Myanmar: Responsible Business Conduct and the OECD Guidelines for Multinational Enterprises

This background note outlines the purpose and objectives of the special event that will be organised in Yangon on Tuesday 4 March 2014 at the initiative of Italy to raise awareness of the OECD Guidelines for Multinational Enterprises among the domestic and foreign business community, as well as local stakeholders. It is a part of a one-day conference *Promoting Responsible Investment in Myanmar: Domestic and International Responses* organised in co-operation with the Union of Myanmar Federation of Chambers of Commerce and Industry (UMFCCI) on the occasion of the launch of the Investment Policy Review of Myanmar.

What is Responsible Business Conduct?

Incorporating responsibility into business conduct is not a new idea. Responsibility toward people and the environment is deeply embedded in many cultures and religions, including in Myanmar. What is new, however, is the global convergence on what responsible business conduct[1] (RBC) actually entails. There is now a common understanding of the baseline standards for how businesses should understand and address their risks and how governments should support and promote such responsible business practices. This new understanding is centred around the 2011 Update of the OECD Guidelines for Multinational Enterprises (the Guidelines) and the 2011 unanimous endorsement by the United Nations Human Rights Council of the Guiding Principles on Business and Human Rights (the UN Guiding Principles). It is also echoed in other international standards, notably in the revised IFC Performance Standards, UN Global Compact Principles, and the ISO 26000 Guidance on Social Responsibility.

RBC entails above all conduct consistent with applicable laws and internationally recognised standards. Based on the idea that you can do well while doing no harm, it is a broad concept that focuses on two aspects of the business-society relationship: 1) positive contribution businesses can make to sustainable development and inclusive growth, and 2) avoiding negative impacts and addressing them when they do occur. Risk-based due diligence and value creation are at the heart of this process.

The OECD Guidelines for Multinational Enterprises

The OECD Guidelines for Multinational Enterprises are the only and the most comprehensive set of government-backed recommendations on RBC in existence today. They express the shared views and values of 46 countries,[2] including major emerging economies, which are the sources and the recipients of a large majority of the world's investment flows and are also home to a majority of multinational enterprises (MNEs). The Guidelines cover all major areas of business ethics - their recommendations are set out in 11 chapters and cover topics such as information disclosure, human rights, employment and labour, environment, anti-corruption, and consumer interests. The Guidelines set out government expectations for MNEs that operate in or from the adhering countries. Investors often shape their responsible business conduct strategy on the Guidelines and use them to contribute to sustainable development and inclusive growth.

The active way in which the Guidelines are implemented distinguishes them from other international corporate responsibility instruments. Adhering countries are obliged to set up National Contact Points (NCPs) that are tasked with furthering the effectiveness of the Guidelines by undertaking promotional activities, handling inquiries, and providing a mediation and conciliation platform for resolving issues that arise from the alleged non-observance of the Guidelines. This effectively makes the Guidelines the only international corporate responsibility instrument with a built-in grievance mechanism. The implementation of the Guidelines is also supported by the proactive agenda, which aims to help enterprises identify and respond to new challenges.

The unique government-to-government approach, in which adhering governments also place concrete obligations on themselves to promote responsible business conduct, has been widely recognised as one of the

[1] Often referred to as corporate social responsibility or CSR.
[2] See Annex for a full list of adherent countries.

main pillars of the effectiveness of the Guidelines. It could serve as a source of inspiration for a similar network of government focal points in Southeast Asia to support responsible business practices. An active governmental role in this area was recommended at a recent joint OECD and United Nations Economic and Social Commission for the Asia-Pacific (UN ESCAP) conference, held in Bangkok on 18 November 2013 during the third UN ESCAP Trade and Investment Week.[3]

Responsible Business Conduct in Myanmar: An Opportunity

Myanmar has undergone profound and rapid changes over the past few years. Impressive political, economic and social reforms have led to the opening up of the country after decades of international isolation. The country's great economic potential, rooted in rich natural resources, young population, and strategic location, is obvious. Investors are keenly interested in profitable opportunities in Myanmar and, barring unforeseen circumstances, there appear to be no indications this trend would subside in the short- and medium- term. Myanmar is chairing ASEAN in 2014, a significant recognition of these positive developments.

