement concerning the subject matter of the TSD Chapter from regular dispute settlement under the FTA. Instead, a specialised dispute settlement provision is available under Art. 15 for the parties to invoke in case of disagreements concerning the interpretation or application of the Chapter. If consultations are unsuccessful, a specialised Panel is formed composed of independent members with specialised knowledge in labour or environmental law, the issues falling under the scope of the Chapters or in the resolution of disputes under international agreements. The general terms of reference of this panels are to examine the matter referred to in the request for the



Chuquicamata, Chile: For the EU, facilitating trade in raw materials takes precedence over environmental, human rights or labour issues.

Photo: Bruna Fiscuk on Unsplash



Port San Antonio, Chile: The EU's proposal for a Trade and Sustainable Development Chapter lacks teeth.
Photo: Matt Hints on flickr

establishment of the Panel of Experts, and to issue a report with findings and recommendations for the resolution of the dispute.

Unlike the general dispute settlement provisions under the FTA, this 'specialised' proceedings do not foresee any actual sanctions, nor the possibility to suspend concessions made under the rest of the Agreement in case of non-compliance with the TSD Chapter. This shortcoming seriously limits the potential effectiveness of dispute settlement provisions, and risks turning the entire Chapter into little more than a collection of empty commitments. Coupled with the frequently hortatory and non-committal language in the rest of the Chapter, as well as a vague formulation of mandatory obligations which make them hardly enforceable (i.e. 'Each Party shall implement measures to combat illegal logging and related trade'), such dispute settlement provisions hardly represent an effective mechanism for enforcing social and environmental standards in the scope of application of the FTA in general, and its ERM Chapter in particular.

1.2 EU Proposal for an EU-Australia FTA

The Council of the EU authorised opening the negotiation of a FTA with Australia (as well as New Zealand) in May 2018. Currently, EU-Australia trade relations take place on the basis of a 2008 EU-Australian Partnership Framework.¹⁹ It provides a forum to strengthen bilateral and multilateral dialogue in support of mutual foreign policy interests and it forms the basis to further promotion and expansion of a bilateral trade and investment relationship. A possible future EU-Australia FTA would more ambitiously aim to pursue a broad

combination of economic and non-economic goals ranging from the removal of barriers to trade and investment to the promotion of smart, sustainable and inclusive growth, to the creation of employment opportunities and increased benefit to consumers of both parties.²⁰ The EU proposed Chapters both on Raw Materials and Sustainable Development, while open for negotiations between the parties, are nonetheless indicative of the EU's approach and intentions on trade liberalisation and non-trade concerns surrounding extraction, trade and investment in raw materials.

1.2.1 EU textual proposal for an Energy and Raw Materials Chapter

The text made public by the EU²¹ presents several similarities with those under negotiation with Chile. The objective of the ERM Chapter similarly attempts to balance trade and investment with environmental sustainability. Also in this case, the balance seems to be tilted towards the former. However, a few more obligations with a potential positive impact on social and environmental conditions are present, albeit in a rather 'soft' form. Exactly as in the proposed text for the EU-Chile FTA, the most precise provisions are those concerning trade liberalisation, i.e. the prohibition of import and export monopolies, the prohibition of export pricing, and the possibility to regulate domestic prices only via a public service obligation. Also this proposed ERM Chapter contains detailed provisions for enhancing transparency and efficiency concerning authorisation for exploration and production of raw materials. Many of the most precise obligations refer to energy rather than raw materials.

Different from the proposed Chile ERM Chapter, and for reasons that are difficult to fathom, Art. 8 includes a provision requiring parties to ensure environmental impact assessment. This should happen prior to granting authorisation to projects for the production of raw materials, and where the project may have a significant impact on population and human health; biodiversity; land, soil, water, air and climate; as well as cultural heritage and landscape. The impact assessment shall allow interested parties to comment. It should be noted that human rights impacts, often at high-risk in connection to projects involving, for example, mining, are not included in the scope of the impact assessment. This may be particularly worrisome in a country with marginalised indigenous communities such as Australia, where extensive community and land tenure rights claims may be present. Furthermore,



Quarry in Barossa Valley, Australia. Photo: Dion Beetson on Unsplash

the impact assessment is not binding on the relevant authorities, which only have to take into account its outcome.

Other provisions which are not present in the Chile ERM draft text include an Article on 'Research, development and innovation', under which parties shall promote research, development and innovation in the areas, inter alia, of raw materials. Art. 14 provides (very limited) margins to include social and environmental considerations, however couched in a predominantly economic and market rationale. More specifically, the EU and Australia commit to promote the dissemination of information and best-practices on environmentally sound and economically efficient raw materials policies, as well as cost-effective practices and technologies. They also commit to the promotion of research, development and application of energy-efficient and environmentally sound technologies, practices and processes which would minimise harmful environmental impacts in the relevant supply chains.

In line with the Chile text, an Article on 'Cooperation' enumerates a series of commitments including in the social and environmental domain. While many of these commitments are specific for energy, some are nonetheless relevant for raw materials as well. In particular, under Art. 17 parties commit to reduce or eliminate trade and investment distorting measures in third countries; coordinate their positions in the relevant international body, promote corporate social responsibility in accordance with international standards as the OECD Guidelines for Multinational Enterprises and the respective Due Diligence Guidance; promote responsible sourcing and mining globally as well as maximise the contribution

of their raw materials sectors and associated industrial value chains to the fulfilment of the UN Sustainable Development Goals; and to promote the efficient use of resources.

As in the text under negotiation with Chile, also this proposed text follows an approach predominantly aimed at liberalising and facilitating trade rather than simultaneously advancing practices that could lessen negative social and environmental impacts connected to extraction and production of raw materials. The only improvement is represented by the presence of an obligation to conduct environmental impact assessments which, however, fails to include negative human rights impacts in its scope. Finally, while Art. 17 makes an expressed reference to an international standard – the OECD Guidelines – and to responsible sourcing practices, the obligation is couched in such non-committal terms that render it hardly enforceable.

1.2.2 EU textual proposal for a Trade and Sustainable Development Chapter

The proposed TSD Chapter²² is also closely aligned to the text under negotiation with Chile. Its goal is to 'enhance the integration of sustainable development, notably its labour and environmental dimensions, in the parties' trade and investment relationship'. It contains comparable obligations on the right to regulate, multilateral labour standards and agreements, as well as multilateral environmental agreements. Mirroring the text discussed above, similar provisions address in Art. 5 trade and climate change; trade and biological diversity in Art. 6; trade and forests in Art. 7; trade and

sustainable management of marine biological resources and aquaculture in Art. 8, trade and responsible supply chain management in Art. 9. Art. 10 refers to the need to adopt measure on the basis of scientific evidence, as well as the use of precaution in the lack of scientific certainty in connection to a potential threat. Art. 11 contains similar transparency provisions. Art. 15 provides for very similar dispute settlement provisions as under the proposed TSD Chapter with Chile, removed from the potentially more effective dispute settlement mechanisms under the FTA.

1.3 A synthesis of legal shortcomings

Even just a cursory review of the ERM and TSD Chapters in two FTAs under negotiation reveals a number of structural legal shortcomings that must be urgently addressed in order to properly integrate social and environmental concerns into the EU trade agenda. Shortcomings are even more evident in the area of raw materials where, in light of the almost complete lack of enforceable and precise social and environmental obligations in the dedicated Energy and Raw Materials Chapters, all possibilities to ensure sustainable exploitation and exploration fall back on the weak and basically unenforceable TSD Chapter. The combined reading of ERM and TSD Chapters reveals thus a number of problems.

As discussed in the analysis above, the most serious problem in view of ensuring sustainability in trade and investment in raw materials is the predominately hortatory character and lack of specific language connected to social and environmental obligations. Such obligations are either relegated to the context of provisions on cooperation between the parties, or characterised by non-committal language such as ‘the parties shall strive’ or ‘shall promote and support’. On occasions, such obligations are couched in such general terms that enforcement would be very complicated even under a proper dispute settlement mechanism. Much more precise obligations are therefore needed. This should be operationalised by clarifying from the outset coordinates and boundaries of social and environmental objectives, and then specify the actual extent of commitments, for example by indicating procedural and substantive obligations that the parties must respect and/or incorporate in their legislation. This would contribute to turning Chapters *de facto* aiming at the liberalisation of trade and investment in raw materials into Chapters more effectively *regulating* social and environmental components connected to trade and investment in raw materials.

A second crucial aspect relates to the decoupling of social and environmental concerns. While the Chile FTA ERM Chapter fails to address either of them, the Australia ERM Chapter seems to focus more on environmental impacts than social impacts (including human rights), as evinced by the obligations connected to environmental impact assessment. Also a holistic human rights dimension seems to be lacking in the TSD Chapters, whose obligations focus exclusively on labour rights. Human rights apart from labour rights instead only appear in connection to corporate responsibility and responsible supply chain management.

