



**Memorandum on  
international law issues for  
'Justice For Myanmar',  
instructed by the  
Australian Centre for  
International Justice (ACIJ).**

On International Law Issues Arising for the Singapore Stock Exchange from its Listing of the Singapore-domiciled Emerging Towns & Cities Singapore Ltd given its Financial Relationship with the Quartermaster General's Office of the Myanmar Army.

**On International Legal Issues Arising for the Singapore Stock Exchange from its Listing of the Singapore-domiciled Emerging Towns & Cities Singapore Ltd given its Financial Relationship with the Quartermaster General's Office of the Commander-in-Chief of the Myanmar Army.**

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**MEMORANDUM**

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**SCOPE OF OPINION**

1. We have been instructed by the Australian Centre for International Justice (**ACIJ**) to provide a memorandum for 'Justice For Myanmar' on "the international law compliance of payments from the Singapore domiciled company Emerging Towns & Cities Singapore (**ETC**) to the Myanmar Quartermaster General's Office of the Commander-in-Chief (Army) (**QMGO**)". This follows the recent report from the Office of the United Nations High Commissioner for Human Rights (**OHCHR**) about human rights violations in Myanmar and the earlier findings of the U.N. Fact Finding Mission in Myanmar (**FFMM**).
2. We are told that the purpose of the brief is to send a legal memorandum to the Singapore Stock Exchange (**SGX**), and to make that memorandum public. It is understood that this memorandum will form the basis of engagement with SGX over Singapore-based businesses linked to the Myanmar military (sometimes referred to as the Tatmadaw).<sup>1</sup>
3. We make it plain that this memorandum is not legal advice on any legal issue that may arise during such engagement. It is solely an overview of laws and guidance that we consider relevant to the business, crime and human rights risks of SGX continuing to list **ETC** which promotes investment in a single real estate development project known as the Golden City property development (**Golden City**) in Myanmar on land owned by the Myanmar military.
4. The discussion of the broad overlap between criminal law and corporate responsibility in this memorandum is well within our area of expertise, but any specific litigation should be the subject of much more detailed information and bespoke legal advice.
5. The specific questions we have been asked to consider are:
  - (a) Under international law, do ETC's 2018 and 2020 payments, and future planned

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<sup>1</sup> Note - Where 'Tatmadaw' is referred to in original sources, we have replaced with "Myanmar military"

payments and asset transfer to the QMGO raise any concerns?

- (b) Do ETC's payments amount to the company being "involved in or connected with... illicit activities" as per Practice Note 2B of the SGX?
  - (c) Is there a legal risk for the SGX under international law if they continue to allow ETC's listing?
  - (d) Any other relevant matter arising.
6. It follows that our instructions are broad and wide ranging, but we have not been directly instructed to advise on litigation. In seeking to encompass "any other relevant matter arising", we have considered any international law issues that may arise for SGX within the broader factual matrix, of which ETC's 2018 and 2020 payments, future planned payments, and asset transfer are only one part. This advice is therefore a broad overview of selected international law which we consider is relevant to compliance issues. In the time allocated, we have chosen those issues which currently appear to be most relevant, based on the information provided by ACIJ and on publicly available investigative findings. We have limited our references to open-source materials to assist ACIJ with transparency and accessibility. We note the ongoing issues with the Pandora Papers leaked by the International Consortium of Investigative Journalists (ICIJ) but have not sought to analyse that material at this stage.
7. The overarching question relates to the consideration that SGX may need to give to risks of potential legal liability, reputational damage, and any consequential cost implications of being connected to Golden City. To this end, we have attempted to focus on the identification of issues that will most assist further investigations, should they become necessary, as well as decision making on investment risk.
8. The global banking industry is alive to the sanctions on Myanmar's energy and commodities sectors, particularly the military holding companies Myanma Economic Holdings Limited (**MEHL**) and Myanmar Economic Corporation Limited (**MEC**) and to the potential for extension of application of those sanctions to non-US banks.<sup>2</sup> We note that in February 2021, the Monetary Authority of Singapore (MAS) reminded all chief executives of financial institutions of the need for robust customer due diligence and appropriate risk mitigation measures in higher risk situations.<sup>3</sup>

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<sup>2</sup> Jacob Atkins, 'Myanmar sanctions a tangled web for banks', *Global Trade Review* (Web Page, 7 April 2021) <<https://www.gtreview.com/news/asia/myanmar-sanctions-a-tangled-web-for-banks/>>.

<sup>3</sup> Simon Lewis, Anshuman Daga and Aradhana Aravindan, 'Singapore regulator tells banks to monitor Myanmar fund flows after coup', *Reuters* (online, 4 March 2021) <https://www.reuters.com/article/us-myanmar-politics-singapore-cenbank-idUSKBN2AW0DP>>.