However, concurrent implementation of political, economic and social objectives does not come without enormous challenges. The pace of the ambitious reform agenda has exposed a significant capacity problem in the country, both in the government but also in the private sector and civil society. Developing that capacity will take time. In the meantime, there is a lingering fear that the rapid growth will not be sustainable and/or inclusive. Considering the important role envisaged for foreign investment in economic reforms, foreign investors have a significant opportunity to contribute to the sustainable and inclusive development of Myanmar. Investors can support the country's path to economic transformation and to restoring its international role by embedding high standards of responsible behaviour in their operations right from the start. Acting responsibly has to be a pillar of any long-term investment strategy. This is also the broad expectation expressed in Myanmar new investment law that all new investments should be responsible and inclusive.

Positive developments related to RBC have already been observed in Myanmar. Knowledge about the rules that govern business activity, universal human rights, and specific instruments that enshrine these rights (such as the Guidelines and the UN Guiding Principles) is increasing.

On the government side, related regulatory and legal frameworks are improving, although more needs to be done both in adopting the relevant principles and standards but especially in implementing them on the ground. More information about the government role in protecting rights and promoting RBC can be found in the Investment Policy Review of Myanmar, undertaken by the OECD in partnership with the ASEAN Secretariat. The Investment Policy Review provides reform suggestions in numerous policy areas, including RBC and sustainable investment in agriculture. Although there appears to be no systematic way to incorporate RBC into investment considerations, a number of promising initiatives have emerged. To name a few, the recent efforts by members of the Myanmar Investment Commission to explore the feasibility of setting up a National CSR-RBC Committee (which could be chaired by the President's Office), as well as the merits of developing specific CSR guidelines to examine incoming investment projects, have been well received by the government. In this context, establishing a focal point in the government to promote and oversee RBC actions is something that could be envisioned in the medium-term.

On the civil society side, a relatively active UN Global Compact Network is already operational in Myanmar. Furthermore, through a joint initiative of the Institute for Human Rights and Business and the Danish Institute for Human Rights, Myanmar Centre for Responsible Business was established in mid-2013 to promote observance of responsible business practices. The International Labour Organisation has also reported that increased resources are being devoted to training and capacity building of trade unions, especially related to understanding the concept of freedom of association.

[3] See Press Release: http://www.oecd.org/daf/inv/mne/tradeandinvestmentweekkicksoffwithresponsiblebusinesspracticeconference.htm

About the Event

It is becoming increasingly important to promote the Guidelines in Myanmar, considering that more and more investors from the Guidelines adhering countries are investing in Myanmar. Sharing the Guidelines principles and operational modalities with regional investors (i.e. China, Malaysia, Thailand and Singapore) and local business can also contribute to levelling the playing field.

Italy was among the first governments to support Myanmar's historic opening and to encourage its recent reforms. The dialogue between Myanmar and Italy is based on developing new and valuable business relationships and in the context of the current situation in Myanmar. The Italian Ministry of Economic Development, where the Italian NCP is located, has taken the initiative to support a project in Myanmar to 1) raise awareness of and develop an understanding of the role of RBC in building healthy and functioning business environments, 2) raise awareness of the OECD Guidelines, 3) advise business on the specifics of investment context in Myanmar and how observance of the OECD Guidelines could help them obtain a license to operate in Myanmar, and 4) discuss how the Italian NCP and the OECD could assist Italian companies in meeting their corporate challenges in Myanmar.