Furthermore, the conflation of these two terms is rather problematic, given that they identify different phenomena. While corporate social responsibility is connected to voluntary practices of corporations towards specific stakeholder groups usually identified by the corporations themselves, responsible supply chain management is linked to a societally expected responsibility of business conduct throughout their operations, and grounded in the United Nations Guiding Principles on Business and Human Rights. Furthermore, both the ERM and the TSD Chapters only marginally address potentially impactful guiding principles for corporate practices such as social and environmental due diligence, which could be operationalised by making them mandatory as part of a trade agreement (see section 2.5).

Finally, the dispute settlement provisions and the institutional provisions suffer from a serious lack of actual ‘teeth’ that could spur parties towards compliance. To remove social and environmental aspects from the more effective formal dispute settlement proceedings under the FTA seriously undermines their enforceability. The agreement should provide the possibility to suspend and remove of concession and even to retaliate in case of failure to comply with social and environmental obligations. In addition, even the watered-down dispute settlement under the TSD Chapter is only accessible to the parties, thereby not allowing civil society to directly file claims and complaints.

Possible options to improve the legal framework of EU FTAs include either the strengthening of ERM chapters with precise, raw-materials specific, and enforceable sustainability obligations, or reinforce TSD Chapters altogether. Whatever venue is chosen, a series of issues must be addressed. Section 2 now turns to discuss each of them into detail.

2. A new legal framework for raw materials. From liberalisation to regulation of trade in raw materials



Supporting the sustainable management of global natural resources is among the EU's fundamental principles. Photo: Casey Horner on Unsplash

As a preliminary matter we recall that with the Treaty of Lisbon the EU Treaties require the EU institutions to integrate the EU's external objectives and principles such as human rights, social, and environmental protection into EU trade policy.²³ These principles and goals articulated in Article 21 (1-2) TEU include:

1. democracy;
2. the rule of law;
3. the universality and indivisibility of human rights and fundamental freedoms;
4. respect for human dignity, the principles of equality and solidarity;
5. respect for the principles of the United Nations Charter and international law;
6. foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty;

7. help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development.

The EU is required to respect and pursue these principles and objectives and shall ensure that the EU is consistent in different areas of external action, including its trade policy, development policy, environmental policy and social policy.²⁴ Furthermore, Article 11 TFEU specifically states that 'environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development.' These foundational legal principles of the EU demonstrate that from a strictly legal perspective alone the EU can and perhaps should do more when it comes to integrating social, environmental, and human rights concerns in its trade policy.

2.1 Objectives and principles of the Raw Materials Chapter

2.1.1 Formulation of the objectives

The Commission's current textual proposal on the objective of the raw materials chapter for the agreement with Chile is

*The parties aim at facilitating trade and investment in the areas of energy and raw materials, and improving environmental sustainability in these areas, in accordance with the provisions of this Agreement.*²⁵

We suggest to shift the aim of the chapter's provisions from a strict orientation towards trade *liberalisation* and facilitation to trade *regulation* with a view of protecting public interest objectives such as development goals and environmental, social and human rights protection. The chapter's aim would evolve from catering to the interests of EU industry to aiming at accommodating a wider range of interests that can be affected by extraction activities. We emphasise two further aspects that should be considered in the provision on objectives. First, the temporal scope of the objectives of the chapter should explicitly

cover future sustainable development. Governments may choose to progressively raise their environmental ambitions, for instance, as is provided for under the Paris Agreement.²⁶ The raw materials chapter should encourage and not restrict the ability of governments to do so when they regulate mining activities, for instance when adjusting water use permits or further curbing GHG emissions. Thus, the EU should not strive for a ‘predictable business environment’, but rather a regulatory environment that is adaptive to the needs of all affected parties, including current and future generations.²⁷ Second, the chapter’s aims should take into account how extraction can benefit local communities as opposed to obtaining the lowest price and unrestricted access to raw materials for EU industry as is currently required by the negotiating mandate of the Commission.²⁸ This aim should inform the existence of provisions enabling local content requirements, price regulation, and import and export monopolies.

In short we suggest to include the following elements in a future objectives provision for raw materials chapters:

1. A sentence that makes clear that the parties aim at ensuring that trade in the areas of energy and raw materials is conducted on the condition that such trade has no adverse impact on current and future sustainable development in the country of extraction;
2. A sentence that the regulation of trade in the areas of energy and raw materials shall be based on a number of elements such as:
 - a. local benefit;
 - b. social progress and inclusion;
 - c. a high level of protection and improvement of the quality of the environment, especially in relation to GHG emissions and water; and
 - d. respect for human rights and the rights of local and indigenous communities.

2.1.2 Rights and Principles

While the Commission’s textual proposal to Chile does highlight the sovereignty of the country of extraction over its natural resources, it does not contain any explicit references to legal principles that are crucial for sustainable extraction of raw materials.

Considering the negative impacts of the extractive industry in the past on the environment and human rights, we suggest that parties commit to basing their domestic raw materials policies on the following non-exhaustive list of legal rights and principles:

1. the precautionary principle;
2. the principle that preventive action should be taken to avoid environmental damage;
3. the principle that environmental damage should as a priority be rectified at source;
4. the principle that the polluter should pay;
5. the right to drinkable water;
6. transparency and openness of decision-making;
7. the principle of free prior and informed consent in relation to land tenure and use, as well as strict compliance with all internationally recognised human rights obligations, including human rights due diligence.

The first four principles (1.-7.) are well-known principles of international environmental law that also feature in the EU Treaties. These principles inform basic but important environmental obligations for mining companies under EU law.²⁹ Given the significant concerns over the extensive use of water by the extractive industry, it would be important to recognise the interests of others such as small-scale farmers and local communities in having access to drinkable water in areas where mining takes place. The human right to drinking water (v.) and sanitation is recognised in UN General Assembly Resolution 64/292 and the first recital of the EU Water Framework Directive states “*water is not a commercial product like any other but, rather, a heritage which must be protected, defended and treated as such*”.³⁰ Access to government-held information (vi.) is also essential for citizens, local communities, indigenous communities, and civil society organisations to ensure that mining operations are conducted in accordance with the applicable rules. Transparency and openness of decision-making is enshrined in the EU Treaties and the Charter.³¹ The principle of free prior and informed consent in relation to land tenure and use (vii.) is an important principle

of international law for indigenous peoples and will be discussed further below.

2.2 Transparency and democracy

Rules on transparency and participation in decision-making is essential for the proper functioning of a sustainable extraction industry. This is in principle also recognised by the extraction industry through a wide array of toolkits, guidance, and standards the industry uses.³² In particular, laying down rigorous consultation and information disclosure requirements for undertakings at all stages of extraction projects, especially at the early stages, prevents conflicts with governments, local communities, local undertakings, and civil society organisations.³³

2.2.1 The Right of free prior and informed consent and the rights of indigenous peoples

Raw materials can often be found under land that is closely associated with indigenous peoples. In the past extraction of minerals has led to indigenous peoples and communities being dispossessed, discriminated against, and disadvantaged.³⁴ A key component to protect the rights of indigenous peoples and communities is the principle of free, prior and informed consent in relation to land tenure and use (FPIC).³⁵ This principle seeks to ensure that when an extraction project uses lands, the entities involved should have obtained FPIC. 'Free' should be understood as meaning that there should be no coercion, intimidation, or manipulation by undertakings or governments and there is no retaliation in case indigenous peoples do not give their consent. 'Prior' means that undertakings or governments should seek and receive consent before any activity on the land of indigenous peoples and communities takes place and that these groups have sufficient time to consider giving consent. 'Informed' means that project developers engage in full disclosure of their plans so that indigenous communities fully understand the impact of these plans on them. 'Consent' means that indigenous peoples have a real choice and that there is widespread consent within the community and not just consent by a small elite group of that community.

FPIC features most notably in Article 6 of ILO Convention 169 but its tenets are also part of many other international and European instruments, such as the UN General Assembly 2007 Declaration of the Rights of Indigenous Peoples³⁶, the Convention on Biological Diversity³⁷, the Rio Declaration on Environment



Indigenous groups like the Mapuche in Chile are fighting extractive projects to preserve their traditional lands.
Bildunterschrift: Photo: Esteban Ignacio on flickr

and Development³⁸ and the EU Council Resolution on Indigenous Peoples within the Framework of the Development Cooperation of the Community and the Member States of 30 November 1998 which states that "*indigenous peoples have the right to choose their own development paths, which includes the right to object to projects, in particular in their traditional areas*".³⁹ Raw materials chapters should build on these international instruments and explicitly recognize this right of indigenous peoples and communities. They should include the explicit right of indigenous peoples and communities to reject raw material extraction projects.