9. There are widespread reported calls for tracking the Myanmar military business interests.<sup>4</sup> We have considered sanctions and taken a broader context by considering how Singapore as a state, SGX as an overseer, and potential investors can protect their interests and comply with international law and guidance in their business dealings within Myanmar. In this context, we have considered *both* the risk of funding activities connected to human rights violations *and* the wider range of risks associated with a real estate development project being undertaken in a state where business and human rights may not be properly understood or respected. These latter obligations might include contractual and tortious liability for parent companies and subsidiaries, occupational health and safety, quality management, and other issues that are subject to international laws and standards. To this end, we have included approaches to regulatory compliance as part of our overview of applicable international law and guidance.
10. We note that there are also broad policy issues that ought to capture the attention of SGX which arise from U.N. Sustainable Development Goals, particularly for women and girls,<sup>5</sup> but we have not included policy issues in this memorandum as we were asked to focus on a legal memorandum.
11. This memorandum should be read in full. In summary, our advice is that the range of relevant law and guidance requires an expansive approach to due diligence, including enquiries into payments, broad contractual arrangements, torts, construction practices, and sanctions, and the connection of such with genocide, atrocity crimes, terrorism, complicity in criminal activity, and humanitarian concerns.

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<sup>4</sup> Jonathan Liljeblad, 'We know how to cut off the financial valve to Myanmar's military', The Mandarin (online, 5 April 2021) <<https://www.themandarin.com.au/152998-we-know-how-to-cut-off-the-financial-valve-to-myanmars-military/>>.

<sup>5</sup> 'The 17 Goals', *United Nations* (Web Page) <<https://sdgs.un.org/goals>>; 'World Economic Situation and Prospects' (Report, The United Nations, 2020) <[https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/WESP2020\\_FullReport.pdf](https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/WESP2020_FullReport.pdf)>; World Bank Group, 'Myanmar: Economic Transition Amid Conflict' (Report No 143563-MM, 2019) <<https://documents1.worldbank.org/curated/en/507421574785059413/pdf/Myanmar-Economic-Transition-amid-Conflict.pdf>>.

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## A. FACT FINDING AND OVERVIEW

12. In 2019, the World Bank reported on Myanmar's economic transition amid conflict.<sup>6</sup> It noted that "Myanmar is endowed with a wealth of natural resources and a strategic location between China and India, surrounded by 40 percent of the world's population. Adding to its strategic position are 1,200 miles of uninterrupted coastline that stretch from the Bay of Bengal to the Andaman Sea, and a wealth of natural resources. It has enormous potential to translate these assets into progress for its 53 million people". Against a background of "a uniquely complex transition", the World Bank noted that Myanmar's opening in 2011 led to strong economic performance as Myanmar sought to transition from authoritarian rule, economic mismanagement, and multiple conflicts. These were seen by the World Bank report as "critical turning points" for Myanmar, generating a wave of optimism:

The Nationwide Ceasefire Agreement (NCA) started a new political dialogue on what the future structure of a democratic and inclusive Myanmar state could look like. Reforms led to remarkable progress on economic growth and improved living standards. Progress on economic transition has been substantial, whereas progress on political transition has been moderate, and progress towards peace more modest.

13. However, by 2019 the World Bank expressed concerns over economic uncertainty and highlighted that the military response in Rakhine State in 2017 against... the Rohingya, which led to loss of human lives and the forced displacement of about 725,000 refugees to Bangladesh, exposed the limits of the democratic transition and was met by widespread international condemnation". The momentum of transition has waned, structural transformation is slow and Myanmar "needs a greater focus on inclusion to take full advantage of opportunities to promote peace, build shared prosperity, and reduce poverty".
14. On February 1, 2021, the military moved to seize power in Myanmar, deposing the democratically elected government, and detaining leaders of the ruling NLD party. This took place on the day the new Parliament was scheduled to convene, and a military caretaker government and state of emergency was declared. Demonstrations and general strikes followed.

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<sup>6</sup> World Bank Group, 'Myanmar: Economic Transition Amid Conflict' (Report No 143563-MM, 2019) <<https://documents1.worldbank.org/curated/en/507421574785059413/pdf/Myanmar-Economic-Transition-amid-Conflict.pdf>>.

15. In June 2021, the U.S. State Department<sup>7</sup> found that in response there was a “brutal crackdown against the people of Burma<sup>8</sup>, led by many of the same individuals largely responsible for previous abuses, including atrocities against Rohingya. The military has killed peaceful protesters, they have arrested and detained thousands, and there are disturbing reports of security forces using torture and sexual violence against those in detention”. It was also noted that “the military has also moved to clamp down on fundamental freedoms and access to information, blocking access to social media sites, including Facebook, which is widely used in the country, and intermittently restricting access to the Internet to stop popular protests and prevent reporting on human rights abuses”. The US State Department acknowledged the economic effect of these events as follows:

Although some business activity has since resumed, the coup has set off a banking and liquidity crisis that represents a significant threat to the broader economy. The United States has led the international effort to press the military regime to reverse course, refrain from further violence, restore the country’s path to democracy, release all those unjustly detained, and hold those responsible for the coup and violence against the people to account.

