

Myanmar Business & Legal Update

[current as at 16 February 2021]

The political situation in Myanmar changed dramatically on 1 February 2021 with the declaration of a 12-month State of Emergency (SOE) pursuant to the Constitution and the assumption of all legislative, executive and judicial powers by the Commander-in-Chief of Myanmar's Defence Services (**Tatmadaw**), Senior General Min Aung Hlaing. Many in the senior leadership of the previous National League for Democracy (**NLD**) and other prominent political figures were detained in the wake of this.

New governance arrangements have been progressively introduced since then with the formation of the State Administrative Council (**SAC**) as the principal ruling body, appointment of new Ministers and Deputy Ministers, reconstitution of a number of Government authorities and changed administrative arrangements at State/Regional, City, District and Township levels.

Notwithstanding these significant political changes, the leaders of the new Military Government (**NMG**) have made a number of statements, and undertaken a number of

supporting actions, intended to signal that, at least from an economic and investment point of view, things are "business as usual" in Myanmar.

While this may be the policy intention, we have observed material interruptions to some Government and other services, particularly telecommunications and financial services, that are affecting business. These have mainly occurred as a result of cuts to telecommunications services and the impact of Civil Disobedience Movement (**CDM**) that has arisen in opposition to the SOE. Other policy statements and actions by the NMG will also change the regulatory landscape for investors, including the proposed new Cybersecurity Law.

The recent announcement by the Biden Administration in the US of a new sanctions regime will also directly impact some investors, and have an indirect effect on the sentiment of many more, as would any similar actions by other Governments or multilateral institutions. We analyse some of these major changes and impacts in this update.

State of Emergency

The declaration of the SOE followed on from the Tatmadaw's contention, shared by some other political parties, that the results of the general election held in November 2020 were unsound due to widespread voter fraud and other irregularities, with this causing a loss of stability in Myanmar.

In their announcement of 2 February 2021 the NMG reasoned that the failure of "relevant officials" to resolve issues related to more than 10.4 million "fraudulent ballots", and the steps taken by the NLD to convene Parliament and form a new Government, amounted to "acts to take over the sovereignty of the Union by forcible means" which enabled the SOE provisions of the Constitution to be invoked.

There has been legal debate regarding the application of these Constitutional provisions and the procedures that were followed to invoke them, however the NMG continues to act under this authority and has stated that “free and fair general elections will be held as soon as the tasks are completed in accordance with the emergency provisions, and the power

will be transferred to the winning political party”.

The SOE provisions of the Constitution allow a 12 month period for this, which may be extended. In a press conference on 16 February the NMG spokesperson confirmed that the SOE period, and authority of the SAC, would be for a maximum of 1 year.

State Administrative Council

On 2 February 2020 the State Administrative Council was formed with Senior General Min Aung Hlaing as Chairman. This body will exercise sovereign powers pursuant to the SOE provisions of the Constitution. The SAC

comprises 15 other office holders and overall comprises 8 senior Military officers and 8 civilian members (some of whom are associated with minor political parties, others are from some of Myanmar’s minority ethnic groups).

Ministries

Following the declaration of the SOE all Ministerial and Deputy Ministerial appointments of the previous NLD government were terminated (and a number of those former office holders were detained). New Ministers have now been appointed across all portfolios and a number of Deputy Minister positions have been filled.

Aside from the Ministries where the Military already had the right/responsibility to appoint the Ministers pursuant to the constitution (Ministry of Defence, Ministry of Home Affairs, and Ministry of Border Affairs), and the Ministry of Office of Union Government (which now houses the General Administration Department, which previously sat within the Ministry of Home Affairs) and the Ministry of Transport and Communications, the new appointees are civilians (a number have previously been serving military officers). Many were already

serving in senior civil service roles in their Ministries and several had served in Ministerial, Deputy Ministerial or senior civil service official roles in previous Governments.