2.2.2 Transparency and access to documents

The EU's current approach in trade agreements is to highlight the importance of transparency in connection to administrative and legal requirements affecting trade and investment. However, this is done solely from the perspective and interest of EU industry seeking to undertake economic activities abroad. For instance, the Commission's textual proposal on raw materials for the agreement with Chile would impose transparency obligations in relation to authorisations for exploration and

production of raw materials for the purposes of enabling 'potentially interested applicants to submit applications'.⁴⁰ The Commission's textual proposal fails to consider the issue of transparency from the perspective of others affected by the extraction of raw materials (local and indigenous communities, trade unions, environmental organisations). This is not only problematic from the perspective of those that are ignored in the Commission's proposal, but also overlooks the wider benefits of greater transparency in the regulation of the extractive industry. Greater transparency provides safeguards against corruption, contributes to an undertaking's social licence to operate and ensures that any potential downsides to extraction projects are identified at the earliest possible stage. This is also in the interests of the extractive industry itself as it prevents projects from running into political difficulties later on when significant investments may have already been made. Transparency requirements should therefore be drafted in a way that ensures that citizens, local and indigenous communities, and public interest organisations have early and full access to any government held information relevant to the extraction of raw materials in the country. Furthermore, parties should commit to laying down public reporting and monitoring obligations of undertakings active in the extractive industry.

The following elements to provisions on transparency and access to documents relating to extraction of raw materials should be considered:

1. Publication of contracts between the government and the extractive industry on a publicly available website that can be fed into databases such as <https://www.resourcecontracts.org/>, as well as permits applied for and held by the extractive industry;
2. Implementation of the Extractive Industries Transparency Initiative Standard⁴¹ which must include the publication of the beneficial ownership of the economic operators;
3. A right of the public to request and obtain all government held information relating to extraction of raw materials. The definition of information should be construed as widely as possible, and should include information on known raw materials deposits, land ownership, and planning and permitting documentation;

4. A commitment from the parties to lay down public reporting and monitoring obligations of undertakings extracting raw materials including state-owned enterprises on the goals of its extraction projects, revenue streams, impact assessments, geological information relevant to assess the extent of mineral deposits, and development and closure plans of mines;⁴²
5. A right for the public to access to all documents submitted in the context of social, environmental and human rights impact assessments, at any stage of the project.

2.2.3 Enforcement and introduction of domestic laws on environmental, social and human rights aspects of mining

Enforcement and introduction of domestic laws protecting labour, human rights and the environment is an important issue in mining. In some countries, there is a lack of effective enforcement of such laws. Current sustainable development chapters in EU FTA's have provisions on banning lowering levels of protection of the environment or labour laws and on enforcement of those laws.⁴³ These provisions are a step in the right direction, but they do contain important shortcomings, as is evidenced by the outcome of the interpretation of a similar provision in CAFTA in the recent US-Guatemala labour dispute.⁴⁴ While these provisions suggest that they prevent lowering levels of environmental protection or failure to enforce domestic laws, they contain such significant qualifications that they have limited practical use. In CETA, for instance, Article 24.5 (3) suggests that a Party shall not fail to effectively enforce its environmental laws. However, this provision makes clear that a Party is only prohibited from doing so (1) 'through a sustained or recurring course of action or inaction' (2) in order 'to encourage trade or investment'. Similar language exists for the ban on lowering levels of environmental protection.

This sets a very high burden of proof on the other Party to demonstrate that the Party in question failed to effectively enforce their environmental laws. Indeed, in the *US-Guatemala* dispute, the Panel in question found that while Guatemala had failed to enforce court orders and fines concerning several employers that had fired workers who had attempted to engage in union activities, the United States had failed to demonstrate that Guatemala had done so 'in a manner affecting trade'. We suggest to amend or delete the

qualifying language currently in EU FTA's, or reverse the burden of proof for the qualifying language. Thus, when a Party is found to lower its level of protection or is found to have failed to effectively enforce its domestic laws, that Party needs to plausibly demonstrate that this was **not** done in order to attract trade and investment.

Moreover, we suggest to include a clarifying provision that nothing in the agreement shall prevent parties from raising in good faith domestic environmental, labour, and human rights standards, including during an extraction project. We also suggest to prohibit parties from including 'stabilisation clauses' in contracts with undertakings in the extraction industry.⁴⁵ Such clauses 'freeze' the regulatory environment for undertakings in the extractive industry, shielding them from stricter rules adopted at a later stage by the government.

In short we suggest including the following elements in any provision on domestic introduction and enforcement of environmental, labour, and human rights law:

1. a strong clause preventing parties from lowering the levels of protection;
2. a clause obliging parties to ensure effective enforcement of these laws, possibly including funding arrangements among the parties in the case the agreement is negotiated with developing countries;
3. a clause that makes clear that noting in the agreement shall prevent parties from introducing stricter domestic legislation, including unilateral trade and investment measures addressing social and environmental harm abroad;
4. a clause explicitly allowing for local content requirements for local development purposes;
5. a clause banning parties to use 'stabilisation clauses' in mining contracts;
6. a clause confirming right to regulate also after a concession for exploration and exploitation is granted.

2.2.4 Involvement of local communities and participatory rights

Many social, environmental, and human rights problems that are the result of mining activities can be prevented by adequately and



Trade agreements should support the enforcement of domestic laws. Photo: Joakim Honkasolo on Unsplash

timely consulting with local communities and public interest organisations. It also prevents extraction companies from losing significant amounts of investment because a lack of a social licence to operate results ultimately in shutting down mining operations. In line with the second pillar of the Aarhus Convention, we therefore recommend including provisions in the raw materials chapters that commit the parties to giving the public participatory rights in decision-making surrounding the planning, carrying out, and closure of mining activities.

We would recommend to consider the following elements:

1. ensure that the population shall be informed early in a decision-making procedure pertaining to mining activities, and in an adequate, timely and effective manner, inter alia, of:
 - a. the proposed activity and the application on which a decision will be taken;
 - b. the nature of possible decisions or the draft decision;
 - c. the public authority responsible for making the decision;
 - d. the envisaged procedure, including when the procedure starts and the opportunities for the public to participate.

2. ensure that all information is available to the public relevant to the decision-making procedures pertaining to mining activities including:

- a.** description of the site and the physical and technical characteristics of the proposed activity, including an estimate of the expected residues and emissions;
- b.** description of the significant effects of the proposed activity on the environment;
- c.** description of the measures envisaged to prevent and/or reduce the effects, including emissions;
- d.** alternative options;
- e.** the main reports and advice issued to the public authority.

3. allow and enable citizens, communities and public interest organisations to submit any comments, information, analyses or opinions that it considers relevant to the proposed activity and ensure that due account is taken by the authorities of the outcome of this public participation.

4. ensure that when the decision has been taken by the public authority, this information is made publicly available and that such a decision states the reasons and considerations on which the decision is based.

2.2.5 Access to justice

Access to justice for violations of environmental, social, and human rights obligations in the context of raw materials extraction for citizens, communities, unions, and civil society is essential for the effectiveness of these provisions. In the context of environmental law, the EU is party to the Aarhus Convention where access to justice in environmental matters is the third pillar of that convention. The CETA provides a good provision requiring the parties to provide access to justice in environmental matters in the Trade and Environment Chapter although it is only linked to environmental protection and contains an unfortunate qualification that it is 'pursuant' to a previous provision that is limited in scope.⁴⁶

Nonetheless, an access to justice provision could be inspired by this provision and include:

1. an obligation to ensure that administrative or judicial proceedings are available to citizens, communities and public interest groups who maintain that a right is infringed under its law, in order to permit effective action against infringements of its environmental, labour, and human rights law, including appropriate remedies for violations of such law.

2. commitments that these proceedings are not unnecessarily complicated or prohibitively costly, do not entail unreasonable time limits or unwarranted delays, provide injunctive relief if appropriate, and are fair, equitable and transparent, including by:

a. providing defendants with reasonable notice when a proceeding is initiated, including a description of the nature of the proceeding and the basis of the claim;

b. providing the parties to the proceeding with a reasonable opportunity to support or defend their respective positions, including by presenting information or evidence, prior to a final decision;

c. providing that final decisions are made in writing and give reasons as appropriate to the case and based on information or evidence in respect of which the parties to the proceeding were offered the opportunity to be heard; and

d. allowing the parties to administrative proceedings an opportunity for review and, if warranted, correction of final administrative decisions within a reasonable period of time by a tribunal established by law, with appropriate guarantees of tribunal independence and impartiality.

3. availability of administrative and judicial proceedings for the public to guarantee the right to access to documents.