16. In September 2021, the Office of the United Nations High Commissioner for Human Rights (OHCHR) released a report on the situation of human rights in Myanmar. The report stated:

[5] Following the February coup, the Myanmar military has systematically unleashed a new level of violence and repression across the country against the people of Myanmar [Citations omitted] ...

[6] Myanmar’s people met the coup with near universal rejection and launched a broad-based, sustained, and peaceful civil disobedience and protest movement across the country. In succeeding months, a human rights crisis ensued, with a steady escalation of attacks against the civilian population as the Myanmar military sought to suppress opposition and consolidate power. Military authorities abused the legal framework to stifle free expression, enable arbitrary deprivation of liberty, and strip away due process and fair trial rights as they detained thousands, particularly activists, journalists, and human rights defenders. When nationwide peaceful protests began, military authorities

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<sup>7</sup> ‘U.S. Relations with Burma’, *United States Department of State* (Web Page, 3 June 2021) <<https://www.state.gov/u-s-relations-with-burma/>>.

<sup>8</sup> The United States continues to refer to Myanmar as ‘Burma’.

initially used less-lethal weapons in an unnecessary and disproportionate manner and conducted neighbourhood raids, creating an atmosphere of terror. This evolved into systematic targeted killings and mass arrests, with torture and ill-treatment causing additional deaths in custody. **Simultaneously, armed conflict in Myanmar's border areas has continued and resurged. In both contexts, the Myanmar military has conducted both targeted and indiscriminate attacks against civilians. Combined with a freefalling economy and worsening COVID-19 pandemic, the situation in Myanmar has become a human rights catastrophe.**<sup>9</sup>

17. In addition to naming the Myanmar military as the source of continued human rights abuses since the February 2021 coup, the OHCHR's report states:

[69] As a result of the coup, Myanmar is increasingly at risk of state collapse, with shattered economic, education, health, and social protection systems. Double shocks of COVID-19 and the coup are projected to almost double the poverty rate from 24.8 per cent in 2017 to 48.2 percent by early 2022. Impacts from the coup are estimated to put an additional 1.5 million to 3.4 million people at risk of food insecurity. [Citations omitted].<sup>10</sup>

18. In addition to EU sanctions, the European Parliament (EP) passed its 11th resolution on human rights in Myanmar on 7 October 2021, since 2010, stating it:

4. Denounces the Myanmar military's widespread violent response to any kind of protest and the gross human rights violations it has committed and continues to commit against the people of Myanmar, including against ethnic and religious minorities, which amount to crimes against humanity; expresses its deep concern at the frequent attacks on churches, mosques, schools and medical facilities, and the arrests of religious leaders;

[and]

26. Reiterates its call on EU-based businesses with operations or supply chains in Myanmar to conduct heightened human rights due diligence and to ensure that they have no ties with Myanmar's security forces, their individual members

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<sup>9</sup> Human Rights Council, *Written updates for the Office of the United Nations High Commissioner for Human Rights on the Situation of human rights in Myanmar*, 48<sup>th</sup> sess, UN Doc A/HRC/48/67 (16 September 2021) [5]-[6].

<sup>10</sup> Ibid [69].

or entities owned or controlled by them, and that they do not contribute, directly or indirectly, to the junta's crackdown on democracy and human rights; calls on EU-based businesses to publicly disclose their conclusions and to work on continually improving labour conditions and environmental standards within their undertakings in Myanmar;

27. Reiterates its call to continue implementing targeted sanctions against those who are responsible for the atrocities against the Rohingya;

28. Reiterates its call on the Commission to swiftly launch an investigation into the trade preferences that benefit Myanmar, especially regarding companies owned by members of the Myanmar military, in specific sectors and to keep Parliament duly informed of the steps to take; acknowledges that improvements have been achieved since Myanmar was reinstated into the Everything But Arms (EBA) scheme in 2013, for example the creation of jobs in the garment sector, which has benefited women in particular; underlines, however, that the enhanced engagement process had already been established in 2018, focusing on compliance with international human rights conventions and labour rights, and that the coup reversed the progress made during the democratisation process, thereby undermining the conditions for granting EBA preferences...<sup>11</sup>

19. The background for these concerns is set out in the U.N. Independent International Fact-Finding Mission on Myanmar reports in 2018 (**the FFMM**).<sup>12</sup>

***The FFMM areas of economic interest:***

20. The FFMM investigated five areas of economic interest as follows: <sup>13</sup>

- (a) the Myanmar military's principal conglomerates, Myanmar Economic Holdings Limited (MEHL) and Myanmar Economic Corporation (MEC), the
- (b) subsidiaries owned or controlled by them, the Myanmar military's role in State-owned

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<sup>11</sup> 'European Parliament resolution of 7 October 2021 on the human rights situation in Myanmar, including the situation of religious and ethnic groups' (2021/2905/(RSP)) (7 October 2021) <[https://www.europarl.europa.eu/doceo/document/TA-9-2021-0417\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2021-0417_EN.html)>.