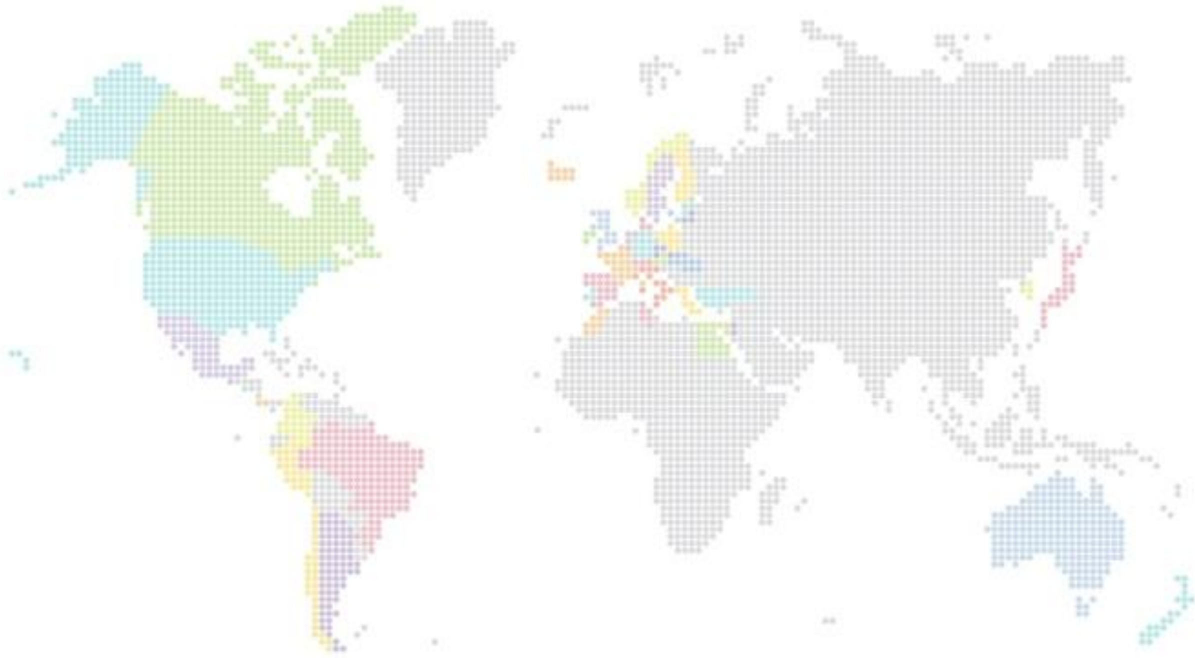
The event will pursue the discussion launched at a high-level conference in October 2013 in Rome, which benefited from the participation of Myanmar Minister of Foreign Affairs and the Italian Minister of Foreign Affairs, and was attended by approximately 200 people from institutions, the business sector and civil society.

For more information, please contact:

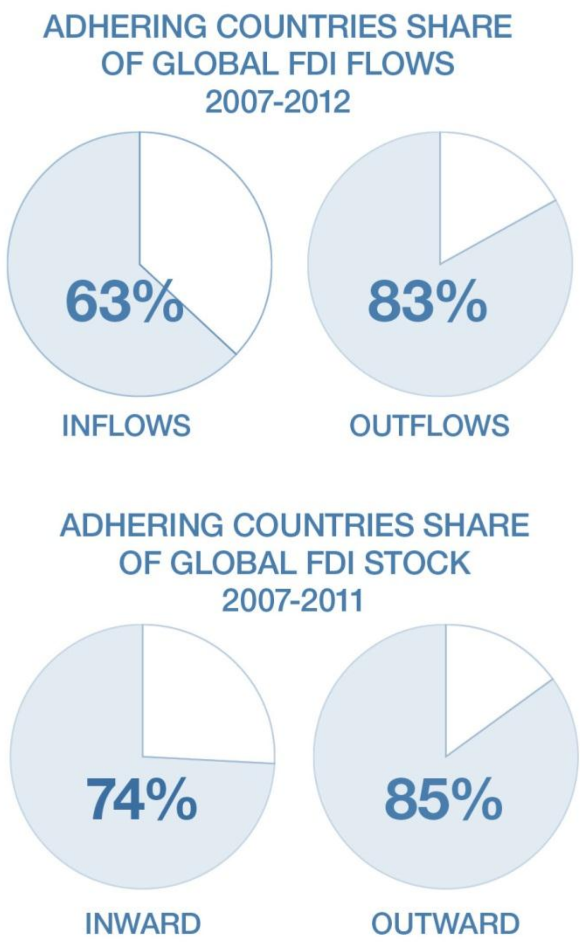
Marie-France Houde
Head of Unit, OECD Guidelines
OECD Investment Division
marie-france.houde@oecd.org
+33 1 45 24 91 26