Local content provisions

It is well established that only under the proper conditions (foreign) investment in the extractive industry has the potential to generate positive impact for development in the country of operation.⁴⁷ It is crucial to provide an appropriate legal framework ensuring that mining operations are not exclusively ran and managed by foreign personnel and with the almost exclusive employment of foreign inputs. In other words, to ensure positive development and not just constitute a foreign 'enclave', extractive operations should generate local benefit, e.g. by employing local workers and using national products and services. This would have a positive impact on employment and skills, increased domestic investment in association to foreign investment, potential technology and knowledge transfer, as well as increased governmental revenues. Provisions in the FTA should therefore explicitly state that the limitations of local content regulation expressed in the WTO Agreement on Trade-related Investment Measures (TRIMS)⁴⁸ do not apply, and stipulate instead a number of local content requirements that host countries are free to implement either in legislation or in the context of a bilateral contract with the investor.

These may include:

1. An obligation for the investor to hire a minimum share of local workers, including for managerial positions and subcontracting.
2. An obligation to contract a minimum amount of goods and services from firms owned and managed by citizens of the host countries, as well as operating in the host country (and not just registered there).
3. An obligation that, in the presence of indigenous communities, both their employment and their products and services shall be given preference.
4. An obligation to provide programs for skill enhancement and training to local communities.
5. An obligation to give precedence to the host country in case of development of downstream activities (for example, the construction of a smelter) in that value chain.



Employing local workers and using national products and services is essential for local benefit to arise.

Photo: Parolan Harahap on flickr

Investors' compliance with these provisions shall be closely monitored by the parties to the FTA. The determination that no local product, service, or worker is of adequate quality and therefore the use of foreign content is necessary, must be made jointly by the parties to the agreement.

2.3 Substantive standards: Strengthening existing agreements

A wide array of international treaties and conventions are relevant to the extraction of raw materials. These agreements generally oblige governments to take regulatory action relevant for mining activities for public interest purposes. The relationship between these agreements and an international trade agreement should be based on two core elements that can be specified in the trade agreement. First, the trade agreements should make clear that nothing in the agreement shall be construed as preventing parties to implement in good faith obligations following from these other international agreements. Moreover, parties should be given a wide discretion in choosing the means by which parties seek to implement their other international law obligations.

In particular we recommend introducing a hierarchy clause in the trade agreement. Under the *lex posterior* rule, a later international



Alto Bío Bío in Chile: A hierarchy clause would give primacy to international environmental treaties over trade agreements. Photo: Esteban Ignacio on flickr

agreement overrules an earlier one in a dispute between two parties bound by both agreements. This interpretative rule poses challenges in the event of direct conflicts between EU trade and investment agreements and other international regimes that protect public interests. Hierarchy clauses are not uncommon in international law. Among international trade agreements, Article 104 of NAFTA provides a (weak) example.⁴⁹ A strong hierarchy clause would stipulate that in the event of any inconsistency between the trade agreement and any international environmental, labour, or human rights agreement binding on one of the parties, such obligations from those international environmental, labour, or human rights agreements shall prevail as long as the party is implementing them in good faith. Such a clear and unconditional hierarchy clause would have the added advantage of sending a clear signal as to the importance of these other international obligations compared to any trade obligation.

If such a provision that ensure the primacy of other international agreements is present in a trade agreement, the trade agreement itself may present an opportunity to ensure wider effective participation in such international efforts to address issues such as climate change, corruption, pollution and human rights violations. As a second element, therefore, it must be ensured that the parties to the agreement respect and effectively implement international law relevant to mining activities before the entry into force of the trade agreement. The date of the entry into force of the agreement can be set by the joint committee established under the agreement once the joint committee has established that all parties have effectively implemented their obligations.⁵⁰

International treaties and conventions relevant to mining activities include:

1. The Minamata Convention on Mercury (2017);
2. UNFCCC and the Paris Agreement (1994, 2016);
3. The Espoo Convention on Environmental Impact Assessment in a Transboundary Context (1997, a regional convention);
4. The Aarhus Convention (1998, regional);
5. The Convention on Biological Diversity (1993);
6. The Convention on Wetlands (1975);
7. United Nations Convention to Combat Desertification (1996);
8. ILO Convention 169, the Indigenous and Tribal Peoples Convention (1989, the EU and most Member States are not a Party, Chile is);
9. United Nations Convention against Corruption (2005);
10. International Convention for the Protection of All Persons from Enforced Disappearance (2010).

Relevant soft law instruments include:

1. OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1999);
2. United Nations Guiding Principles on Business and Human Rights (2011)
3. OECDE Guidelines on Multinational Enterprises (2011)
4. OECD Due Diligence Guidance for Responsible supply Chains of Minerals from Conflict-Affected and High-Risk Areas (2016)

A short overview will highlight relevant provisions in some key international agreements that have implications for the extractive industries sector. They will also provide an indication from which widely agreed elements the substantive obligations for social and environmental responsibility in the extractive sector can be derived.

2.3.1 Sustainable Development Goals

The EU and its Members adopted the UN Sustainable Development Goals (SDGs) and the Agenda 2030,⁵¹ aiming at ending poverty, protecting the planet from degradation and achieve prosperity in harmony with nature. The SDGs embody a global consensus on the need to enact policies at any level to ensure responsible production in particular in light of preventing pollution, environmental degradation and loss of biodiversity. The integration of the SDGs into a legal framework for ERM chapters provides thus the general policy boundaries for ensuring social and environmental responsibility in ERM chapters, to be then flashed out by means of enforceable measures. Particularly relevant for extraction and trade in raw materials, especially in light of the specific social and environmental threats posed by the extractive industry, SDG 6.3 aims at improving water quality by reducing pollution, eliminating dumping and minimizing release of hazardous chemicals and materials. Central for the purpose of ERM chapters, SDG 12.2 aims at achieving sustainable management and efficient use of natural resources by 2030 and SDG 12.6 aims at encouraging especially large and transnational companies to adopt sustainable practices. Also SDG 15 (life on land) is key in light of environmental impacts of the extractive industry, with several targets addressing sustainable use of terrestrial ecosystems, degradation of natural habitats, and the conservation of ecosystems and biodiversity. SDG 13.2 requires integration of climate change considerations at any policy level.

2.3.2 Convention on Biologic Diversity

More specifically concerning ecosystems and biodiversity, the Convention on Biologic Diversity (CBD) – entered into by both the EU and its Members – represents the foremost international law instrument recognising that conservation is a ‘common concern of mankind’ and essential prerequisite for sustainable economic development.⁵² Parties to the Convention have adopted the Aichi Biodiversity Targets,⁵³ aiming to address the root causes of biodiversity loss, several of which are relevant for ERM chapters in light of the large impact on ecosystems and biodiversity associated to extractive operations. For example, Target 3 requires the elimination of all incentives harmful to biodiversity by 2020 and Target 5 aims at halving the rate of loss of natural habitats by 2020 and reduce degradation; Target 18 aims at guaranteeing that traditional knowledge, innovation and



Ensuring the “conservation, restoration and sustainable use of terrestrial and inland freshwater ecosystems” is one of the Sustainable Development Goals.

Photo: United Nations on wikimedia

practices of indigenous communities, and in particular their customary use of biological resources are fully respected.

2.3.3 Paris Agreement

Also the Paris Agreement recognises the importance of sustainable consumption and production patterns, especially in developed countries. In strengthening the international response towards climate change, the Agreement commits parties to hold the global temperature increase to ‘well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels’.⁵⁴ The Agreement provides for a mechanism for States to establish, plan and report on precise policies and measures enacted to arrest climate change. Parties to the Agreement must scale up their commitments regularly. The EU’s intended nationally-determined contributions aim to achieve by 2030 a 40 % domestic reduction in greenhouse gas emissions compared to 1990 levels.⁵⁵ In light of the mining industry’s large carbon dioxide emissions along its value chain, from the moment of extraction, refining and smelting to final consumption and disposal or recycling, which makes it one of the most polluting industries in terms of CO₂ emissions, urgent action needs to be taken in order to ensure compliance with the Paris Agreement.

2.3.4 Human rights

Finally, in the domain of human rights, EU Member States are signatories to the International Covenant on Civil and Political Rights⁵⁶ and the International Covenant on Economic,



Land dispossession, breaches of (traditional) land rights, evictions, and lack of free, prior and informed consent are the most frequent human rights violations related to extractive industries. Photo: DFID - UK Department for International Development on flickr

Social and Cultural Rights.⁵⁷ As seen above, among the most severe human rights violations connected to extractive industry operations, land dispossession, breaches of (traditional) land rights, evictions, and lack of free, prior and informed consent are the most frequent. Softer obligations transposing human rights obligation to corporations, under an emerging corporate responsibility to respect human rights are contained in the UN Guiding Principles on Business and Human Rights, the OECD Guidelines on Multinational Enterprises and their sectoral transpositions. These instruments will be discussed extensively in Section 2.4.