<sup>12</sup> Human Rights Council, *Report of the Independent International Fact-finding Mission on Myanmar*, UN Doc A/HRC/39/64 (27 August 2018).

<sup>13</sup> Human Rights Council, *The economic interests of the Myanmar military: Independent International Fact-Finding Mission on Myanmar*, 42nd sess, UN Doc A/HRC/42/CRP.3 (5 August 2019).

enterprises and the Myanmar military's close ties with a subset of domestic private business enterprises, known as "crony companies";

- (c) the Myanmar military's economic interests in the continuing armed conflicts in Kachin and Shan States in northern Myanmar.
- (d) companies and organisations that provided Myanmar military-solicited donations in support of the military's "clearance operations" that began in August 2017 against the Rohingya in northern Rakhine, as well as businesses that have carried out infrastructure development projects in northern Rakhine State.
- (e) the Myanmar military's joint ventures and other commercial relationships with foreign companies; and
- (f) companies and States selling or transferring arms and related equipment to the Myanmar military since October 2016.

### ***The FFMM findings***

21. The FFMM's findings were submitted to the Human Rights Council at its 39th session in September 2018. The 2018 report included evidence of crimes under international law, and serious violations of human rights and humanitarian law committed within Myanmar. In terms of business arrangements by the Myanmar military, the FFMM found the following (citations omitted):

61 Through its investigations, the Mission identified 106 military businesses that it concluded on reasonable grounds are fully owned by MEHL and MEC, among them 45 subsidiaries of MEHL and 61 subsidiaries of MEC. The Mission identified a further 27 businesses that it concluded on reasonable grounds are affiliated with MEHL and MEC through their corporate structures. The Mission is certain that it has not been successful in identifying all MEHL and MEC subsidiaries.

62 Identified MEHL subsidiaries span a diverse range of industries, including ruby and jade mining, cement manufacturing, construction, tourism, banking and insurance. MEHL businesses are structured into three departments: service, trade and production. The MEHL service department is led by Major General Aung Ye Win, a retired member of the Myanmar military, who serves as a managing director. The trade department is led by Dr. Tun Zan Aung, a director. The production department is led by Colonel Win Kyi, a retired Myanmar military officer, and deputy managing director.

63 Under the production department, MEHL has 41 factories, including for the production of palm oil, sugar, soap and cement. Some of these factories supply others as part of an integrated production business. For example, the MEHL Kanpauk Oil Palm Estate and Palm Oil Mill Project in Tanintharyi Region produce raw oil for the MEHL Padonma Soap Factory in Mon State. The Mission has also identified MEHL subsidiaries under its service and trade departments. MEHL subsidiaries include three beverage and drinking water companies, four companies producing construction materials, three construction businesses, five businesses in finance and insurance, four companies in the food, agriculture and fisheries sectors, two companies in the tourism sector and five trade and logistics firms. In the mining and gems sector, MEHL has 31 companies, including subsidiaries specializing in the extraction of jade and rubies.

64 MEC subsidiaries are equally diverse but with a greater focus on the production of raw materials, including coal and gas, and manufacturing. Among the subsidiaries, the Mission identified five companies in the finance and insurance sector, eight food production companies, seven companies producing raw materials and six companies in the telecommunications sector. These sectors are consistent with information that the Mission received characterizing MEC as a conglomerate that supplies natural resources to the Myanmar military and operates factories manufacturing goods for use by the Myanmar military.

65 Among their subsidiaries, MEHL and MEC also operate two of Myanmar's largest private banks. Established in 1993, Myawaddy Bank is owned by MEHL. As of March 2016, the International Finance Corporation of the World Bank reported Myawaddy Bank to have Ks 1.3 trillion in total assets (855 million USD), making it the fourth largest private bank in Myanmar. Its shares are held by serving and retired military personnel and related organizations such as the Veterans' Associations. According to the German development agency Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, in May 2018, Infosys, an Indian multinational corporation, partnered with Myawaddy Bank to provide it digital banking software. Separately, MEC owns Innwa Bank, which was established in 1997. GIZ found that Innwa Bank Limited is managed by retired and active military officers of the Myanmar military, and it acts as a financial vehicle for the affiliates and subsidiaries of MEC.

66 While it remains unclear how much profit Myawaddy and Innwa banks generate for the Myanmar military, they provide an important means for MEHL and MEC, their subsidiaries and their owners to access the international banking system, even when U.S. sanctions remained in place against their parent companies, MEHL and MEC. By providing a public banking service, they also provide mechanisms by which the Myanmar military can draw funds, sometimes compulsorily, from soldiers, military veterans and other Myanmar residents to fund their operations.