Some of the new Ministers are well known to investors, including the Minister for Investment and Foreign Economic Relations, U Aung Naing Oo, who previously served as Director General of DICA (the corporate regulator), and Secretary of the MIC the investment regulator) and most recently was Permanent Secretary of the Minister for Investment and Foreign Economic Relations under the NLD government. We worked with U Aung Naing Oo closely in the preparation of the Myanmar Companies Law and Investment Law reforms and in other capacities and he has long been regarded by international investors as an approachable and highly capable official who was supportive of increased foreign investment and the reforms

to the legal framework needed to attract it. His appointment as Minister, and the NMG's approach of appointing "technocratic" Ministers with experience in their portfolios, is

consistent with their public statements regarding continuity of economic policy and the attempt to adopt a "business as usual" approach to regulation.

Other Authorities and Significant Appointments

The Chief Justices of the Supreme and Regional High Courts, and other Judges of these Courts, were immediately reappointed to continue their duties. Four Supreme Court Justices were subsequently terminated and three additional Supreme Court justices appointed, with two Regional High court Chief Justices also added to the Supreme Court bench.

A new Attorney General has been appointed (previously Permanent Secretary of the Union Attorney General's Office and someone we have also worked closely with on previous Government assignments), as has a new Auditor General.

Members of the Anti-Corruption Commission and the Human Rights Commission were similarly re-authorized.

A new eight member Union Election Commission has been formed. This is the body with primary responsibility for preparing for and conducting new elections. The NMG announced that the UEC has commenced its investigation into voter fraud in the 2020 election and it has started to release its initial findings.

A new Governor and Deputy Governors of the Central Bank of Myanmar have been appointed to replace the former officeholders, all of whom have prior or current experience as senior officials at the Bank.

We have not seen any announcements to reconstitute and appoint members to the Myanmar Investment Commission. This is somewhat surprising given the NMG's stated focus on economic development and the continuation of prior policies and we assume that an announcement will be made soon once new members have been identified.

For State and Regional Administration, new State and Regional Administrative Councils have been adopted in place of Chief Ministers and Regional Governments. We expect these Councils to play more of an administrative (including security) rather than policy making role, with policy making responsibility further centralised in Nay Pyi Taw.

New District Administration Committees have been formed comprising the District Administrator (a role designated by the General Administration Department), a Tatmadaw Officer, a local representative and District Heads of the Immigration Department and Police Force.

For administration of Nay Pyi Taw, Yangon and Mandalay cities, the governing "Development Committees" have been reconstituted with reduced numbers of members appointed by the SAC.

Key orders, policies and statements by the NMG relating to the business environment

Economic Policy

In its first Notification on 1 February 2020 the NMG announced that efforts would be made to support businesses affected by COVID 19 and restore the economy as soon as possible. In a subsequent public address the Commander in Chief/ Chairman of the SAC announced that he and SAC members had met with leaders from the peak business association the UMFCCI and Chairman of a number of private banks to discuss the recovery. In the speech he reiterated that investment was welcomed and invited domestic and foreign investment and cooperation from partner countries. He stated that existing agreements would be followed in accordance with the law, that foreign investments will be implemented under the existing laws, and that permits approved “in policy” by the previous Government would be issued as soon as possible. He said there would be “no change in foreign policy, government policy and economic policy of the country”.

At a subsequent press conference the SAC also stated that agreements made during the period of the previous Government would remain and that contracts with investors would not be revoked or terminated. The NMG has also announced that it would continue to actively participate in multilateral fora, including ASEAN, and it reiterated a commitment to honouring existing bilateral and multilateral agreements.

In terms of concrete measures, the existing taxation relief measure on advance income tax for exports was extended until the end of February.

Telecommunications and Digital Services

Temporary cuts to telecommunications networks and digital services, including particular services such as Facebook, have been ordered on several occasions by the NMG. It is unclear how long the ordering of these shutdowns will continue – currently they are occurring nightly in the small hours.

More broadly, the NMG has proposed a new Cyber Security Law which could have a significant impact on business – certainly to those business who hold a lot of customer data, but also potentially to all other businesses which rely on cloud-based systems. Please refer to our separate detailed alert on this for more information. The proposed law provoked significant adverse comment from human rights groups and other CSOs, some business chambers and others. Whether or not in response to this, we understand that the implementation of the proposed Cyber Security Law may have been deferred, however key sections on Personal Data Protection and the penalties related to misadministration of Personal Data and the inclusion of penalties for dissemination of “fake news” and Cyber Terrorism have since been enacted as amendments to the Electronic Transactions Law.