2.4 Enforcing best practices in the extractive industry

As seen above, the EU has entered into a number of international obligations which are highly relevant for ERM chapters and, more generally, for the definition of a sustainability framework for extraction and trade in raw materials. Such obligations, and precise national targets where relevant, shall be incorporated in the ERM chapters in order to provide with certainty the coordinates of both parties' sustainability obligations. This approach is capable to create a regulatory environment which is proactive insofar it aims at preventing the most typical negative impacts associated to extractive industries. At the same time, it is adaptive to the need of all affected parties, including future generations, and also serves to provide certainty and stability to economic operators concerning future developments of relevant regulatory frameworks affecting their projects.

From selected review of key international commitments entered into the EU, it is clear that compliance with such obligations must be reflected in appropriately drafted ERM chapters. Starting from the parties' reiteration of their international commitments, specific provisions may then be included in the text in order to address the most serious negative impacts from extraction of raw materials. This could be done firstly by recalling the relevant international provisions and, subsequently, by requiring both parties to introduce, if necessary, and strengthen national or regional regulation implementing such obligations, including a precise timeframe for implementation.

Strengthening national provisions could thus compensate, at least partially, for a possible increase in negative impacts accruing from trade liberalisation. It also significantly reduces the need for social and environmental obligations in bilateral contracts entered into by States and investors, which can be characterised by a lack of transparency, or ad hoc provisions carved out to accommodate the request of economically powerful firms. This would have the effect to reinforce the position of the parties (especially non-EU ones) when engaging in negotiations concerning concession and exploitation of natural resources since social and environmental requirements are provided for in the FTA and would therefore be non-negotiable. Most importantly, this would also have the effect to consolidate State's social and environmental commitments from being eroded or side-lined at a subsequent moment in time.

In this way, the FTA effectively incorporates *substantive* provisions directed towards the parties and, indirectly, towards undertakings active in extraction and exploitation of raw materials. This process reinforces implementation of international provisions and their transposition into national obligations capable to directly disciplining corporate action. It therefore allows the regulatory potential of the FTA to fully unfold in a way which does not exclusively aim at liberalising trade and investment.

2.4.1 Raw materials-specific best practices

After defining the legal boundaries for national provisions ensuring responsible exploitation of raw materials as determined by international obligations, parties should address specific issues which are particularly important for the sector concerned, in light of the more frequent social and environmental

risks and impacts. These issues include the importance of undertaking extensive impact assessment in line with internationally-recognised best practices, as well as sound and sustainable management of all social and environmental risks in three key domains: waste disposal, water, and soil management. The Agreement should then provide that provisions shall be enacted in respective national legislation in order to ensure their enforceability and uniform application to all enterprises concerned. As one of the aims of the ERM chapters is to set down clear, precise and enforceable regulatory obligations of both parties, detailed substantive provisions that will form the content of national provisions should be included in the text of the Chapter or in a dedicated Annex on 'Regulatory Convergence'.

2.4.2 Impact assessments and relevant management plans

ERM chapters should address, and provide for, administrative tools to ensure long-term sustainability of extractive operations. For example, it should require that legislation concerning social, environmental and human rights impact assessments reflects state-of-the-art practice (such as that provided under the Initiative for Responsible Mining Assurance Standards for Responsible Mining,⁵⁸ and following best practices as identified by the International Association for Impact Assessment⁵⁹) and should require that impact assessment includes all direct, indirect, cumulative, transboundary and global impacts. Impacts assessed should include at least those on local communities and local land use, displacement and resettlement, rights based on custom or tradition, issues specifically affecting women, youth, and the elderly, as well as possible impacts stemming from labour practices. Environmental impacts to be assessed should at least encompass those on air and soil resources, marine resources, water and wetlands, and biological and biodiversity resources. Impact assessments should be carried out independently, with the highest possible degree of public participation, and by adopting a broad and all-encompassing perspective which does not limit its focus to high-risk issues or concerns. Also the temporal scope of the assessment shall be extended, and not limited to short-term risks or impacts. On the basis of the impact assessment, public authority can make specific recommendations and request for additional commitments to the undertakings concerned in order to improve their social and environmental performance.

Modern environmental, social and human rights protection regimes include at least the following elements:⁶⁰

1. Baseline environmental and social data prior to the project
2. Sector strategic environmental and social assessment
3. Environmental and social impact assessments (ESIA)
4. Environmental and social management plan (ESMP)
5. Management plans for health and safety impacts
6. Hazardous material handling, transport and storage management plan
7. Community development agreement (CDA)
8. Biodiversity action plan
9. Decommissioning and closure management plan (including post-closure monitoring if needed)

This list shall also include, throughout all business operations, compliance with appropriate international management standards for responsible conduct such those indicated in the OECD Due Diligence Guidance for Responsible Business Conduct and the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas.



Trade agreements should enable national frameworks to comprehensively regulate corporate activities.
Photo: unefunge on flickr

2.4.3 Decommissioning

Since additional negative environmental damages may occur when mines are closed down, and extractive activities are ceased, specific obligations must address decommissioning.

An obligation to draft and emend decommissioning and closure management plans must include the following elements⁶¹:

1. begin at the feasibility stage and at the impact assessment stage, and be carried out regularly throughout the entire duration of the project;
2. incorporate appropriate arrangements to avoid, and if not possible minimise, any environmental hazard which may emerge after closure, including environmental monitoring that might be required after closure is finalised;
3. include appropriate planning for decommissioning and removal of the plant and all equipment, in view of ensuring long-term land reclamation, stabilization and restoration to an alternative use acceptable to the local communities;
4. provide for handover to the local community of any remaining useful productive assets and machinery.

2.4.4 Waste disposal

A legal regime ensuring environmental sustainability should be in force when an extractive project is being authorised. Particular attention should be devoted to mining waste and pollution resulting from mining operations. Parties to the FTA should be required to enact legislation offering at least an equivalent level of protection of the EU Waste Directive.⁶²

As a means of illustration, legislation should include at least the following elements:

1. An obligation for firms to draft and continuously update a waste management plan concerning waste arising from the prospecting, extraction (including pre-production development stage), treatment and storage of mineral resources. Such plans must aim at minimising waste generation, harmfulness, and maximising waste recovery;
2. An obligation for firms to adopt accident prevention policies for all types of waste;
3. An obligation for firms to require specific additional permits for waste disposal facilities, of which the public must be aware;
4. The establishment of stringent requirements concerning design, location and management of waste disposal facilities;
5. An obligation for firms to lodge a financial guarantee covering the cost of rehabilitation of all land affected by a waste disposal facility.
6. An obligation for firms to report on these issues, coupled with a regime of regular inspections.

2.4.5 Water

As the most likely potential negative impacts of the extractive industry may be in terms of water pollution and water scarcity, the establishment of dedicated legal obligations is essential. Mining operations are water-intensive, and without a secure and stable supply extractive operations are at threat. Large-scale consumption, however, limits water usage for other means, often with devastating effects on water quality due to pollution and discharge of pollutant in water sources. Compliance with business best-practice⁶³ must be ensured, and commitments must be scaled up if necessary.



Regulating waste disposal is essential to making mining operations more sustainable.

Photo: Nuclear Regulatory Commission on flickr

Relevant obligation may include:

1. An obligation to draft water management plans, to be approved by relevant authority;
2. The allocation of responsibilities and accountabilities at the corporate level for any detrimental impact on water sources;
3. The integration of water management plans into business planning and business operations;
4. Report on water management plans and water usage following one of the industry specific water accounting schemes.

2.5 Better engaging the private sector: responsible supply chain management and third-party schemes

EU regulators have engaged with measures addressing 'responsible' or 'sustainable' corporate conduct, with a recent focus on global value chains and their responsible management. Several EU institutions acknowledged the links between EU trade policy, global value chains, and associated negative impacts on social and environmental sustainability. In a 2017 Resolution, the European Parliament urged the European Commission to put global value chains governance at the centre of EU trade policy, therefore including in bilateral trade agreements, and to develop mandatory value chain human rights due diligence legislation.⁶⁴ The Parliament expressed its support for a mix of mandatory rules and voluntary corporate action in global value chain governance. It stressed the need for a more prominent role for private initiatives in pursuing responsible and sustainable global production, to be activated across policy domains. The European Commission in its 2015 'Trade for all' agenda promised to prioritise the promotion of social and environmental due diligence,⁶⁵ though implementation has fallen short. A recent report for the European Commission on the issue⁶⁶ was summarised by civil society as "*unequivocally affirm[ing] that voluntary measures are failing and that there is urgent need for regulatory action at EU level*".⁶⁷ Embedding sustainability considerations in value chains and in particular within corporate processes, is therefore an urgent policy need as expressly acknowledged at several stages by EU institutions. Two possible venues for leveraging private sectors' potential contribution exists that are relevant to ensure sustainability in connection to raw materials and their trade,



Companies must have due diligence systems in place along their entire supply chain.