67 MEHL and MEC subsidiaries have a wide range of commercial activities across various industries throughout Myanmar. Many benefit from joint ventures with domestic Myanmar businesses. As discussed later in this report, MEHL and MEC subsidiaries are extensively involved in the extraction of jade and rubies in Kachin and Shan States. Some of those subsidiaries, however, operate in other parts of the country and in other extractive industries. For example, MEHL's wholly owned subsidiary Myanmar Ruby Enterprise has a joint venture with a private company, Geo – 70 Co. Ltd., for the extraction of an “industrial raw material” in Sin Phyu Daing, in Dawei Township, Dawei District, Tanintharyi Region.

68 MEHL and MEC subsidiaries, as well as the Myanmar military directly, own sizable amounts of land throughout Myanmar – much of it highly valuable real estate, generating a major revenue stream. The Mission received credible information that these include MEHL-owned Pyinmabin Industrial Zone in Yangon, the Ministry of Defence-owned “Golden City” residential development in Yangon, and the Quartermaster General Office-owned land leased to the Sule Shangri-La Hotel and Sule Square commercial project. Some foreign companies entering the Myanmar market rent their premises in MEHL, MEC and Myanmar military owned or leased commercial real estate. One example is Telenor, a Norwegian telecommunications company and the largest 4G network provider in Myanmar with offices in Sule Square, Yangon. MEHL and MEC subsidiaries are also involved in the tourism industry. For example, MEHL operates Myawaddy Travels and Tours Co. Ltd. and Nawadae Hotel and Tourism Ltd.; MEC also runs the Okkala Golf Resort.

22. We note that Telenor, referenced by the FFMM, announced in September 2021 that it would be

“selling its Myanmar operations to avoid European Union sanctions”,<sup>14</sup> and this is subject to an OECD complaint.<sup>15</sup> This also comes after Kirin Holdings, the large Japanese firm, announced in February it was abandoning its partnership with MEHL following the coup.<sup>16</sup> We note that Lim Kaling is a prominent Singapore investor who in February 2021 was reported as saying he had been “closely monitoring the situation in Myanmar and recent events there caused him “grave concern””. Such cases show that companies involved in Myanmar have assessed the risks of remaining involved in business dealings there and have decided to take mitigatory action.

23. Overall, the FFMM found a complex nexus between military and trade which means that investment in construction and operation of an enterprise like Golden City requires an assessment of the risk that a consequence of such an investment is the funding of activities which violate human rights. Legal and Policy Findings by the FFMM include the following:<sup>17</sup>

145. The Mission finds that any foreign business activity involving the Myanmar military and its conglomerates MEHL and MEC poses a high risk of contributing to, or being linked to, violations of human rights law and international humanitarian law. At a minimum, these foreign companies are contributing to supporting the Myanmar military’s financial capacity.

146 Given this situation, the absence of security sector reform and the persistent lack of accountability documented in its 2018 report, the Mission concludes on reasonable grounds that the activities of these foreign companies and foreign SOEs<sup>18</sup> dealing with the Myanmar military and its conglomerates have a reasonably foreseeable adverse impact on the situation of human rights in relation to Myanmar. States hosting these foreign companies and SOEs therefore have a heightened duty to take appropriate legislative and other measures to ensure that the companies’ and SOEs’ activities are consistent with the State’s human rights obligations

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<sup>14</sup> Fanny Potkin, ‘Norwegian communications firm Telenor is selling Myanmar unit to avoid EU embargo breach’, *Independent* (online, 16 September 2021) <<https://www.independent.ie/business/world/norwegian-communications-firm-telenor-is-selling-myanmar-unit-to-avoid-eu-embargo-breach-40855373.html>>.

<sup>15</sup> ‘Update on the ongoing OECD complaint against Telenor on the sale of Telenor Myanmar (27 September 2021)’ (Media Release, Telenor Group, 27 September 2021) <[https://www.telenor.com/media/announcement/update-on-the-ongoing-oecd-complaint-against-telenor-on-the-sale-of-telenor-myanmar-27-september-2021#:~:text=\(Fornebu%2C%2027%20September%202021\),operation%20and%20Development%20\(OECD\)%2C](https://www.telenor.com/media/announcement/update-on-the-ongoing-oecd-complaint-against-telenor-on-the-sale-of-telenor-myanmar-27-september-2021#:~:text=(Fornebu%2C%2027%20September%202021),operation%20and%20Development%20(OECD)%2C)>.

<sup>16</sup> Ben Doherty and Ben Butler, ‘Kirin beer company cuts brewery ties with Myanmar military over coup’ *The Guardian* (online, 5 February 2021) <<https://www.theguardian.com/world/2021/feb/05/kirin-beer-company-cuts-brewery-ties-with-myanmar-military-over-coup>>.

<sup>17</sup> Human Rights Council, *The economic interests of the Myanmar military: Independent International Fact-Finding Mission on Myanmar*, UN Doc A/HRC/42CRP.3 (5 August 2019).

