Public Consultation on the future investment relationship between the EU and Myanmar

1. INFORMATION ON RESPONDENTS

1.1. What is your profile? -single choice reply-(compulsory)	Non-governmental organisation
1.2. Please state the name of your business/organisation/association etc: -open reply-(compulsory)	Institute for Human Rights and Business

1.3. What is your main area/sector of activities/interest? -open reply-(compulsory)

Think tank The Institute for Human Rights and Business (IHRB) is a global centre of excellence and expertise on the relationship between business and internationally proclaimed human rights standards.

TRANSPARENCY and CONFIDENTIALITY To ensure that our public consultation is open and transparent, the report of the consultation, published on the European Commission's website, will include a list of the names of all the organisations from whom we have received contributions to this process. In addition, we will also publish the contributions of those organisations that have agreed to this publication. If you agree in general for publication of your contribution, you may nevertheless indicate some information that you would like to be treated as business confidential and not be published. For organisations which do not agree to the publication including for reasons of business confidential information, their contribution will be treated as confidential and will not be made public. Please indicate your preference: -single choice reply-(compulsory)	I agree to the publication of my contribution to this public consultation

If you agree in general to publication but would like part of your contribution to be treated as confidential, please indicate (also in the questionnaire) what information you consider confidential and do not wish to be made public and why:
-open reply-(optional)

2. INVESTMENT ENVIRONMENT IN MYANMAR

2.1. Are you either a business, or a trade association representing business? -single choice reply-(compulsory)	NO
2.2. Overall, how do you evaluate the change of investment climate in Myanmar in the past 2 years? -single choice reply-(compulsory)	Improved

Please explain: -open reply-(optional)

Prohibition to invest / limited scope of business -single choice reply-(optional)	
National security control -single choice reply-(optional)	
Subsidies policy -single choice reply-(optional)	
Merger review procedures -single choice reply-(optional)	
Excessive capital requirements -single choice reply-(optional)	
Foreign ownership (equity) limitations -single choice reply-(optional)	
Joint venture requirement -single choice reply-(optional)	
Local partner requirement -single choice reply-(optional)	
Local incorporation requirements -single choice reply-(optional)	
Burdensome regulatory approval -single choice reply-(optional)	
Burdensome licensing requirements/procedures -single choice reply-(optional)	
Registration / documentation requirements -single choice reply-(optional)	
Local content requirements -single choice reply-(optional)	
Problematic requirements for experience/qualification of personnel -single choice reply-(optional)	
Economic needs tests (e;g; on number of foreign businesses permitted..) -single choice reply-(optional)	
Nationality / residency requirements -single choice reply-(optional)	
Standards, testing -single choice reply-(optional)	
Technology transfer requirements -single choice reply-(optional)	
Limitations on R&D possibilities -single choice reply-(optional)	
Visa procedures -single choice reply-(optional)	
Price controls -single choice reply-(optional)	
Tax measures -single choice reply-(optional)	

Other restrictions -single choice reply-(optional)	
I did not encounter any barriers -single choice reply-(optional)	
Not applicabe -single choice reply-(optional)	
If you chose "other restrictions", please specify: -open reply-(optional)	
2.4. If you have directly experienced any of the barriers that you have identified, please explain which ones, and what happened. Please provide information on the level of impact which the barrier(s) had for your business; and if possible, on the cost of the barrier(s) for your business. -open reply-(optional)	
2.5. In light of recent political changes and EU normalisation of relations with Myanmar, do you plan to invest in Myanmar in the coming years? -single choice reply-(compulsory)	Not applicable
2.6. Do you see any barriers that would deter you from going through with plans to invest in Myanmar? -single choice reply-(compulsory)	Not applicable
2.7. Which aspects and factors of the Myanmar's market attract you the most and might make you decide to invest? -multiple choices reply-(compulsory)	Medium-term economic prospects - Proximity to the clients/markets - Size of Myanmar's market
Additional comments -open reply-(optional)	
2.8. Have you (or your members) ever made an investment in Myanmar? -single choice reply-(compulsory)	No
3. INVESTMENT ENVIRONMENT IN THE EU	
3.1. In the current post-sanction context, Myanmar's outward foreign investment (i.e. Myanmar's companies investing abroad) in your specific sector of operation in the EU is: -single choice reply-(compulsory)	No opinion
3.2. Do you see Myanmar's companies investing in your sector in the EU and competing with you in the coming years? -single choice reply-(compulsory)	Not applicable
3.3. Do you see specific issues linked to investment into the EU by Myanmar state owned companies? -single choice reply-	No opinion

(compulsory)

4. POTENTIAL IMPACTS OF AN EU-MYANMAR INVESTMENT AGREEMENT

A. Impacts on the investment climate

4.1. Do you consider that there is a need for the EU to contribute to facilitate EU investment in Myanmar, possibly through a bilateral agreement? -single choice reply-(compulsory)	No opinion
4.2. Are there any specific issues that EU-Myanmar investment should focus on for facilitating EU small and medium enterprises' (SMEs') investment in Myanmar? -single choice reply-(compulsory)	YES

Please explain

-open reply-(optional)

Meeting international requirements and expectations on sustainable development standards, including international human rights standards

B. Sustainable development aspects

4.3. How could the EU and Myanmar seek to better integrate sustainable development (economic development, social development and environmental protection) considerations in their discussions and issues that concern their investment relations?