Tihana Bule
Economist and Policy Analyst
OECD Investment Division
tihana.bule@oecd.org
+33 1 45 24 13 10

Annex 1: List of OECD Guidelines Adhering Countries



Argentina	**Jordan**
Australia	**Korea**
Austria	**Latvia**
Belgium	**Lithuania**
Brazil	**Luxembourg**
Canada	**Mexico**
Chile	**Morocco**
Colombia	**Netherlands**
Costa Rica	**New Zealand**
Czech Republic	**Norway**
Denmark	**Peru**
Egypt	**Poland**
Estonia	**Portugal**
Finland	**Romania**
France	**Slovenia**
Germany	**Slovak Republic**
Greece	**Spain**
Hungary	**Sweden**
Iceland	**Switzerland**
Ireland	**Tunisia**
Israel	**Turkey**
Italy	**United Kingdom**
Japan	**United States**



Source: OECD international direct investment database, IMF.

Annex 2: Background note for the conference "Myanmar: Diplomacy for sustainable growth" held in Rome, Italy on 23 October 2013[1]

Myanmar and OECD on Responsible Investments

Businesses must acknowledge that operating globally also implies a responsibility for their impact locally.

OECD Secretary-General A. Gurría

The OECD has a long-standing commitment in support of international investments, and responsible investments in particular: the *Guidelines for Multinational Enterprises*, first adopted in 1976, clarify the governments' expectations on how their enterprises should operate according to principles of responsible conduct, at home and abroad.

There are today 45 governments - among OECD and OECD countries - that adhered to the *Guidelines* and took the international commitment of creating National Contact Points, in charge of promoting the Guidelines knowledge and implementation by businesses. Adherents, including Italy, account internationally for around four-fifths of outward FDI and two-thirds of inflows.

The democratic transition taking place under Myanmar President Thein Sein's guidance is historical, entailing reforms that touch upon a wide range of issues and close cooperation between the Government, trading and investment partners, and international organisations. Against this background, the OECD has undertaken an *Investment Policy Review of Myanmar* at the request of the Myanmar government.

The *Review* is based on a list of key questions that need to be addressed by any government seeking to create a favourable investment climate. These questions can help the Myanmar government evaluate progress and identify priorities for action in ten policy areas: "responsible business conduct" (RBC) is one of them.

This is by no means a coincidence. A framework capable of attracting and retaining investments includes an element of RBC that contributes to create an environment of trust for investors and host society alike, and long-term business relations: a "win-win" situation that is conducive to sustainable and inclusive growth.

The OECD *Guidelines for Multinational Enterprises* represent the broadest international consensus so far about what constitutes responsible investment, notably as regards human rights, workers rights, the fight against corruption, environment and consumer interests.

Foreign investors that shape their responsible business conduct strategy by referring to recommendations of the OECD *Guidelines*, can meet the expectations clearly expressed by the Myanmar government: welcome and support new, responsible investments in the country.

[1] For more information please visit: mneguidelines.oecd.org/conference-sustainable-development-myanmar-2013.htm

Investment and human and labour rights and environmental protection in Myanmar[2]

My government is taking steps to build investor confidence and promote responsible investment in Myanmar.