<sup>18</sup> State owned enterprises.

and responsibilities. The Mission similarly concludes that foreign companies and SOEs involved with the Myanmar military and its conglomerates MEHL and MEC should sever their relationships with these enterprises in light of the information presented in this report and should ensure that they are fulfilling their corporate responsibility to respect human rights. Those in commercial relationships with MEHL or MEC may find themselves complicit, in law, fact or the eyes of the broader public, in contributing to the resources available to the Myanmar military to continue its involvement in gross violations of international human rights law and serious violations of international humanitarian law. This report puts companies on further and effective notice of the human rights implications that arise from maintaining business connections with the Myanmar military.

*The 2019 Report to the 42nd Session of the Human Rights Council*

24. An update to the 2018 report was presented to the 42nd session of the Human Rights Council. This report did not provide an exhaustive list of all businesses, individuals and States that provide economic benefit to the Myanmar military and its senior generals but provided an overview and a foundation upon which other investigators and researchers can continue to build. Based on its investigations, the FFMM concluded on reasonable grounds the following:

a. Two Myanmar military conglomerates, Myanmar Economic Holdings Limited (**MEHL**) and Myanmar Economic Corporation (**MEC**), are owned and influenced by senior Myanmar military leaders, including the Commander-in-Chief Senior General Min Aung Hlaing and the Deputy Commander-in-Chief Vice Senior General Soe Win, responsible for gross violations of international human rights law and serious violations of international humanitarian law. The Mission identified 106 MEHL and MEC owned businesses across diverse sectors of the economy – from construction and gem extraction to manufacturing, insurance, tourism and banking, and a further 27 businesses that are closely affiliated with the MEHL and MEC through corporate structures. The revenue that these military businesses generate strengthens the Myanmar military’s autonomy from elected civilian oversight and provides financial support for the Myanmar military’s operations with their wide array of international human rights and humanitarian law violations. There are strong and persistent business and familial links between the Myanmar military, its conglomerates MEHL and MEC, and a number of private Myanmar companies and conglomerates, colloquially known as “crony companies”.

b. Human rights and international humanitarian law violations, including forced labour and sexual violence, have been perpetrated by the Myanmar military in mining areas, particularly in Kachin State, in connection with their business activities. MEHL and MEC and 23 of their identified subsidiaries have numerous licenses for jade and ruby mining in Kachin and Shan States.

c. At least 45 companies and organizations provided the Myanmar military with USD 6.15 million in financial donations that were solicited in September 2017 by senior Myanmar military leadership in support of the “clearance operations” that began in August 2017 against the Rohingya in northern Rakhine. The Mission also found that private companies with enduring links to the Myanmar military are financing development projects in northern Rakhine in furtherance of the Myanmar military’s objective of re-engineering the region in a way that erases evidence of Rohingya belonging in Myanmar and preventing their return to access their homeland and communities. These projects, carried out under the Union Enterprise for Humanitarian Assistance, Resettlement and Development in Rakhine (UEHRD) consolidate the consequences of war crimes, crimes against humanity and acts of genocide.<sup>6</sup> On the basis of these findings, the Mission has identified private companies with officials who may have made a substantial and direct contribution to the commission of crimes under international law, including the crime against humanity of “other inhumane acts” and persecution, warranting their criminal investigation.

d. 14 foreign companies have joint ventures and at least 44 foreign companies have other forms of commercial ties with Myanmar military businesses. Through such joint venture and commercial relationships, the Mission finds that any foreign business activity involving the Myanmar military and its conglomerates MEHL and MEC poses a high risk of contributing to, or being linked to, violations of international human rights law and international humanitarian law. At a minimum, these foreign companies are contributing to supporting the Myanmar military’s financial capacity.

e. At least 14 foreign companies from seven States have provided arms and related equipment to the Myanmar military since 2016, after the Myanmar military’s dismal human rights record was widely and publicly known. Moreover, the public record made it clear that the Myanmar military used many of the types of arms and related equipment that these entities were providing to commit gross violations of human rights and serious violations of international humanitarian law. Many of these companies and States therefore knew, or ought to have known, that their arms transfers could have a direct and reasonably foreseeable impact on the human rights situation in Myanmar. Among the arms suppliers identified by the Mission, 12 companies are State-owned enterprises.

The Mission also received credible information regarding seven foreign private companies from which the Myanmar military procured or sought to procure dual-use goods and technology since 2016. The technology includes telecommunications services, tracking and precision systems, unmanned aerial vehicles, and internet and data transmission technology.

