

COUP D'ETAT IN MYANMAR – WHAT NEXT FOR FOREIGN INVESTORS?

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EXECUTIVE SUMMARY

The *coup d'état* by Myanmar's military has sparked mass protests, which have been met with the imposition of martial law, media and telecommunication blackouts, and human rights violations, including mass arrests and deadly force. Many foreign investors have been required to suspend operations to ensure the security of workers and their investments.

Over the past decade, Myanmar has encouraged foreign investments by providing investors with better legal protections. Foreign investors whose investments have been harmed as a result of the *coup d'état*, either as a direct or indirect result of the military, State authorities or a State-owned entity's actions, may thus be able to seek legal redress against Myanmar for breach of an investment treaty, contract or domestic law. In particular, investors from Singapore, Korea, Japan, Israel, Australia and New Zealand may have claims under treaties between their home States and Myanmar and can potentially commence arbitration proceedings to pursue them.

1 INTRODUCTION

On 1 February 2021, Myanmar's military, claiming that the 2020 November General Election was mired in fraud, seized power and arrested elected officials from the National League for Democracy party ("NLD"), including its head, and re-elected State Counsellor, Aung San Suu Kyi. The military's return to power has sparked mass protests over the past several weeks. In response, the junta has imposed martial law, caused media and telecommunication blackouts and committed human rights violations, including resorting to mass arrests and using deadly force, with over 700 people reportedly killed.¹ Calls to halt the violence have been made by the United Nations High Commissioner for Human Rights² and Ambassadors

to Myanmar from various countries including the UK, Switzerland, New Zealand, Korea, Australia, the US and EU countries.³

The *coup d'état* is said to mark the end of a decade of democratic rule that had coincided with the release of Aung San Suu Kyi in November 2010 from house arrest, followed by her and the NLD's victory in the 2015 General Election. Over this period, foreign investments into Myanmar grew with investors hailing primarily from Singapore, China (including Hong Kong), South Korea, neighbouring Thailand and Japan. Sectors which draw the most foreign investment are retail manufacturing, real estate, energy (oil & gas), and transport.⁴

The increase in foreign investments was facilitated by reforms to Myanmar's investment policy, including the enactment of the Myanmar Investment Law in 2016 ("MIL") and the Investment Rules in 2017 ("MIR"). Myanmar also concluded bilateral investment treaties ("BIT") and multi-lateral trade agreements (comprising investment chapters), within the framework of the Association of Southeast Asian Nations ("ASEAN").⁵

However, the *coup* and heavy-handed approach to the protests have impacted Myanmar's economy – whose output had drastically slowed because of the Covid-19 pandemic and is now predicted to shrink by 10% this year – and created uncertainty for foreign investors.

This article examines the possible legal remedies for foreign investors in Myanmar.⁶

2 Impact of the Coup on Foreign Investments

The effects of the coup on foreign investments are difficult to predict.⁷ Reports are that the new regime does not wish to jeopardise the economic benefits that have accrued from foreign investments.⁸ For example, the Myanmar Investment Commission, newly appointed by the military, has authorised new foreign investments.⁹ The situation at the Ministry of Investments and Foreign Economic Relations, however, appears unstable, given that some 80 civil servants reportedly went on strike and have been fired in recent days in April.¹⁰

Foreign investors, especially in the extractive / mining and energy industries, are facing logistical challenges and have in some instances suspended

their operations. Some have instructed local employees not to travel to their workplace or they have been unable to do so for fear of being harmed or arrested. Certain countries have called on their nationals in Myanmar to leave. Much of the unrest has occurred in Yangon, Myanmar's main commercial port, which has delayed supplies and hampered exports. The internet and telecommunication blackouts are affecting business throughout Myanmar.

There is also cause for concern for the security of work sites, given the military's use of lethal force and promises of retaliation by rebel groups.¹¹ Conversely, Chinese-owned investments have been frequent targets of protesters who see China as an ally of the military.¹²

3 Legal Remedies

3.1 Domestic law

Over the past decade, Myanmar has opened economic sectors to foreign investment – for example banking, financial services, telecommunications – and provided investors with enhanced protections.¹³

The Investment Law and Investment Rules

The MIL and MIR provide protections to foreign investors and their investments¹⁴, including:

- Protections against direct expropriations and indirect expropriations,¹⁵ namely measures having the equivalent effect to the transfer / seizure of property and effectively depriving the investor of the benefit of ownership of the investment.¹⁶ Expropriations are forbidden unless they serve a public purpose, are non-discriminatory, in accordance with the law and against prompt, fair and adequate payment of compensation.¹⁷ The MIL defines fair compensation, as the “market value” of the investment but also refers to other considerations such as the public interest and profits from the investment.¹⁸
- Fair and equitable treatment (“FET”), including the right to obtain information on measures or decisions that impact a given investor

or investment and the right to due process and appeal in respect of government measures, including changes to terms of government-granted investment licences or permits;¹⁹

- Non-discriminatory treatment of foreign investors as compared to both Burmese nationals (national treatment) and other foreign investors (most-favoured nation treatment);²⁰ and
- Subject to certain limitations, the right to carry out a free transfer of funds from investment activities.²¹