Photo: ILO Asia-Pacific on flickr

i.e. the practice of human rights and environmental due diligence, and the possible use of third-party certifications and schemes.

2.5.1 Human rights due diligence

Human rights due diligence (HRDD) represents the most original feature stemming from the United Nations Guiding Principles on Business and Human Rights (UNGPs).⁶⁸ The UNGPs urge multinational corporations to use HRDD and incorporate the respect of human rights in internal management processes. HRDD 'comprises an ongoing management process that a reasonable and prudent enterprise needs to undertake, in the light of its circumstances (including sector, operating context, size and similar factors) to meet its responsibility to respect human rights'. HRDD should consist of the publication of a policy commitment, of human rights risk impact assessment, the integration of findings in management processes and decisions, the tracking of responses, external communication and reporting, and ensuring remediation to victims. For the mining sector the OECD has recommended that "*Measurable risk mitigation should be adjusted to the company's specific suppliers and the contexts of their operations, state clear performance objectives within a reasonable timeframe and include qualitative and/or quantitative indicators to measure improvement*".⁶⁹

While the UNGPs are not binding on corporations, human right due diligence has been made mandatory in some states, including in EU members such as France,⁷⁰ with



Coltan extraction, Democratic Republic of Congo: In the case of conflict minerals the EU has already adopted human rights due diligence obligations for importers. Photo: MONUSCO Photos on flickr

proposals being considered in Germany,⁷¹ and in specific sectors via legislation, such as in the Netherlands⁷² and UK.⁷³ Notable EU initiatives in this domain include a Regulation on Conflict Minerals,⁷⁴ requiring EU importers of minerals associated to armed conflict to establish due diligence systems and to implement the OECD Due Diligence Guidance for Responsible Supply Chain of Minerals from Conflict-Affected and High-Risk Areas.⁷⁵ The EU has therefore already enacted mandatory non-financial due diligence rules in the extractive industry. In light of the high-risk for human rights impacts generated by the extractive industry, the EU should now expand the scope of application of the regime to all trade in minerals and to all companies in upstream and downstream sector. However, this would not replace the need for a general human rights due diligence regulation that covers all sectors. Another initiative, the so-called 'Binding Treaty' on Business and Human Rights currently under negotiation at the UN Human Rights Council, points towards the establishment of an obligation for states to ensure that economic actors fully respect human rights.⁷⁶

HRDD is based on the principle that multinational corporations respect human rights, rather than relying on voluntary efforts in a specific issue area and towards a limited number of possible beneficiaries. The responsibility to respect human rights encompasses both (self) regulation of economic activities between a mother company and its subsidiaries, and all

human rights impacts stemming from commercial and non-commercial relations that a corporation has with other business entities, including governments and public bodies, and human rights holders affected by business operations. The UNGPs hold that corporations may be involved with human rights impacts through their own activities, or as a result of their business relationships.⁷⁷

HRDD constitutes therefore an ongoing, proactive and reactive process through which corporations monitor and administer their activities and relations with suppliers with the goal to ensuring that they do not contribute to negative impacts on human rights. For the purpose of this study, relevant human rights impacts may include, among the others, labour rights, indigenous communities' (land) rights and also environmental considerations which may negatively affect the enjoyment of human rights in connection to exploration and extraction of raw materials and commodities. The Organisation for Economic Cooperation and Development (OECD) drafted the Guidelines for Multinational Enterprises and various specific instruments, which constitute an international standard for responsible business conduct. Such instruments operationalise HRDD by prescribing processes and procedures for corporations to follow. While compliance with the OECD Guidelines and its Guidance documents is voluntary for private actors, the EU and its Members should take steps to make compliance with OECD Guidelines a legal requirement.

2.5.2 HRDD and trade agreements

HRDD may offer important regulatory functions to guarantee social and environmental considerations in connection to exploration, exploitation and extraction of raw materials. This is particularly the case if companies are obliged to structure their internal due diligence systems appropriately and a clear framework is established to regulate corporate behaviour in connection to specific human rights and environmental risks. A possible venue to better integrate HRDD in EU FTAs could be via the establishment of an obligation, either in the ERM or the TSD chapters, to implement within a specific time limit national legislation making due diligence mandatory in connection to raw materials. This could be done either by establishing specific guidance in implementing relevant management processes for undertakings engaging in exploration, exploitation, extraction and trade in raw materials, or by making reference to specific OECD Guidance documents and make their compliance mandatory for corporations. Compliance can then be assessed by means of third-party auditing of management processes and internal due diligence systems.

To avoid the proliferation of different standards and requirements and to allow detailed enough guidance to be used, the second approach seems preferable. However, the OECD has currently not yet developed a raw materials-specific Guidance. This notwithstanding, a number of OECD instruments are at least partially relevant for responsible exploration, exploitation, extraction and trade in raw materials. These include the OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector,⁷⁸ general elements structuring due diligence processes as provided for in the OECD Due Diligence Guidance for Responsible Mineral Supply Chains and, for certain raw materials, the OECD-FAO Guidance for Responsible Agricultural Supply Chains.⁷⁹ Mandatory HRDD in the extractive industry would also include a non-financial reporting obligation for all undertakings concerned.

If the introduction of mandatory legislation for due diligence is not contemplated, at the very minimum, provisions requiring companies to undertake due diligence and comply with relevant OECD Guidance shall be included in the ERM chapters. Regardless of the approach chosen, the imposition of HRDD obligations could be coupled by the establishment of a specific multi-stakeholder forum where relevant corporations in the raw materials value chain submit their due diligence systems and

third parties, civil society organisations, or even an independent Secretariat can evaluate their processes and require to improve them if they are deemed unsatisfactory. The forum could be integrated with dispute resolution mechanisms in case disagreements over the effectiveness of due diligence processes emerge, or to receive complaints about human rights violations, similarly to those contemplated under the Dutch Agreement on Sustainable Garment and Textile.⁸⁰

2.5.3 Private standards

The second possible mechanism to leverage private action in the service of public goals in EU FTAs is to better exploit private standards and certifications. Private standards and certifications, also known as voluntary sustainability standards or schemes, designed by private bodies with the purpose of addressing, directly or indirectly, and by means of third-party certification of products and processes, the social and environmental impact resulting from the production of goods, extraction or gathering of raw materials and commodities. Such standards have acquired considerable proliferation not just among consumers of certified or sustainable products, but especially among producers which use them to coordinate relations and product features in their value chains. This may not necessarily be the case of the raw materials sector, especially in light of the complexity of the value chain and the extreme fragmentation of the most upstream tiers.

EU authorities have used private standards in the framework of measures regulating reporting obligations, public procurement,



The importance of private sustainability standards and certification, for example in the forestry sector, has risen. Photo: CIFOR on flickr

and value chains such as those of biofuels,⁸¹ 'conflict minerals'⁸² and forestry products.⁸³ With public use, the importance of private standards and certification in regulating global production has increased accordingly. Potentially such standards are appealing to public regulators because they are tools for industries to align themselves to OECD standards and help them to fulfil their due diligence obligations which may go beyond those otherwise applicable, provide means for corporations to operationalise legal requirements, as well as increasing their ability to monitor and enforce compliance with sustainability-related provisions in value chains. In addition, private standards may incorporate international law provisions in their standards such as human rights, labour rights, and environmental conventions, international agreements and protocols, thereby facilitating corporate compliance with such obligations. Independent third-party certification and auditing often required by private standards, if performed against stringent requirements of impartiality and disclosure of audit outcomes, could be capable of effectively monitor compliance of economic operators.

Such standards, however, have also been observed to be set in disregard of local specificities, or via processes that offer limited venue to participation to interests other than those of large economic actors. At the same time, sustainability standards have been found to vary considerably in their approach chosen; some are satisfied with a verification of legality whereas others pursue various and more or less stringent sustainability-based approaches going beyond applicable legal rules. Under certain conditions, competing standards have been observed to create race to the bottom, which may be exacerbated by public use in regulation which does not identify stringent criteria for their recognition and employment.⁸⁴ Generally auditing as a means of enforcement generates concerns of independence since the very entities being audited are paying for it. In the absence of auditing, however, private standards may be little less than empty hortatory commitments given the lack of tools to enforce and secure compliance. By putting the financial burden for compliance on the upstream tiers of value chains, standards may generate considerable distributional effects from smaller producers towards larger retailers and processors. As producers pay most of the costs, retailers and processors reap the benefits of price premiums associated to sustainable products. This is why any form of use of private regimes in public measures or bilateral agreements such as in EU FTAs requires firstly an extensive benchmarking exercise aiming at identifying which regimes could contribute to public objectives, and how.