25. In keeping with the giving of notice regarding the human rights implications of maintaining business with the Myanmar military, in 2019, the Chairperson of the FFMM, Marzuki Darusman, called upon U.N. Member States to continue to pursue accountability, considering what was termed a clear “accountability deficit” on the part of the Myanmar Government, and to mandate alternative accountability mechanisms, if needed.<sup>19</sup>
26. The international community has responded with a varying degree of sanctions and diplomacy.<sup>20</sup> At the time of writing, it is understood that several banks have been fined in connection with US sanctions on Myanmar from 2010-2019.<sup>21</sup>
27. Singapore has condemned the military coup in Myanmar; as a state, it is one of the leaders in ASEAN where the response more generally has been symbolic.<sup>22</sup> Singapore is also the biggest source of foreign capital in Myanmar, according to official Myanmar data between 1988 and 2020.<sup>23</sup> It follows that Singapore, its State organs, and its companies all have overlapping financial and legal interests in a business-stable environment in Myanmar free of the uncertainties of sanctions, regulatory action, deficits in shareholder and investor confidence, and other chilling factors for economic growth and investment. It is therefore clear that SGX is caught between its core business interests and the wider responsibilities which come with acknowledgment of the role that corporate activity plays in ensuring investment in projects which have responsibility for human rights as a core tenet.
28. Accordingly, we have sought to provide a legal memorandum which provides an ‘easy read’

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<sup>19</sup> ‘UN Independent International Fact-Finding Mission on Myanmar calls on UN Member States to remain vigilant in the face of the continued threat of genocide’, *Office of the United Nations High Commissioner for Human Rights* (Web Page, 23 October 2019)

<<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25197&LangID=E>>.

<sup>20</sup> Alice Cuddy, ‘Myanmar coup: What is happening and why?’, *BBC News* (online, 1 April 2021)

<<https://www.bbc.com/news/world-asia-55902070>>.

<sup>21</sup> See ‘Civil Penalties and Enforcement Information’, *United States Department of the Treasury* (Web Page, 2021)

<<https://home.treasury.gov/policy-issues/financial-sanctions/civil-penalties-and-enforcement-information>>; ‘Fines for Banks the Breached U.S. OFAC Sanctions’, *Refinitiv* (Infographic, 2020)

<[https://www.refinitiv.com/content/dam/marketing/en\\_us/documents/infographics/fines-for-banks-that-breached-us-sanctions-infographic.pdf](https://www.refinitiv.com/content/dam/marketing/en_us/documents/infographics/fines-for-banks-that-breached-us-sanctions-infographic.pdf)>.

<sup>22</sup> ‘The 2021 Coup and implications for Myanmar’s “disciplined democracy”’, *Australian Institute of International Affairs* (Blog Post, 11 March 2021) <<https://www.internationalaffairs.org.au/news-item/the-2021-coup-and-implications-for-myanmars-disciplined-democracy/>>.

<sup>23</sup> Aradhana Aravindan, ‘Analysis: Quiet Singapore turns up volume on Myanmar as regional fears grow’, *Reuters* (online, 31 March 2021) <<https://www.reuters.com/article/us-myanmar-politics-singapore-diplomacy-idUSKBN2BN0VS>>.

overview on international laws and standards, as well as including approaches to regulatory compliance as part of our overview of applicable international law and guidance.

## A.1 International Governance

29. In providing this advice, we recognise that financial institutions operate in a global marketplace and that governance is a challenge. It is our view, however, that consideration of international law in this context is important, not least because the globalisation of financial markets has diminished domestic government influence. The volume of world financial trade, facilitated by technological advances, exceeds the total foreign exchange reserves of all governments. The growth of international private capital portfolio transactions eclipses the aggregate GDP of Organization for Economic Cooperation and Development (OECD) nations. Against the global surge in 'free trade' rather than multilateral systems,<sup>24</sup> ensuring that financial institutions operating in global markets act in accordance with international law, and upon advice from rigorous investigative bodies such as the FFMM, remains a matter of international concern.
30. International governance can influence the intersection between state and corporate conduct in the context of business and human rights. It follows that international corporate governance issues should be as relevant to Singaporean financial institutions as domestic regulatory compliance.

## A.2 Domestic Compliance

31. Community trust in the financial services sector has declined following revelations of malpractice in the industry, as illustrated by the Hayne Royal Commission in Australia, and in investigations conducted elsewhere. Whilst attention tends to focus primarily on revelations concerning the vulnerability of individual customers, there is no doubt that financial institutions are under increased pressure to strictly adhere to regulatory requirements. Public opprobrium can have a significant impact. It is a heavily regulated, process-driven and scripted environment in which investment opportunities must comply with relevant laws and processes, whilst also being empathetic to customer needs and the wider public interest.<sup>25</sup> It goes without saying that failure to achieve confidence in a global marketplace can have significant financial and reputational impact. A simple example is the collapse of the Rana Plaza Garment Factory in 2013 which

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<sup>24</sup> Susan Harris Rimmer, 'We lose more than we gain in moving away from multilateral trade', *The Conversation* (online, 12 November 2015) <<https://theconversation.com/we-lose-more-than-we-gain-in-moving-away-from-multilateral-trade-50361>>.