Disputes between foreign investors and the State are to be resolved amicably through the Investor Grievance Mechanism,²² which was set up in 2020.²³ Should the parties fail to resolve the dispute, investors may bring claims through a contractually-agreed forum, such as arbitration, through the national courts, or mechanisms provided by investment treaties.²⁴

The Arbitration Law

Following its accession to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“**NY Convention**”),²⁵ in 2016, Myanmar adopted a new arbitration law. It has been welcomed as a means of providing a more stable legal environment for foreign investors.²⁶

While State courts are more restricted in their ability to intervene or interfere with arbitration proceedings based in Myanmar, enforcement of an arbitral award may be refused if it “would be contrary to the national interests of the State”.²⁷ The new law’s effectiveness will depend on its implementation, which in turn rests upon the judiciary’s independence.²⁸

3.2 International law

Myanmar has a poor track record in terms of the rule of law and the *coup* has demonstrated the precarity of its legal institutions. Myanmar’s international legal obligations therefore provide a firmer basis for foreign investors to seek redress for interference with their investments.

Myanmar has recently concluded a series of international agreements providing protections to foreign investors both on a bilateral basis and as part of ASEAN.

Bilateral investment treaties

Myanmar has signed 11 bilateral investment treaties, eight of which are in force, with China, India, Israel, Japan, Korea, Philippines, Thailand, and, most recently, Singapore. These BITs include protections commonly provided to foreign investors.²⁹ The protection against expropriation and the FET standard are generally more favourable to investors than those contained in the MIL. Also, Myanmar has committed to ensuring full protection and security (“FPS”) to foreign investments so that investors and investments should be free of harm from physical violence, for example resulting from civil unrest, whether it stems from third parties or the State itself, and that the State will remedy any such harm.³⁰

The standards of protection in the recent BIT with Singapore are more precisely defined. FET and FPS are defined as corresponding to the minimum standard of treatment under customary international law;³¹ FET is also defined as including “denial of justice” and FPS as requiring “each Party to provide the level of police protection required under customary international law.”³² Annex II sets out a more precise definition of expropriation. Of particular interest is Article 7.2 of the BIT, which provides that the host State is responsible for providing restitution or compensation, or both if appropriate, where investors suffer a loss “resulting from the (...) destruction of the investment or part thereof of the investor by the latter Party’s forces or authorities, which was not required by the necessity of the situation.”³³

The BITs provide access to investor-state dispute settlement mechanisms, namely investment arbitration, which offers investors a safer, neutral forum in which to seek redress. Also, arbitration may provide an avenue for bringing human rights violations claims, insofar as they may be relevant to investment disputes and encompassed by BITs.³⁴

Multilateral treaties

Myanmar, through its membership of ASEAN, is party to seven multilateral agreements, which contain varying degrees of investor protections.³⁵ Among these are the ASEAN Comprehensive Investment Agreement (“ACIA”), an investment treaty between the members of ASEAN, as well as the ASEAN-Australia-New Zealand Free Trade Agreement

(“AANZFTA”), which provides protections to Australian and New Zealand investors in Myanmar.³⁶

The scope and level of protection offered in these treaties differ. For example, the FET and FPS standards in AANZFTA or the ASEAN-Korea Treaty provide the level of protection required under customary international law, and FET includes protection against denials of justice.³⁷ In the case of ACIA and the ASEAN-China FTA, FET is defined as no more than a protection against denials of justice. Except for the ASEAN agreement with Hong Kong, these agreements provide for investor-state arbitration.³⁸

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¹ R. Paddock, “More Bloodshed in Myanmar as Crackdown on Coup Protests Continues”, *New York Times*, 11 April 2021 (available at: <https://www.nytimes.com/2021/04/11/world/asia/myanmar-coup-protests.html>).

² H. Regan, “UN rights chief fears Myanmar heading to 'full blown conflict' with echoes of Syria”, *CNN*, 14 April 2021 (available at: <https://edition.cnn.com/2021/04/14/asia/myanmar-un-conflict-syria-intl-hnk/index.html>).

³ “Joint Statement by Ambassadors to Myanmar”, 9 April 2021 (available at: <https://mm.usembassy.gov/joint-statement-by-ambassadors-to-myanmar/>).

⁴ World Bank, *Myanmar Economic Monitor coping with Covid-19*, December 2020, pp. 32-33.

⁵ ASEAN is an intergovernmental organisation comprising ten States seeking to promote economic, political, social, educational and cultural development and promote peace in the region (available at: <https://asean.org/asean/about-asean/overview/>).

⁶ This article does not address legal remedies resulting from human rights violations or how these may be sanctioned.

⁷M. Bahree, “For foreign investors in Myanmar, coup adds new uncertainties”, *Al Jazeera*, 18 February 2021 (available at: <https://www.aljazeera.com/economy/2021/2/18/for-foreign-investors-in-myanmar-coup-adds-new-uncertainties>).

⁸C. Khieng Yuit, “What does military rule mean for foreign investments in Myanmar?”, *Channel News Asia*, 16 February 2021 (available at: <https://www.channelnewsasia.com/news/business/what-military-rule-mean-foreign-investments-myanmar-money-mind-14122120>).