-open reply-(compulsory)

The EU Communication - Towards a comprehensive European international investment policy, COM(2010)343, notes that an international investment policy can contribute to the objectives of smart, sustainable and inclusive growth, as set out in the Europe 2020 Strategy. These are the right objectives, provided that the objectives include both the EU and the investment partner country, in this case Myanmar. The Communication also notes that while “the aggregate balance is positive, negative effects may of course arise on a sector-specific, geographical and/or individual basis.” As the consultation document highlights, the risks of potential negative impacts are particularly high in the Myanmar. The Myanmar Government does not currently have adequate capacity and mechanisms to enforce international standards of corporate conduct within the country, nor is it likely to in the near future. Yet early investments will set the tone and standard for future investments. It is therefore critical that home countries, including in this case the EU, supplement Myanmar government efforts by using appropriate tools to promote, regulate and supervise EU investment adherence to international guidelines and principles. The Council Conclusions of April 2012 on Myanmar/Burma state that “the EU … would welcome European companies exploring trade and investment opportunities. This should be done by promoting the practice of the highest standards of integrity and corporate social responsibility. These are laid out in the OECD Guidelines for Multinational Enterprises, UN guiding principles on business and human rights and the EU's own CSR strategy 2011-2014.” The future EU-Myanmar Investment Agreement provides the opportunity to back up this commitment with concrete steps and requirements. These steps and requirements could include: 1. Requiring compliance with the OECD Guidelines and UN Guiding Principles as a condition for accessing the benefits of the EU-Myanmar Investment Agreement (see 4.4). 2. Developing specific guidelines for EU companies operating in Myanmar on how to apply these standards. 3. Requiring transparent reporting by EU companies benefiting from the EU-Myanmar Investment Agreement aligned with the recent US reporting requirements applying to US companies investing in Myanmar. An aligned requirement from the EU would reinforce the application of the UN Guiding Principles and OECD Guidelines in Myanmar; reinforce the importance of transparency around the application of these standards in Myanmar where transparency has not been the norm; help level the playing field for companies through the application of the same requirements; encourage other regional organisations to require similar behaviour of their own companies; and assure large multinationals operating in both the EU and the US that they will not face conflicting reporting requirements or expectations. 4. Ensuring that any companies participating in EU trade missions to or about Myanmar attend briefings on responsible business practices and the application of the OECD Guidelines and UN Guiding Principles as a condition of participation in the mission. 5. Cooperating with the OECD to promote proactive action by OECD National Contact Points (NCPs) to draw attention to EU based

companies of the requirement to apply the OECD Guidelines in Myanmar. In addition, the EU could cooperate with the OECD to ensure a coordinated response to any complaints among different EU OECD NCPs on Myanmar. Ensuring that the NCPs take a similar approach to grievances about the application of the OECD Guidelines in such challenging circumstances as Myanmar will be crucial: to ensure a level playing field among companies; to support application of the OECD Guidelines in line with the Council Conclusions; and for the credibility of the OECD NCP process as an important contribution to resolving disputes around investments that are accessible to communities (see 4.4). 6. Support efforts to promote responsible business in Myanmar, such as the Myanmar Centre for Responsible Business.

4.4. How, in your view, corporate social responsibility practices and international guidelines and principles in this area (such as OECD Guidelines for Multinational Enterprises and UN guiding principles on business and human rights) can best be promoted in the context of EU-Myanmar investment relations and in particular in the framework of an investment agreement? -open reply-(compulsory)

