

# Myanmar update from on the ground: implications for investors

18 February 2021

## Latest developments on the ground

- In response to the takeover, many people (including a large number of civil servants) have chosen not to continue to work as part of what has become known as the “civil disobedience movement”. Protests are reportedly scheduled to wind up on 1 March, however it remains to be seen whether protests will extend beyond that date.
- Staff shortages have meant that a number of branches of state-owned banks, commercial banks and government departments have temporarily suspended their operations, such that in-person banking transactions and certain Government services have been unavailable.
- Access to the internet has been restricted, with practical consequences for investors resulting in difficulty with communications with partners and advisors on the ground in Myanmar (although telephone calls are so far unaffected). It has also resulted in interruptions to online banking and other online services such as money transfer and e-wallet services.
- Despite internet restrictions, The Yangon Stock Exchange remains open.
- The State Administration Council, formed by Min Aung Hlaing to act as the cabinet during the military rule, has moved quickly to replace union ministers, regional chief ministers, city mayors, members of the Central Bank of Myanmar and judges (including Supreme Court justices).
- Key new ministerial appointees include General Tin Aung San (the current Commander-in-Chief of the Myanmar Navy), appointed as the Minister of Transport and Communication (this includes control of telecommunications and internet regulators); Aung Than Oo (formerly the Deputy Minister of the Ministry of Electric Power), appointed as the Minister of Electricity and Energy (**MOEE**); and Dr Pwint San (the former Deputy Minister under the Thein Sein administration) appointed as the Minister of Commerce.

## Introduction

On the morning of 1 February 2021, in response to allegations of voter fraud, Vice-President Myint Swe (who has since assumed the role of acting President) declared a State of Emergency for one year and conferred full legislative, administrative and judicial power to Senior General Min Aung Hlaing, the Commander-in-Chief of Myanmar’s armed forces.

This article forms part of an ongoing series of updates on key developments in Myanmar and their implications for investors into the country. This update focuses on:

- Sanctions, including possible additional sanctions on military personnel
- Dispute resolution options using Investment Treaties
- Wider investor considerations: power sector case study

### Sanctions update

Since the military takeover, a number of countries have signalled an intention to impose additional sanctions on military-related personnel and entities in Myanmar.

On 9 February, U.S. President Joe Biden signed Executive Order 14014 authorising sanctions on individuals and entities connected with the military or deemed to be involved in activities that undermine democracy in Myanmar or otherwise threaten human rights.<sup>1</sup> Ten high-ranking generals in the Myanmar military were then sanctioned under Executive Order 14014, in addition to three military-affiliated companies.<sup>2</sup> All of these individuals and entities are now subject to asset-freezing sanctions in the U.S., and U.S. persons are effectively prohibited from engaging in any transaction with or for the benefit of any of these targets, or their property and interests in property. This includes any entities that are owned, 50% or more, by any of the targets. Any transaction involving these targets, their property, or interests in property that has any connection to the U.S. (including, eg, any payment in USD) risks breaching U.S. sanctions. Non-U.S. persons transacting with these targets also risk incurring sanctions designations themselves.

Importantly for foreign investors, Executive Order 14014 authorises additional sanctions against any person (individuals or entities) determined by the U.S. government to fall within a list of categories, including, any person who

<sup>1</sup> <https://www.govinfo.gov/content/pkg/FR-2021-02-12/pdf/2021-03139.pdf>

<sup>2</sup> <https://home.treasury.gov/policy-issues/financial-sanctions/recent-actions/20210211>

has "... materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of any person targeted by sanctions ..." under Executive Order 14014. To be clear, this means that any person that transacts with Myanmar sanctions targets that were designated under Executive Order 14014 may themselves become targeted by the same asset-freezing sanctions. This applies both to those persons targeted today and any forthcoming designations.

At this stage, the U.S. sanctions do not directly restrict transactions with state owned enterprises such as Electric Power Generation Enterprise (EPGE) and ministries such as the MOEE as these entities are not owned 50% or more by the sanctioned military leaders and are not sanctioned in their own right. However, risks remain in dealing with these entities due to the risk of incidentally transacting with sanctioned senior military leaders and the possibility that additional U.S. sanctions targeting military-affiliated entities could be enacted at any time. We recommend taking sanctions and Myanmar local counsel advice on a case-by-case basis.

Further sanctions, including from the United Nations and the European Union, are expected to be announced in the coming weeks. Additional U.S. sanctions may follow pursuant to Executive Order 14014 if the military takeover persists.

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## Investment treaties

For investors in Myanmar who might be exploring dispute resolution options, it is noteworthy that Myanmar is a party to a network of investment treaties (either through its own negotiations or by virtue of its membership in ASEAN) that provide substantial rights of protection to foreign investors and their investments in Myanmar.