Financial Services

Generally, the NMG has tried to assure people and investors that the financial system remains stable and operating. They responded quickly to rumours to deny the withdrawal of higher denomination bank notes and have been noticeable in their efforts to encourage/require CBM staff to return to work. They have made

public announcements directed at staff of local banks requesting them to continue to provide services and we understand that privately they have been encouraging local banks to maintain operations during the current period of instability (obviously within the constraints caused by suspensions of telecommunications services).

Government Services

The NMG and specific agencies, including the Ministry of Health and Sports, have made a number of announcements urging and requiring absentee officers to return to work. Hotlines for civil service staff to report people who may be coercing them not to attend work have been established.

These announcements have warned absent staff that action may be taken against them if they breach workplace rules and regulations. However, in their press conference on 16 February, the SAC representative stated that a short grace period would apply where those officials who had participated in the CDM and returned to work would not face action.

The SAC has also stated that Government services are running and that applications which had been made by investors, including investment proposals, would be processed and approved as soon as possible. As noted above, we are not aware that the MIC, being principal regulatory authority for investments, has been reconstituted, so any applications for investment approvals or other matters made to

it under the Myanmar Investment Law are presumably pending.

COVID-19

In their first Notification the NMG noted that all efforts to address and prevent COVID 19 would continue. It subsequently announced that it was continuing to work on the vaccination program and procurement of additional vaccines with “added momentum”.

The NMG has announced that it will increase relief flights to bring Myanmar nationals who may be overseas back to Myanmar.

Peace Process

In their first Notification the NMG noted that emphasis will be placed on restoring peace in Myanmar in accordance with the National Ceasefire Agreement. They separately announced that a conditional ceasefire would apply during February 2021 and that the Tatmadaw’s Peace Talks Committee had been reconstituted to continue peace talks “as quickly as possible” with the ethnic armed organisations who are party to the Nationwide Ceasefire Agreement and others.

Other Matters

In response to the CDM curfews have been imposed in many places, new restrictions on assembly have been legislated and a number of additional actions associated with the CDM have been criminalised. New requirements for householders to report the presence of overnight guests to Ward Administrators have been introduced.

Disruptions/interruptions to the business environment

We have observed interruptions to many over the counter and over the phone services provided by a range of Government agencies to business customers over the last two weeks. These include service interruptions at different offices of the CBM, FDA, DICA/MIC (including one stop service assistance provided by/on behalf of other agencies), Environmental Conservation Department, Internal Revenue Department, Immigration Department, Labour Department, Registration Office and offices of the YCDC. Court hearings have been delayed/rescheduled at different centres and levels of court. Transport interruptions have also been reported on rail network and at Yangon Airport with some delays at ports and land border crossings also reported.

In recent times a number of Government processes and services have moved online. These include platforms to apply for import/export approvals and licences, certain approvals from the FDA, an online trademark registration system and the corporate filing platform MyCo. All of these systems have been disrupted by the shutdowns of telecommunications services and potentially

also due to the unavailability of back office staff because of their participation in, or through difficulties in attending work due to, the CDM. Reports of cyber attack on some Government websites have also been made.

In addition to the Government services mentioned above, many private services have been disrupted. This has been particularly visible in the banking sector, with many bank branches closed or operating with reduced capacity and some banks having to introduce restrictions on ATM use. This will cause a knock-on effect to many other industries and businesses who rely on the payment and other financial services of the local banks.

Many companies have also had to manage the impact of their own staff participating in the CDM, or being unable to attend work as a result of CDM activities (eg because of safety concerns, traffic jams etc).

In short, many operational aspects of doing business in Myanmar have been significantly disrupted since 1 February 2021 for many investors.

New US sanctions and other international actions in response to the NMG

On 11 February 2021 US President Biden issued an Executive Order “Blocking Property with Respect to the Situation in Burma”. This sets out the framework for renewed targeted sanctions to limit transactions between US persons and named people and entities from Myanmar and other countries. It also permits the US to freeze assets held by such persons and take other measures. The scope of the Executive Order is quite broad – for example, it

could theoretically apply to all Government officials and agencies – however we anticipate that it will be applied narrowly to limit impact to those more directly involved in the leadership of the NMG. It must be born in mind that Executive Order only provides the sanctions framework – to apply actually sanctions to particular people and entities (and their related parties) their designation as sanctioned parties must be announced by the

US Secretary of Treasury, in consultation with the Secretary of State. Ten individuals and three entities connected to the military leadership in Myanmar have been designated so far, including the Commander in Chief/SAC Chairman.