President U Thein Sein

As sanctions are lifted, investment should be responsible and help the process of democratisation.

Daw Aung San Suu Kyi

The EU recognises the vital contribution the private sector has to make to the development of Myanmar/Burma and would welcome European countries exploring trade and investment opportunities. This should be done by promoting the practice of the highest standards of integrity and corporate social responsibility.

Council of the European Union, April 2012

Foreign investors in extractive sectors in Myanmar since the first period of liberalisation beginning in 1988, usually in partnership with local state-owned or military controlled enterprises, have received substantial criticism from international civil society. Non-governmental organisations have documented many human rights abuses associated with large investment projects in the past, mostly as a result of land clearance and resettlement by the government and the provision of security services by the military. Allegations include forced labour and other violations of labour rights, extensive land confiscation with inadequate compensation, harassment and intimidation by state agents, arbitrary detention and torture, as well as more generally a pervasive lack of meaningful consultations and consent among affected communities (EarthRights International 2011). Land and labour issues are discussed in more detail later.

These allegations led to consumer and shareholder boycotts for those foreign investors associated with the projects concerned, as well as cases brought before courts in home or third country jurisdictions. Faced with reputational risks and increasingly restrictive sanctions by western governments, several investors ultimately withdrew from Myanmar or abandoned plans to invest, *e.g*. Heineken, Carlsberg, British American Tobacco, Triumph, the Arcadia Group, British Home Stores, C&A, Phillips, Levi Strauss, Apple, Pepsi Cola and Reebok.[i]

Progress in strengthening human rights protection in Myanmar

Myanmar has had a long history of human rights violations, associated with decades of military rule and ethnic conflict. Armed conflict still persists in Kachin State and inter-ethnic conflict in Rakhine State and elsewhere. Furthermore, while hundreds of political prisoners have been released, many were estimated in 2012 still to remain behind bars (Amnesty International 2012). The UN Special Rapporteur for human rights in Myanmar, in a visit to Myanmar in mid-2012, pointed out that the country continues to grapple with human rights challenges but nevertheless noted improvements in the situation and the increasing engagement in the reform process of civil society, political parties and other stakeholders (UN 2012).

Myanmar has not yet become a party to most of the world's conventions governing human rights.[ii] The government has not signed the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, including the two optional protocols. The same is true for many other key conventions, such as those relating to slavery and torture. It has nevertheless signed conventions related to women's human rights and certain labour rights, among others.

[2] Extracts from the OECD *Investment Policy Review of Myanmar* (http://www.oecd.org/daf/inv/investment-policy/investment-policy-reform-in-myanmar.htm)

Myanmar National Human Rights Commission

To address existing and future human rights issues, President U Thein Sein established the Myanmar National Human Rights Commission in 2011 by executive order (Box 1). International non-governmental organisations such as Amnesty International welcomed the creation of the Commission, but questions remain about its independence and influence. Furthermore, the Commission is only empowered to consider complaints relating to acts which took place after its establishment (Amnesty International 2011). It was created through an executive order[iii] and as such is dependent on the president for its existence and lacks the imprimatur of the parliament (*Pyidaungsu Hluttaw*).[iv] Legislation is reportedly being prepared, with international assistance, to give the Commission a clear legal basis and statutory mandate.[v] Various groups have called on the Commission to take on a larger role in investigating and publicising human rights abuses, advocating ratification of key international conventions and educating the public.[vi]

Box. 1. Myanmar National Human Rights Commission

Established by Presidential Ordinance 34/2011 on 5 September 2011, the National Human Rights Commission has the following mandate:

- To receive communications on the violations of the fundamental rights of citizens, to investigate them and to convey the findings to the relevant government departments and bodies for necessary action.
- To examine whether the rights under international human rights instruments to which Myanmar is a state party are fully enjoyed and to advise on reports Myanmar is required to submit to UN bodies and committees and regional organisations.
- To examine the conformity of national legislation and administrative provisions with international human rights instruments to which Myanmar is a party and with the principles of promoting and protecting human rights and to make appropriate recommendations to the government.
- To study international instruments on human rights to which Myanmar has not yet been a party to, and to submit recommendations on signing and acceding to appropriate instruments.
- To communicate with UN organisations and foreign and domestic bodies engaged in the promotion and protection of human rights.
- To enhance public awareness and knowledge of human rights promotion and protection.
- To carry out tasks occasionally assigned by the President in connection with promotion and protection of human rights.
- To submit annual reports to the President on the activities of the Myanmar National Human Rights Commission and developments in the field of human rights.

The Commission is empowered to summon and question the individuals concerned; to claim and examine the relevant documents except those specially classified as required by the state, and to visit and examine scenes of violations.

Source: Presidential Ordinance 34/2011

Land

One of the main areas of human rights abuse in Myanmar involves land grabbing. The majority of cases brought before the MNHRC involve property disputes, including land confiscations. According to the Institute for Human Rights and Business, the government and dominant businesses have often used coercion and have paid inadequate compensation to those who are evicted with the result that such compensation is insufficient to maintain a basic standard of living (IHRB 2012). This in turn begets further landlessness and increasing poverty among those affected. As seen in the Chapter 9 on investment in agriculture, many farmers do not have title to their land and in some areas practice shifting cultivation. The *Farmland Law* and the *Vacant, Fallow and Virgin Land Management Law* are intended to provide greater security to farmers but have been criticised for making it easier for the government to appropriate land if it is deemed to be unused. Non-governmental organisations have also lamented the lack of access to the court system in the event of disputes over land (Amnesty International 2011).

Land issues are clearly an essential component of responsible investment. Given the history of disputes related to major investment projects, sometimes involving foreign investors, future investors will need to tread cautiously in this area. A number of organisations provide guidance in this area, including the UN *Basic Principles and Guidelines on Development-based Evictions and Displacement* which provide a framework for the development of policies, legislation and other measures to ensure that forced evictions do not take place and for effective remedies should prevention fail (UN 2012). The IFC also has performance standards on land acquisition and involuntary resettlement. For acquisitions of agricultural land, FAO *Voluntary Guidelines on Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security*, adopted by the Committee on World Food Security in May 2012, provide the most relevant framework for responsible tenure governance.

Two key elements of a responsible investment strategy related to land are free, prior and informed consent (FPIC) involving all affected parties and an independent grievance mechanism (discussed later) to hear complaints and settle disputes. The UN *Declaration on the Rights of Indigenous Peoples* states that “no relocation shall take place without free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, the option of return”. The notion of FPIC is gaining increasing currency and more than 200 states have ratified international and regional treaties and covenants that expressly provide for, or recognise, a state’s duty to obtain FPIC where warranted (UN-REDD 2013).

Investors can also adopt FPIC principles. A report issued by Talisman Energy at the request of its Canadian shareholders concluded that “in the long term, the benefits of securing community agreement were likely to outweigh the challenges and costs of doing so” (IHRB 2013). Based on interviews in the extractive sector, one study highlighted the serious potential costs to investment projects from disputes, including disruption to production, lost opportunities and management time dealing with the conflict (Davis and Franks 2011).

Labour issues

Myanmar has a long history of forced labour, with local populations providing construction or press-ganged into acting as porters or even soldiers. The 1907 *Town Act* and the 1908 *Village Act* both allow the government to oblige local populations to participate in public works. Draft legislation has been submitted to parliament to repeal both acts. In any event, the defence of forced labour on the basis of these acts has never been accepted by the international community. As a result of persistent forced labour, the Council of the European Union withdrew Myanmar’s access to generalised trade preferences in March 1997. Partly as a result of this record, Myanmar was effectively excluded from the International Labour Organization, a body which it had joined in 1948.