⁹Myanmar Directorate of Investment and Company Administration (DICA), “Myanmar Investment Commission (MIC) holds its regular meeting (2/2021)”, 24 March 2021 (available at: <https://www.dica.gov.mm/en/news/myanmar-investment-commission-mic-holds-its-regular-meeting-2021>).

¹⁰“Junta’s investment ministry fires more than 80 staff over CDM participation”, *Myanmar Now*, 11 April 2021 (available at: <https://www.myanmar-now.org/en/news/juntas-investment-ministry-fires-more-than-80-staff-over-cdm-participation>).

¹¹“Trafigura suspends oil-products transport in Myanmar”, *Lloyds List*, 2 February 2021 (available at: <https://lloydslist.maritimeintelligence.informa.com/LL1135637/Trafigura-suspends-oil-products-transport-in-Myanmar>);

Reuters, *Trafigura's Puma Energy suspends all operations in Myanmar*, 11 February 2021 (available at: <https://www.reuters.com/article/myanmar-politics-puma-energy-idUSL1N2KH1UT>);

Z. Hongpei and L. Xuanmin, “Myanmar rare earths heading toward China encounter shipment obstacles amid upheaval”, *Global Times*, 21 March 2021 (available at: <https://www.globaltimes.cn/page/202103/1218983.shtml>);

“Irish citizens advised to leave Myanmar as security forces kill 114 protesters”, *RTE*, 27 March 2021 (available at: <https://www.rte.ie/news/2021/0327/1206471-myanmar-military-warning-parade/>).

¹²S. Bhaumik, “Martial law in 4 more Yangon townships”, *The Siasat Daily*, 16 March 2021 (available at: <https://www.siasat.com/martial-law-in-4-more-yangon-townships-2111257/>).

¹³OECD, *OECD Investment Policy Reviews: Myanmar 2020 Report* (available at: https://www.oecd-ilibrary.org/finance-and-investment/oecd-investment-policy-reviews-myanmar-2020_d7984f44-en), pp. 19, 24, 38, 45 (hereinafter “**OECD Report**”).

¹⁴MIL, Chap. 16; MIR, Chap. 20. These chapters list the obligations with which foreign investors must comply and include, *inter alia*, abidance to domestic laws and licences, labour rights and environmental standards.

¹⁵MIL, Art. 52.

¹⁶U. Kriebaum and A. Reinisch, “Property, Right to, International Protection” in *Max Planck Encyclopedia of Public International Law* (April 2019), paras. 10-16).

¹⁷MIL, Art. 52.

¹⁸MIL, Art. 53.

¹⁹MIL, Art. 48.

²⁰MIL, Art. 47.

²¹MIL, Chap. XV.

²²MIL, Arts. 82-83.

²³OECD Report, p. 36.

²⁴MIL, Art. 84.

²⁵New York Convention, Status (available at: https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2).

²⁶ OECD Report, p. 86.

²⁷ Myanmar Arbitration Law, Arts. 41(a)(vii) for domestic arbitration and 46(c)(ii) for international arbitration. Please note that the new law also appears more favourable to

²⁸ OECD Report, p. 87.

²⁹ *I.e.* expropriation, national treatment, most-favoured nation, fair and equitable treatment, and full protection and security.

³⁰ See for example Israel-Myanmar BIT, Art. 2.2, Japan-Myanmar BIT, Art. 4.1. Depending on the wording, FPS may also be interpreted to encompass the obligation to provide legal protection and security (see C. Schreuer, “Investments, International Protection” in *Max Planck Encyclopedia of Public International Law* (June 2013), paras. 53-54).

³¹ Myanmar-Singapore BIT, Art. 3. See also, Korea-Myanmar BIT, Art. 2.

³² Myanmar-Singapore BIT, Art. 3.2(b). This definition of FPS is more limited than that provided in other BITs; for example, the Korea-Myanmar BIT provides that FPS corresponds to the requirements of customary international law (see Art. 2.3(b)).

³³ See also similar wording found in the Korea-Myanmar BIT, Art. 4.2(b) and the Israel-Myanmar BIT, Art. 4.2(b).

³⁴ *Strabag SE, Raiffeisen Centrobank AG and Syrena Immobilien Holding AG v. Republic of Poland*, ICSID Case No. ADHOC/15/1, Partial Award on Jurisdiction, 4 March 2020, para. 5-75; *Yukos Universal Limited (Isle of Man) v. Russia*, PCA Case No. 2005-04/AA227, Final Award, 18 July 2014, para. 765; *SAUR International v. Argentine Republic*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability, 6 June 2012, paras. 330-331.

³⁵ These agreements include one between ASEAN member States as well as six other agreements between ASEAN member States and third countries, namely Japan, Korea, China, India, Australia/New-Zealand and Hong Kong.

³⁶ See in particular, AANZFTA, Chap. 11.

³⁷ AANZFTA, Chap. 11, Art. 6; ASEAN-Korea Investment Agreement, Art. 5; ASEAN-India Investment Agreement,

³⁸ OECD Report, p. 90.