International investment agreements can be an important tool in securing responsible business conduct, including respect for human rights as follows: 1. Diverging approaches to what constitutes expropriation versus bona fide regulation: many traditional investment frameworks fail to provide adequate policy space to develop and apply regulations aligned with sustainable development goals, including international human rights standards. As the 2013 Council Conclusion on Myanmar's emphasises that the Myanmar Government should adhere to international human rights standards, any future investment agreement at a minimum should not undermine the Myanmar Government's steps to develop, apply and enforce human rights requirements, including on foreign investors from the EU. The April 2013 Council Conclusion congratulates the Myanmar Government on its "remarkable process of reform"; any future investment agreement should ensure that the Government can continue on that path of reform without being constrained by concerns about claims from EU investors under the investment agreement. 2. Balancing rights and responsibilities: Traditional investment agreement frameworks often do not impose responsibilities on investors, and instead focus on setting out a framework to protect foreign investments. Current thinking on integrating smart, sustainable and inclusive growth into investment agreement frameworks requires an approach that balances investor rights with responsibilities. At a minimum, access to investment agreement benefits should be conditioned on compliance with national law. An approach that better aligns the future investment agreement with the April 2012 Council Conclusions would demonstrate policy coherence, requiring companies seeking to benefit from the investment agreement protections to demonstrate compliance with the standards highlighted in the April 2012 Council Conclusions (i.e. the OECD Guidelines and the UN Guiding Principles). 3. Enabling special treatment for disadvantaged persons: In the particular context of Myanmar, with a complex mix of ethnic minorities, the Myanmar Government may choose to provide for special treatment of disadvantaged minorities in line with its human rights obligations and to ensure that the benefits of the country's growth is indeed inclusive. Any future investment agreement should be careful to preclude such beneficial arrangements from the application of non-discrimination provisions towards investors. Foreign direct investment should be required to comply with any temporary special measures aimed at accelerating de facto equality and should be restricted from claiming that such measures, whether applied in favour of women, ethnic minorities, or indigenous peoples, represents a discriminatory application against foreign investors. 4. Imbalance in access to remedy: Access to international arbitration is an important dimension of current international investment agreements and given the underdeveloped state of the judicial system in Myanmar, will be an important in attracting foreign investment to Myanmar. However, workers and communities who may be negatively affected by incoming foreign investment have no similar alternative mechanism to the Myanmar judicial system to resolve complaints. Both the UN Guiding Principles and the OECD Guidelines prompt companies to set up operational level grievance mechanisms to address complaints at the earliest moment. Requiring adherence to these frameworks as part of any future investment agreement would therefore go some way in addressing this imbalance. Supporting and promoting access to the OECD NCP mechanism is another (see 4.3) 5. Transparency in dispute settlement: The lack of transparency around international arbitration is key area of concern amongst human rights advocates. Full transparency of EU-Myanmar arbitral cases would promote transparency and consistency, reducing the real danger of contradictory decisions from different tribunals. 6. Conditioning access to investment agreement benefits on corruption-free practices: Corruption is and will remain a key challenge for Myanmar (see 5.0). Any future investment agreement should stay application of the benefits to companies that have had corruption proceedings filed against them in Myanmar or their home state, and should exclude from its benefits those companies that have been convicted of corruption. The International Institute for Sustainable Development (IISD) Model International Agreement on Investment for Sustainable Development seeks to strike a balance between rights and obligations of investors, host and home states. It focuses on quality investment and direct investment, rather than the quantity of investment and portfolio investment. IHRB would encourage using IISD's Model Agreement on Investment for Sustainable Development as a starting basis for the EU and Myanmar investment agreement.

C. Social and labour aspects

In the EU -single choice reply-(compulsory)	No opinion

In Myanmar -single choice reply-(compulsory)	Yes, positively

4.6. In your view, which issues linked to social and labour standards would require specific attention, in the context of an EU-Myanmar investment agreement? -open reply-(optional)

Increased EU trade and investment will have impacts on labour rights and social standards in Myanmar which could potentially be negative or positive. The following concerns regarding labour rights require specific attention in the context of the EU-Myanmar investment agreement: 1. Freedom of association and trade union rights. For the first time in 50 years, the right to form independent trade unions is now legal in Myanmar. Although hundreds of unions have subsequently been formed, many employers neither understand nor respect the right to organize and bargain collectively. Employees have been dismissed or transferred for attempting to form trade unions. It will be important to ensure that these rights are protected and promoted, including beyond the enterprise level, where they currently rest, to sector wide unions and industrial dialogue. 2. A legacy of forced labour by the Myanmar military and local authorities. In both the context of counter-insurgency and its economic activities, the military has for decades forced civilians to work as porters or labourers carrying heavy loads or working on military projects including farms. It will be important to encourage current reforms and adherence to the MOU with the ILO to eliminate forced labour by 2015 and to reinforce efforts to ensure that it does not move from the spotlight to the shadows of military controlled businesses. 3. Child labour in many industry sectors. Child labour remains prevalent in Myanmar, which often prevents children from attending school. Under 18s routinely work long hours in tea shops, and restaurants in order to support their families. Child labour is also present in light manufacturing which can expect increased foreign investment. 4. Adequate wages, working conditions and health and safety standards. Although there is important new legislation regarding the minimum wage, it may not be implemented fully. Moreover working conditions are often poor, with a lack of adequate health and safety standards. 5. Dearth of labour inspectors. While Myanmar currently has some labour inspectors, these are to cover existing operations, much less increased operations expected as a result of increased foreign investment. It will be important to reinforce adherence to international labour standards through other avenues such as through the EU-Myanmar Investment Agreement. 6. Risk of increased labour exploitation. Some of the sectors which will undoubtedly be a focus of foreign investment are particularly labour intensive sectors. These include large scale plantations and other agribusiness activities, tourism, and factories. These industries are often characterised by increased risk of labour exploitation.