In particular, Myanmar has investment treaty arrangements with the following States: Australia, New Zealand, China, Hong Kong, India, Israel, Japan, Korea, Laos, Philippines, Thailand and, by virtue of ASEAN membership, Brunei, Cambodia, Indonesia, Malaysia, Singapore and Vietnam.

Key amongst the protections afforded by these investment treaties is the right to fair and equitable treatment, the most frequently invoked protection in investor-State dispute settlement proceedings. It has traditionally been construed broadly to include, amongst other things, affording an investor due process and the non-denial of justice, lack of arbitrariness and non-discrimination, and, importantly, respect for an investor's legitimate expectations. These treaties generally afford foreign investors a direct right of arbitration under the UNCITRAL rules against the State in the event of a dispute arising out of the investment.

Investors who face losses as a result of events in Myanmar may therefore potentially be able to seek a remedy before a neutral international tribunal. Myanmar's investment treaty network is also in addition to the Myanmar Investment Law, which was implemented in October 2016 and offers protections to foreign investors such as treatment no less favourable than that accorded to Myanmar citizen investors, and fair and equitable treatment in respect of the right to obtain information that affects their investment and the right to due process of law.

Allen & Overy's investment treaty specialists would be happy to assist you to determine whether your investment vehicle or your investment falls within the scope of one or more of the investment treaties in place.

For a more detailed discussion of how investors, particularly those in the infrastructure sector, may benefit from protections under investment treaties, please refer to our recent article on investment treaties available [here](#).

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## Wider investor considerations: Power sector case study

### (a) Impact on Project Schedules

Due to the significant investment required in Myanmar's power sector in order to meet its development goals and the apparent intention by the military to encourage a "business as usual" approach to investors, it is unlikely that the military will look to cancel power projects where PPAs have already been signed (even if they were able to do so as a matter of contract).

That said, for those projects already under construction, there may be delays in achieving milestones and commercial operation dates under signed PPAs due to (1) the availability of labour to the extent workers choose not to attend work; (2) near term disruption to supply chains and logistics (over and above that already anticipated from COVID-19); and (3) any delays in obtaining project critical items such as permits and licenses from Government offices that have closed or are not functioning at full capacity, including for imports.

These include the recently awarded solar IPP projects as part of the 1GW solar tender conducted in May 2020 which are reported to have committed to achieving commercial operations within April 2021. Please see below for an analysis of the potential force majeure and other claims that may be available for delays and increased costs resulting from the current circumstances.

As at the time of publication, it is unclear to what extent key ministries such as the Directorate of Investment agencies and Company Administration (**DICA**), the Myanmar Investment Commission (**MIC**) and the Ministry of Natural and Environmental Conservation (**MONREC**) are continuing to issue permits. There have been reports of new MIC Permits being issued (for example, for two of the solar projects) and the submission of at least one EIA Report for a power project since the military takeover. However, it appears that all of these permits were either issued prior to 1 February 2021 or within days of the military takeover suggesting they had already been processed prior to the takeover.

We understand that a number of power projects still in the development stage, for example, those without effective PPAs and financing in place, have been put on hold by some investors so that they can assess the new political landscape and how the situation progresses on the ground over the coming weeks and months. These investors will also need to consider the continued availability of financing for such projects (please see below for further commentary on this) and be ready to assess the impact of any current and future sanctions.

However, this is also likely to vary depending on the investor's country of origin, its sources of funding and the location of its other overseas investments (including, importantly, whether any of these are related to the U.S.).

## **(b) Contractual Relief – Events of Default, Force Majeure and Change in Law**

Investors in Myanmar's power sector should make sure that they are aware of the contractual relief available to them and their counterparties for delays and/or increased costs under the project contracts.

It will be crucial at this stage to serve notices in a timely manner to ensure that any protections are not lost as a result of failure to comply with notice requirements.

### **Events of Default**

While unlikely to be relevant at this stage, counterparties should be ready to move quickly, notwithstanding the current situation, with event of default and reservation of rights notices if there is a breach of contract. This will assist with mitigating the risk that defaults are waived by their action or inaction.

This may become more relevant for any parties approaching connection or commissioning and testing (such as for those developing projects awarded as part of the 2020 solar tender) where the cooperation and attendance of Government employees is envisioned or to the extent deemed commissioning becomes relevant triggering EPGE payment obligations.

### **Force Majeure**

Project documents in Myanmar, including construction contracts and PPAs, typically provide for a party to the contract to be excused from performing its obligations (and from the consequences of delays in performing those obligations eg liability for delay liquidated damages) if they are prevented from doing so by a force majeure event or its effects. Whether the military takeover and its effects will trigger force majeure relief will depend on the scope and the specific wording of the force majeure provision under that contract.