Furthermore, a recent assessment for the European Commission has emphasised the importance and potential effectiveness of a mandatory due diligence system that includes a legal duty of care obligation for companies in preventing negative social and environmental impacts from their operations.⁸⁵ Such a mandatory due diligence framework can serve as a point of departure for the further development of private standards and provide a floor that cannot be undercut. By developing private standards on the basis of such a framework, industries would be able to take up new concerns specific to their sector as they arise and continuously adjust the standard based on audits and stakeholder feedback.

In the context of ERM chapters, under certain conditions private standards can be allowed to provide a means for corporations to comply with obligations on responsible and sustainable raw materials exploration, extraction and trade. Firstly, a scoping exercise may identify sustainability-related policy areas to which voluntary standards could contribute. For example, it may determine that certification of mining operations could improve the respect of labour rights *in situ* or, at a stage prior to the establishment of extracting operations, to ensure and certify that tenure rights have been respected and that free, prior informed consent has been obtained. Alternatively, the auditing mechanisms provided by a scheme could compensate for capacity gaps or enforcement gaps in the country of application.

The Agreement can thus support adherence with recognised private schemes to facilitate compliance. As a first step benchmarking of existing activities would identify the schemes which can effectively contribute to such goals. Relevant schemes can then be formally recognised for employment. Provided that criteria for selection are strict, and if the assessment of which schemes to recognise is performed in a stringent manner, only schemes which can effectively contribute to public policy objectives will be allowed to be used. In addition, this will have the effects to possibly scale-up private schemes. In order to ensure additional uptake, private regimes will likely adjust their requirements in order to meet those spelled out under the Agreement. A similar assessment could be performed for any private initiative which possesses a clear enforcement mechanism, and does not merely rely on the voluntary commitments of its members, such as the Initiative for Responsible Mining Assurance.⁸⁶ As private standards tend to develop quickly over time and few contain mechanisms that prevent a possible backsliding, ongoing monitoring and assessment needs to be assured. Since this might be challenging to

done in the framework of the trade agreement itself, the assessments by the OECD could support an ongoing benchmarking process⁸⁷ as well as input from civil society and affected communities about the effectiveness of private standards on the ground.

2.6 Institutional aspects: Technical and financial assistance and establishment of a multi-stakeholder raw materials committee

Developing countries may face challenges having the necessary expertise and funds to effectively implement and monitor laws and regulations for sustainable extraction of raw materials. In accordance with the principle of common but differentiated responsibilities the EU could take into account the needs and differentiated capabilities of developed and developing countries by providing technical and financial assistance, as is common in most international environmental regimes.

These commitments to technical and financial assistance can consist out of:

1. Sharing technical know-how;
2. Technology transfer relevant to sustainable extraction of raw materials;
3. Capacity building;
4. Providing financing of oversight or other regulatory bodies.

2.7 Enforcement

While the proposals made so far would impose a number of obligations on the parties to the agreement as well as the economic operators involved in the extraction and trade of raw materials, such obligations need to be backed up by an enforcement mechanism that can ensure compliance. The choice for a particular form of dispute settlement under a system of enforcement of international law is generally informed by a few key questions that drafters of international agreements are faced with.

These questions are:

1. What is the purpose of the system of enforcement and dispute settlement?
2. Who should have access to that system?
3. Against whom can a case be brought?

4. What forms of relief should the system offer?

5. What should be the role of the domestic judiciary and what is the relationship between the international system and the domestic judiciary?

Answering these questions is essential to the design of any enforcement mechanism under international law. Traditionally, the purpose of dispute settlement provisions under international law has been simply the peaceful settlement of disputes between states over any potential breaches of international law, whereby the losing state party can be required to cease any wrongful acts and/or pay damages for such wrongful acts to the injured state party. However, a wide variety of dispute settlement systems under international law currently exist.

For illustrative purposes, it may be helpful to compare the general approach under international trade law to that of the approach under international environmental law, as these are fundamentally different. Under WTO law (bilateral trade agreements of the EU take a similar approach) the objective of dispute settlement is to ensure that no party impairs the benefits other parties may have from the WTO agreements. Those benefits are economic in nature, such as lower or no tariffs on goods imported into another country and no quantitative restrictions on imports. In other words, these benefits generally concern undertakings involved in the import and export of goods and services to another country. To that end, the dispute settlement system is set up to ensure that any measure inconsistent with trade obligations that impairs these benefits to another party is withdrawn. Crucially, the system allows for either compensation to be paid to the injured party by the party that is not in compliance, or allows the injured party to retaliate, for instance by raising tariffs for certain goods imported from the non-complying member and these retaliations must be proportionate to the damage suffered.⁸⁸ In other words, the system attaches significant importance to whether or not a party has suffered economic harm because of another party's actions as a means of inducing a party to comply with the agreement. Punitive damages are excluded.

Dispute settlement under international environmental is fundamentally different. It is not uncommon for international environmental agreements to not even have dispute settlement provisions.⁸⁹ The reason is that the purpose of these agreements is generally very different. States do not conclude these agreements on a quid pro quo basis, but are most



An important element of the EU's current approach to enforcement is to establish a widely criticised parallel legal system that is only available to foreign investors. Photo: Mehr Demokratie on flickr

often attempts by states to collectively solve transboundary environmental problems. The focus of these agreements is therefore more on conducting compliance by parties and collaboration and these agreements therefore focus on extensive monitoring, reporting, and compliance procedures. In fact, there have been very few disputes that have been settled by international bodies under international environmental law as states prefer to find other ways of conducting other parties to compliance. To the extent that these agreements do have dispute settlement provisions, agreements only contain state-to-state dispute settlement provisions and not in all cases does the body resolving disputes have compulsory jurisdiction (this means that both parties need to agree to settle a particular dispute before that body). There is no role for individuals in dispute settlement although under the Aarhus Convention and the Bern Convention allows individuals to submit information regarding possible non-compliance issues through compliance and monitoring mechanisms.

In the following, several options for the enforcement of obligations will be presented and discussed.

2.7.1 Domestic courts

It is common practice for the EU to include a provision in its FTAs that specifies that individuals cannot rely on provisions of the FTA before domestic courts.⁹⁰ However, many EU trade agreements already contain a separate dispute settlement mechanism for one

specific group: foreign investors can enforce parts of the agreement through an ISDS mechanism such as the Investment Court System. In the absence of such a mechanism, it is up to the constitutional arrangements of the parties themselves to determine the legal effects of international law in their domestic legal orders. This means that even if this clause would not be present, it depends on the parties whether individuals can rely on the provisions in the agreement before a national court. For the purpose of this study, it should be noted that it would be advantageous for civil society organisations, unions, local communities and indigenous peoples if they could directly rely on any of the suggestions made above before domestic courts, reducing the need for effective enforcement mechanisms in the agreement itself. Whether removing the clause denying direct effect of the agreement overall is the right approach, greatly depends on the other provisions in the agreement, however. From an environmental perspective, for instance, if most provisions of the agreement make it more difficult to maintain or introduce stringent environmental rules, it would be better to not allow for direct effect since individuals could use such provisions to challenge environmental rules before domestic courts.

2.7.2 Enforcement of FTA provisions: shortcomings of the current approach

If the EU's current approach to enforcement of bilateral trade agreements is followed, it would not be well-suited for a raw materials chapter that is designed to protect the interests of stakeholders beyond EU industry for several reasons. First, punitive damages are excluded from the system and as a result compliance can only be induced to the extent that the other party has suffered economic harm in the form of impairment of its rights under the agreement. In other words, only to the extent that one of the state parties can demonstrate 'nullification and impairment' of the agreement's economic benefits for that party because of the actions of the other party, would it be possible to adopt countermeasures, for instance by suspending tariffs. The approach we have suggested above, however, is intended to move away from protecting the direct economic interests of undertakings exporting or importing goods and services, to a much more inclusive approach. These interests cannot easily be qualified in economic benefits for the other party, but are predominantly normative in character. For instance, if a party does not respect the right of free, prior and informed consent of indigenous peoples in the context

of raw materials extraction, it will be hard for the other party to demonstrate any nullification and impairment. As a result, there is no economic incentive available to induce the other party to comply.

Second, in current EU trade agreements only state parties can bring disputes for breaches of provisions of chapters by the other state party (with the exception of the investment chapter). It will thus be upon those stakeholders negatively affected by a breach of one of the provisions by a state party to convince the other state party to bring a dispute before a tribunal. Past practice has shown that this system does not present a barrier for EU industry, but the situation is very different for other stakeholders, notably public interest organisations and local communities. EU industry has well-established and good relations with officials from DG Trade and officials from Member State governments. These good relations help secure a pro-active attitude on part of the EU institutions when another party violates provisions of a trade agreement that negatively affects EU industry. Under the WTO agreements, for example, the EU has brought 102 cases before the WTO Dispute Settlement Body since 1994. Moreover, EU industry has several legal tools available to it under EU law that facilitate bringing international trade disputes, such as the Trade Barriers regulation, the anti-dumping regulation, and the anti-subsidies regulation.⁹¹ Civil society and public interest organisations generally have less established relations with DG Trade officials, not least because such organisations generally oppose the direction of EU's international trade and investment policy. What is more, the European Commission has explicitly rejected the idea of creating a legal instrument that would facilitate receiving complaints from public interest organisations because it considers informal contacts to be sufficient.⁹² Lastly, public interest organisations generally lack the funds that EU industry has to have the proper legal support for such complaints.