The ILO Liaison Officer in Myanmar reported in 2012 that new legislation had been adopted which criminalised the exaction of forced labour. Perpetrators are now prosecuted and punished, including military personnel. The European Commission recommended reinstating generalised tariff preferences for Myanmar in 2012 based on the ILO assessment that violations of the principles laid down in ILO Convention No. 29 (on forced labour) are no longer “serious and systematic”. Myanmar was readmitted as a full ILO member in 2012, following the commitment of President U Thein Sein to eliminate forced labour by 2015. It has at present signed only two of the eight core labour standards.

In other areas, both unions and strikes were forbidden under military rule beginning in 1962. With no independent trade unions until recently, workers in Myanmar frequently saw their rights violated, working long hours at low pay, sexual harassment, ethnic discrimination and no due process in the event of dismissal (IHRB 2012).

Although evidence of violations of labour rights still surface, Myanmar has made great strides to update the legal framework to protect workers' rights. A *Labour Organisation Law* was approved by parliament in late 2011 and signed by the president in March 2012. Workers are now allowed to form unions, and the ILO reported the registration of 263 workers' organisations and 12 employers' organisations as of October 2012. The law also establishes the procedure for holding strikes. This was followed by a *Labour Dispute Settlement Law* which, according to Amnesty International (2012), not only promotes and protects workers' rights but also involved consultations with international experts in the drafting phase. As a result, "both law and process have set a constructive precedent". The Trade Unions Congress (TUC 2013) nevertheless argues that the new dispute settlement mechanisms still do not adequately address worker discrimination for union activity. A *Minimum Wage Law* was enacted in June 2013.

Responsible behaviour by domestic enterprises

Beyond transcribing international standards into domestic legislation and building up the capacity of the civil service to implement these policies, the government of Myanmar needs to ensure that economic actors within its economy obey the new rules. This is particularly important in the context of Myanmar given the role that state-owned economic enterprises (SEEs) play in key sectors of the economy, including the two military controlled conglomerates. Government calls for responsible investment need to include from its own enterprises – especially since foreign investors are required to form joint ventures with domestic firms in some sectors. Indeed, Daw Aung San Suu Kyi has warned foreign investors not to enter into business relationships with local businesses with close ties to the military or with political connections (IHRB 2012). As one sign of progress in this area, the Global Compact launched its activities in Myanmar in May 2012, admitting 14 companies including the Union of Myanmar Federation of Chambers of Commerce and Industry (UMFCCI).

One area in which the government can promote responsible conduct for all investors, domestic and foreign, is through revenue transparency. Only four countries[vii] on the *Corruption Perceptions Index* by Transparency International have a worse score than Myanmar which ranks 172 out of 176 countries. Many large-scale investors have partnered with state-owned economic enterprises, including the two major enterprises controlled by the military with opaque revenue reporting. According to EarthRights International (2011), "there continues to be a lack of institutional capacity, political space and freedom among technocrats and civil society inside Myanmar to effectively advocate for transparent and responsible resource revenue management". To begin to address this problem, the government is considering applying for candidate status under the Extractive Industry Transparency Initiative, a global standard for the promotion of revenue transparency.

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i "Campaigners force Triumph International's withdrawal from Burma", Burma Campaign UK, 28 January 2002.

ii The full list Myanmar's ratifications of human rights treaties can be found at the University of Minnesota Human Rights Library, www1.umn.edu/humanrts/research/ratification-myanmar.html

iii As such, the Commission goes against the Paris Principles—minimum standards endorsed by the UN on the functioning of national human rights commissions (Human Rights Watch, 2013).

iv The parliament refused to include funding for the Commission in the national planning bill on the grounds that it was its constitutional prerogative to create such a body, but also because its policies and objectives had not been included in the national planning bill. See www.mmtimes.com/2012/news/620/news62016.html

v www.hrdreport.fco.gov.uk/human-rights-in-countries-of-concern/burma/?showall=1

vi See, for example, IBAHRI 2012.

vii Sudan, Afghanistan, North Korea and Somalia.