The US also announced a redirection of some development expenditure and a review of other aid programs. The New Zealand Government cut aid programs which it considered may benefit the NMG and announced the suspension of high level political and military contact. The UN Security Council issued a resolution expressing its concern about the situation and the UN Human Rights Council went on to issue more strongly worded statements. Many other Governments, particularly from Western countries, have issued statements expressing concern and calling for the release of persons detained and recognition of the 2020 election results. ASEAN and a number of Governments from Asian countries have also released statements urging dialogue and a peaceful resolution. The government of Japan has expressed its “grave concern” and given its significant engagement with Myanmar in recent years it could be expected to play a significant role in seeking to resolve the current situation, although probably less visibly and vocally than the United States.

Over most of the last decade, and particularly the last five years, multilateral development

institutions (such as the World Bank/IFC, ADB, IMF and various UN agencies) have played an important role in Myanmar’s transition by providing development assistance, concessional finance, technical assistance and capacity building. Their presence also helped to support, directly and indirectly, increased investment by international and domestic investors in Myanmar. Most of these agencies made statements soon after the declaration of the SOE expressing concern for the people of Myanmar while also noting their commitment to ongoing development. We are not aware of any major changes to their strategies regarding Myanmar or particular development programs but expect that some programs and delivery methods (particularly provision of direct services to Government) will be under review.

Appeals have been made to international investors by a range of other international organisations to support efforts to recognise the results of the 2020 election and release the many persons detained since 1 February 2021. Calls have also been made to review business activities and avoid any business dealings with military related businesses. Some groups have even called for the suspension of dealings with State owned enterprises. The NMG’s proposed Cyber Security Law drew particular adverse commentary from CSOs and business groups inside and outside Myanmar.

Concluding observations

The situation in Myanmar is very volatile at present and it is difficult to predict what will happen in the short to medium term. While the NMG has stated its intention to transfer authority back to an elected government following new elections after the 12-month SOE

period prescribed by the Constitution, the pathway to that is not yet clear, especially given the NMG’s seeming intent to minimise or even exclude participation in the process by the NLD.

The ongoing CDM is causing significant disruptions to the provision of Government and non-Government services and cuts to telecommunications services and constraints on financial services continue to interfere with communications and business operations. How long this movement can be sustained (or how long before the NMG takes stronger action to suppress it) is unclear, and the safety and security risks for those involved are significant.

While many Governments and international organisations have called for the reinstatement of the elected Government and the protection of rights and liberties, there has so far been little concrete international action to impact the business environment. It is possible that such actions may yet be undertaken, especially if

there is an increase in repressive measures aimed at ending the CDM.

Our analysis is that the response of most investors at this moment has been to increase their monitoring of investments and risk, focus on navigating operational challenges and preserving the safety and security of their people, and to take a “wait and see” approach until the political situation clarifies, rather than to make any immediate decisions to withdraw or curtail operations. Unless there is a strong reason to do so – such as a widening of the sanctions regime or a very significant deterioration in the security situation – we do not expect there to be significant reductions in existing investments. The flow of new investments is likely to be significantly more impacted.

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SCM Legal is an independent firm, owned and operated by the team who prepared Myanmar’s new Companies Law and Investment Rules. Yangon based Partners Chris Hughes, Min Min Ayer Naing and Stefan Chapman have over 35 years of combined legal experience in Myanmar advising in almost every sector. Each of us worked with leading international firms before launching SCM.

We are best known for our major transactions and projects work, particularly in the telecommunications sector and nation building PPPs, and for advising Government on major law reform processes. We are well connected in the business community through leadership roles in business associations and we pride ourselves on providing innovative, technically sound advice. Please contact any of us at chris.hughes@scm-legal.com, stefan.chapman@scm-legal.com or minmin.ayernaing@scm-legal.com if you would like more information.