Points to note in this regard:

- as above, investors should ensure they are familiar with the notice periods and mitigation requirements (if any) under the PPA and comply with the same, including serving force majeure notices under the relevant upstream contract (for example, the PPA and/or any concession or BOT agreement) if a claim for force majeure relief is received from a counterparty to a feedstock supply, construction or operations and maintenance contract.
- PPAs in Myanmar typically expressly provide that force majeure includes events such as the “declaration of national emergency”, “sanctions”, “general strike or work stoppage” (other than localised to the project) and “civil disturbance”. Therefore, provided such events cause a delay or disruption in the performance of a party's obligations and that all other requirements of the relevant contract have been satisfied, the current events may give rise to a claim for force majeure relief.

– PPAs in Myanmar generally also include additional relief for the project company in the event of “governmental force majeure” (which typically includes the events listed above, provided that the action or inaction of a governmental authority is the controlling or predominant factor in causing such event), entitling the project company to deemed commissioning of the project (in the event that the governmental force majeure occurs during the construction phase and delays commissioning) and deemed offtake from the project (in the event that the governmental force majeure occurs during the operating phase and prevents the project company from generating electricity). One example, typically also covered by the terms of Myanmar PPAs, relates to the delay in issuance of permits by the Government despite the project company meeting the requirements and having taken necessary steps in applying for such permit.

### **Change in Law**

To date, the military has issued a number of directives and orders and we expect this to continue in the near future. While none of these, as far as we are aware, apply to investments in the country and there are still queries around their legal status, change in law provisions in Myanmar PPAs are typically wide enough to capture changes to the implementation and enforcement of laws and so this may be another area to watch.

PPAs in Myanmar have in the past provided for the project company to recover increased costs and to be compensated for decreased revenues (subject to certain de minimis thresholds) where due to a qualifying change in law. The impact of any change in law and whether or not it will qualify for relief under a PPA will require a case-by-case analysis. Again though, it will be important to be aware of notice and any other relevant requirements to ensure investors are ready to make any claims in compliance with the relevant contract.

## **(c) Sovereign Guarantees**

A number of large-scale IPPs in Myanmar, including the 225 MW gas-fired Myingyan IPP, benefit from government guarantees of the offtaker's payment obligations. Our expectation is that government guarantees and obligations under a concession agreement or a direct agreement issued in favour of a project before the military takeover should in theory remain enforceable against the issuing government ministry.

For a more detailed discussion of considerations relevant to investors in projects which benefit from government guarantees, please see our recent article on sovereign payment risk available [here](#).

## **(d) Financing and Political Risk Insurance**

With a relatively limited track record of limited and non-recourse financings in Myanmar's power sector, lenders have often taken a conservative view of the risks posed in financing projects in the developing nation, requiring significant multilateral support in order to finance large-scale power projects. Although commercial lenders have participated in the financing of IPP projects, they have done

so under tranches backed by a political risk guarantee and/or alongside direct lending from multilaterals and development financial institutions.

The continued availability of political risk guarantees and insurance from multilateral institutions or from private providers, is likely to be pivotal in allowing lenders to provide financing in Myanmar's power sector in the future. More generally, we expect lenders to take time to assess and understand any new risks present in financing power projects in Myanmar (particularly any additional sanctions and reputational risk). Financings are therefore unlikely to be able to move forward until the uncertainty surrounding

the current situation has diminished and lenders can more accurately assess these risks.

As above, for investors who have already taken out political risk insurance, and lenders who benefit from political risk guarantees or insurance, we recommend reviewing coverage and promptly providing notice to the relevant guarantor or coverage provider in order to preserve any claims.

For a more detailed discussion of the key terms of political risk guarantees and insurance, please refer to our recent article on sovereign payment risk available [here](#).

## Conclusion

The political situation in Myanmar continues to develop day-by-day. Investors in Myanmar should continue to monitor the situation closely and seek to understand the implications on their business of the practical challenges these developments bring and any changing legal framework such as that concerning sanctions. Investors should also be aware of what protections may be available to them under the terms of the project documents (including force majeure and change in law relief), any sovereign guarantees and political risk insurance and any applicable investment treaties. Immediate action should be taken to serve notices to preserve such claims. Further, investors should also seek to actively engage with all interested stakeholders, including financiers, so that they maintain open channels of communication and minimise the risk of stakeholders taking action without consultation.

Our team in Yangon is safe and, to the extent internet service remains available, remains fully operational with support from our wider Myanmar-focused team. For more information about what is happening on the ground in Myanmar and to discuss further how this might affect investors in the power and other sectors, please get in touch with the contacts listed below.



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