Third, the current Investment Court System (ICS), included in several new trade agreements offers only to foreign investors the possibility to bring claims for breaches of certain sections of the investment chapter. As a result, other stakeholders (such as indigenous peoples) are not in the position to use the ICS. Moreover, the ICS is only available for breaches of sections of the investment chapter by a state party, not the raw materials chapter. Violations by EU industry of any relevant provisions of a raw materials chapter as proposed here therefore cannot be addressed via the ICS.

2.7.3 Recommendations for a more inclusive and effective enforcement mechanism

We suggest several improvements to the current approach that would remedy the defects identified above. The list below is not exhaustive and elements can be considered independently:

1. The establishment of an independent compliance mechanism accessible to public interest organisations, indigenous peoples, local communities, and other stakeholders;
2. Independent monitoring and reporting obligations for the parties concerning implementation of the respective obligations under the FTA as well as industry compliance with national legislation affecting trade and investment in raw materials;
3. The adoption at EU level of a regulation giving public interest organisations and individuals procedural rights comparable to that of EU industry;
4. A punitive system, either through a system of fines or dissuasive countermeasures independent of nullification and impairment;
5. The possibility of damages claims by states and individuals against foreign investors and for damages claims by individuals against states.

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2.7.4 Complaints and compliance mechanism for individuals and public interest groups

In our view, a relatively easy way of making enforcement more inclusive and effective in the protection of interests beyond that of EU industry, would be the introduction of a compliance mechanism comparable to that of the Aarhus Convention. Such a mechanism would allow individuals to lodge a complaint with an independent committee set up under the trade agreement for failure to comply with certain provisions of the agreement. The committee could, on the basis of such a complaint, issue recommendations to either the joint committee of the trade agreement or to the party that is not in compliance with the agreement.

The advantage of such a system is that it is directly accessible to all stakeholders and non-confrontational, non-judicial and

consultative in nature. This means that such a system is intended to help state parties in ensuring compliance with their obligations. It can also be easily modelled after the Article 15 of the Aarhus Convention. The disadvantage is that such a system will not provide for effective judicial relief for parties whose rights have been infringed and who have suffered damages as a result.

The experience with complaints procedures in US' and Canada's FTAs should be taken into account in order to properly design a complaint system, as those systems have not proven to be particularly effective.

The following elements should therefore be considered in the design of a compliance mechanism:

1. It should be easily accessible to affected parties, and there should be no significant restrictions in allowing for submissions;
2. The reviewing body should be fully independent;
3. The reviewing body should be required to review complaints expediently and thoroughly;
4. The parties should commit to ensure proper links between compliance and enforcement.

2.7.5 A punitive system

A second option would be to ensure that proportional and dissuasive suspension of trade concessions can be authorised by an international tribunal in relation to those obligations that do not result in direct economic advantages for either Party. This would for instance allow a Party to change tariffs for goods imported from the other Party for a breach of the right of free, prior and informed consent of indigenous peoples' obligation, or withdraw any other concession made in the Agreement, as deemed appropriate. Such a punitive system has already been read more generally into the sustainable development chapters by the European Court of Justice in *Opinion 2/15*.⁹³ Moreover, such a punitive system is part of the newer generation of FTAs of the United States.⁹⁴ However, even if such a system would be introduced, affected individuals, groups, and communities would still be dependent on one of the parties to the agreement to initiate such dispute settlement and eventually follow through with the suspension of trade concessions. Currently little if any procedural rights exist within the EU that are remotely

comparable to those under the Trade Barriers Regulation for affected third parties to induce the Commission to bringing cases. There may not be much appetite within the Commission to risk good diplomatic relations for social and environmental protection abroad, as is evidenced by the reluctance to bring cases under the current TSD chapters, despite the fact that there are no economic consequences tied to the panel mechanism under those chapters.

An alternative approach to suspension or alteration of trade concessions would be a fining system. The older FTAs of the United States and some of Canada's FTAs contain such a system.⁹⁵ Fines are capped at 15 million dollars per year and these fines must be paid into a dedicated fund to enable capacity building in the area of labour or environmental protection in order to address non-compliance. Effectively a Party would thus be paying itself for non-compliance.

2.7.6 Monitoring and reporting obligations

A third way of ensuring compliance with sustainability provisions in the raw materials chapter is to introduce monitoring and reporting obligations. Such obligations are common practice in most international environmental regimes. They are based on inducing compliance by gathering the information necessary to verify compliance. For instance, parties could agree to establish a multi-stakeholder committee tasked with monitoring compliance with the raw materials chapter or could require parties to report on compliance with the chapter, subject to an independent audit.

2.7.7 Damages claims against the state or foreign investors

Another alternative is to give individuals full access to an international tribunal for damages claims as a result of violations of the chapter against states and/or for damages claims against foreign investors for their conduct in the host state. Giving individuals access to international tribunals for damages claims against states has been done in the past in the context of several regional human rights regimes, such as the European Convention on Human Rights and the Inter-American Court of Human Rights. Individuals could also be given access to international tribunals for damages claims against foreign investors in the mining sector. However, there is currently no such legal regime.

3 Conclusion and policy recommendations

The extraction of raw materials is often accompanied by serious impacts such as of human rights abuses, environmental pollution and biodiversity loss, and can have significant negative effects on local communities and indigenous peoples. These issues are well-documented and well-known. If not regulated, increased trade and investment in raw materials is likely to amplify such negative impacts. The EU as one of the largest importers of raw materials in the world bears a particular responsibility to address them.

We recommend that the EU should consider minimising such impacts by taking an inclusive approach to its raw materials chapters in the trade agreements. An inclusive approach would consider the interests of all those affected by trade and investment in raw materials, and not solely the interests of EU industry. Such an approach would also require a policy shift away from trade liberalisation to the regulation of trade and investment in raw materials. It would also result in doing away with the current separation of economic interests from social and environmental interests in raw materials extraction which is currently achieved by moving the latter to more general, secondary, weak and widely criticised sustainable development chapters. Instead we suggest an integrated and dedicated approach to transnational economic activity in the mining sector.

The effective regulation of the mining industry to make it more sustainable and to prevent human rights abuses, environmental degradation or social harm is a vast undertaking that requires expertise and a significant amount of public resources. A trade agreement alone cannot accomplish such effective regulation. It can, however, set the preconditions for sustainable extraction and facilitate a country's effort to regulate the industry for local benefit, rather than undermine such efforts. This study has set out some of the first initial suggestions and tools for such an approach. The perspective taken in this study is that sustainable extraction of raw materials should be a precondition to trade and investment in those materials and not an afterthought or based on voluntary and individual efforts by the trading countries concluding such agreements. If sustainable extraction cannot be guaranteed, the EU should not enter into a trade and investment agreement with the third country in question.

We propose elements that would ensure:

1. that sustainable extraction of raw materials is a precondition to trade and investment in those materials;
2. that the interests of all stakeholders affected by trade and investment in the extraction of raw materials are reflected in the language of the provisions, in particular the interests of local communities, indigenous peoples, the environment, and labour;
3. that commitments by the parties are tied to, complement, and foster international efforts to make extraction of raw materials more sustainable;
4. that commitments are a floor and never a ceiling for the regulation of the extraction of raw materials;
5. that monitoring and enforcement of the provisions move away from a strictly economic rationale, towards a rationale based on compliance.

This study proposes several elements as a toolbox that can be included in raw materials chapters. These elements are:

1. provisions on the objectives of the chapter, as well as principles and rights that reflects the above goals;
2. transparency, and participatory, and domestic judicial requirements;
3. substantive standards;
4. strengthening private standards and better engaging the private sector;
5. monitoring and enforcement provisions.

The proposed shift in approach also requires a rethinking of the current approach towards monitoring and enforcement which is currently still based on the idea that the ultimate consequence of non-compliance is economic retaliation based on economic damage done to the other Party (nullification and impairment) and that only investors and states have a role to play in enforcement. We suggest a shift here too, in order to make monitoring and enforcement fit this renewed, more inclusive approach.

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- 4 Peter D. Cameron and Michael C. Stanley, *Oil, Gas, and Mining: A Sourcebook for Understanding the Extractive Industries* (2017), Washington, DC: World Bank; available at doi:10.1596/978-0-8213-9658-2, at 241-252.
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- 6 Ibid, 256-257.
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