D. Environmental aspects

In the EU -single choice reply-(compulsory)	No opinion
In Myanmar -single choice reply-(compulsory)	Yes, positively

4.8. In your view, which issues linked to the environment would require specific attention, in the context of an EU-Myanmar investment agreement? -open reply-(optional)

Increased EU trade and investment will have an impact on the environment in Myanmar. The following concerns regarding the environment require specific attention in the context of the EU-Myanmar investment agreement: Over the last decades, extractive industries such as logging, mining and oil and natural gas extraction have particularly contributed to deforestation, soil erosion, landslides, river siltation, damaging topsoil fertility by chemicals, and pollution. This has negatively affected the rights to health, food security, livelihood and the rights of ethnic minorities, and has impacted socially on communities. Such problems are due in part to the lack of legal requirements around compulsory environmental and social impact assessments (ESIAs) and to poor practices by companies. Increased foreign investment is expected in the extractive sectors, as well as other sectors that can have an equally large environmental footprint, such as agriculture, infrastructure and tourism. Although the 2012 Environmental Conservation Act and recently enacted foreign investment rules have provisions on the requirement to carry out ESIA for large projects that have potential negative impacts on communities and the environment, the Myanmar Government still does not have adequate capacity and mechanisms to monitor and oversee the environmental impact of foreign investments.

E. Human rights aspects

In the EU -single choice reply-(compulsory)	No opinion
In Myanmar -single choice reply-(compulsory)	Yes, positively

4.10. In your opinion, which issues relating to human rights might require specific attention in the context of an EU-Myanmar investment agreement? -open reply-(optional)

Increased EU trade and investment will have an impact on human rights in Myanmar. The following concerns regarding human rights require specific attention. 1. Labour rights. These human rights issues are covered off in Section 4.6. 2. Land grabs. For the past two years, the new government has allowed greater freedom of expression and peaceful assembly; consequently, land disputes have increased as communities have been able to exercise their rights more freely to contest previous and on-going land grabbing. Many disputes date back to the previous government; however, there are an increasing number of new land disputes, with some land grabs occurring in anticipation of incoming foreign investment. Land confiscation and forced relocation are prohibited under Article 126 of the new Foreign Investment Rules, as foreign investors are not permitted to lease land for investment purpose if there is objection from affected communities. This provides an important “hook” for any forthcoming investment agreement which should reinforce these national requirements. These widespread ongoing land disputes highlight the need for such in depth human rights due diligence around any land companies seek to acquire or use for their operations, covering land tenure and the processes used to acquire the land. The OECD Guidelines and the UN Guiding Principles require companies to carry out such human rights due diligence. 3. Intimidation and the arrest of human rights defenders. Despite the reforms and increased freedom of expression and peaceful assembly, human rights defenders are still at risk. A recent example is the arrest of human rights defenders for their opposition to Letpadaung Cooper Mine Project which involves a major land dispute (among other issues). 4. Business in areas emerging from conflict: Reliable reports indicate that both the military and non-state armed groups have engaged in land confiscation as businesses associated with the military and non-state armed groups move into newly peaceful areas. It should be noted however, that internal armed conflict continues between the Myanmar army and ethnic minority armed groups in the Kachin and Northern Shan States. 5. Business partners. Given the continued involvement of Myanmar’s military in business activities through entities such as the Union of Myanmar Economic Holdings (UMEH) and the past human rights record of its armed forces, it is crucial that investors undertake enhanced due diligence before entering into contracts, agreements, or partnerships with businesses in Myanmar, so as to avoid the risk of entering into business relationships with business entities involved in past or on-going human rights abuses. Many Myanmar businesses had no choice but to partner with the military during the years of military rule. Associating with these local businesses without due diligence also poses risks. These risks increase for an investing company when land, for example, has been acquired wit

5. OTHER ISSUES

5.1. If there are any other issues that are not mentioned in this questionnaire that you would like to address, please use the space below to set them out. -open reply-(optional)

Corruption is pervasive throughout Myanmar at all levels, which the government itself acknowledged in December 2012. It has subsequently taken steps to tackle corruption within the government, including expressing the intention to join the Extractive Industry Transparency Initiative. However, given that corruption is so ingrained, it will take time to fully address this problem. In light of these concerns, any investment agreement framework should ensure that it is consistent with international standards concerning corruption, such as the UN Convention Against Corruption, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, and applicable home country laws. As noted above, the protections or other benefits provided under any future EU-Myanmar Investment Agreement should not be available to companies accused or convicted of corruption (see 4.4).