<sup>25</sup> Verint, 'Can you be Compliant and Still Human? Overcoming compliance and customer experience challenges in the financial services sector' (Resource Publication, July 2021) <<https://www.verintpac.com/wp-content/uploads/2021/07/Compliance-2021.pdf>>.

exposed poor quality construction, hazardous working practices and poor labour conditions.<sup>26</sup> Investment in construction is not solely about risks arising from payments, but also risks arising from that investment in the long run. This axiomatically turns on who is involved in the business of that construction, and whether there will be any respect for human rights in the building and continuation of the project.

32. Within Singapore, corporate responsibility for the actions of the Myanmar military, through financial arrangements with Singaporean entities, appears to have been approached as a domestic compliance issue, whereby the Singaporean Stock Exchange (**SGX**) has taken regulatory action. Publicly, ETC has requested that trading in its shares be suspended so that it can conduct a review of its contracts with Myanmar government ministries and departments. It indicated that there would be a review of material contractual payments to the Myanmar government and fundraising proceeds.<sup>27</sup>
33. ETC has engaged with SGX by commissioning two reviews:
  - (a) the first by Nexia TS Advisory Pte Ltd, which reviewed (1) the contractual payments to the Myanmar government ministries and departments, including the Ministry of Defence and the QMGO; and (2) the proceeds from ETC fund-raising exercises since the Company's investment in Myanmar in October 2016.<sup>28</sup>
  - (b) the second by Kelvin Chia Partnership, to "conduct an independent review of the Company's investment and business activities in Myanmar and Singapore for compliance with applicable laws and on the applicability and effect on ETC business operations due to the unilateral sanctions imposed on Myanmar".<sup>29</sup>
34. As set out above, the checks required are wide ranging but questions of broader compliance with international law do not appear to have been part of Nexia's review and it is not certain whether the review by Kelvin Chia Partnership will consider international laws to be 'applicable laws'. To the extent that SGX's financial relationships with ETC, and with QMGO by extension, arise under international law, they may ultimately not be raised with SGX. This appears to be inconsistent with the expectations of SGX in its own guidance and the expectations of potential

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<sup>26</sup> 'The Rana Plaza Accident and its aftermath', *International Labour Organization* (Web Page)

<[https://www.ilo.org/global/topics/geip/WCMS\\_614394/lang-en/index.htm](https://www.ilo.org/global/topics/geip/WCMS_614394/lang-en/index.htm)>.

<sup>27</sup> 'Singapore's ETC suspends trading to review Myanmar contracts', *Aljazeera* (online, 3 March 2021)

<<https://www.aljazeera.com/economy/2021/3/3/singapores-etc-suspends-trading-to-review-myanmar-contracts>>.

<sup>28</sup> 'Appointment of Independent Receiver' (Announcement, Emerging Towns & Cities Singapore Ltd, 9 April 2021)

<<https://links.sgx.com/FileOpen/ETC%20-%20Announcement%20-%20Appointment%20of%20Nexia.ashx?App=Announcement&FileID=657768>>.

<sup>29</sup> 'Appointment of Independent Receiver' (Announcement, Emerging Towns & Cities Singapore Ltd, 15 June 2021)

<<https://links.sgx.com/FileOpen/ETC%20-%20Announcement%20-%20Appointment%20of%20KCP%20and%20Confirmation%20by%20FKT.ashx?App=Announcement&FileID=671238>>.

sponsors of listed entities.

## B. BACKGROUND

### B.1 Relevant actors

35. ETC is incorporated in Singapore. Through a majority shareholding of subsidiary companies, it owns the Myanmar-based project developer company called Golden Land Real Estate Development Co., Ltd (**Golden Land**). ETC is listed on the Catalist board of SGX, subject to its own set of rules called the Catalist Rules and is subject to listing arrangements with SGX. Listing on SGX, ETC has a sponsor, currently RHT Capital Pte. Ltd (**RHT**).<sup>30</sup>
36. We are not privy to the legal nature of the sponsorship arrangements, nor do we know if RHT has commissioned its own audit of compliance and risk from a domestic or international standpoint. We have not specifically analysed the listing rules or fee arrangements. We have assumed that SGX is interested in both compliance and risk in the funding of a real estate development project like Golden City when it comes to listing arrangements.
37. Golden Land and Nature Link Co. Ltd (**Nature Link**), also Myanmar-based, signed a contract with the QMGO in 2013 to lease the land on which to build Golden City owned by the Myanmar military for the purposes of building Golden City upon it. ETC is the main investor in Golden City. The QMGO controls the Myanmar Economic Commission (**MEC**).<sup>31</sup> According to Myanmar Ministry of Defence budget documents, the QMGO has been involved in the purchase of arms for the Myanmar military.<sup>32</sup>

### B.2 Justice For Myanmar investigations

38. On 25 February 2021, Justice For Myanmar published its findings on an investigation into the Golden City property development (**Golden City**) in Myanmar - a mixed-use real estate complex built on land owned by the Ministry of Defence under a build-operate-transfer agreement with the QMGO. The relevant terms of the agreement are that the QMGO leases land to Golden Land and Nature Link, and Golden Land pays for its share of the lease and develops real estate

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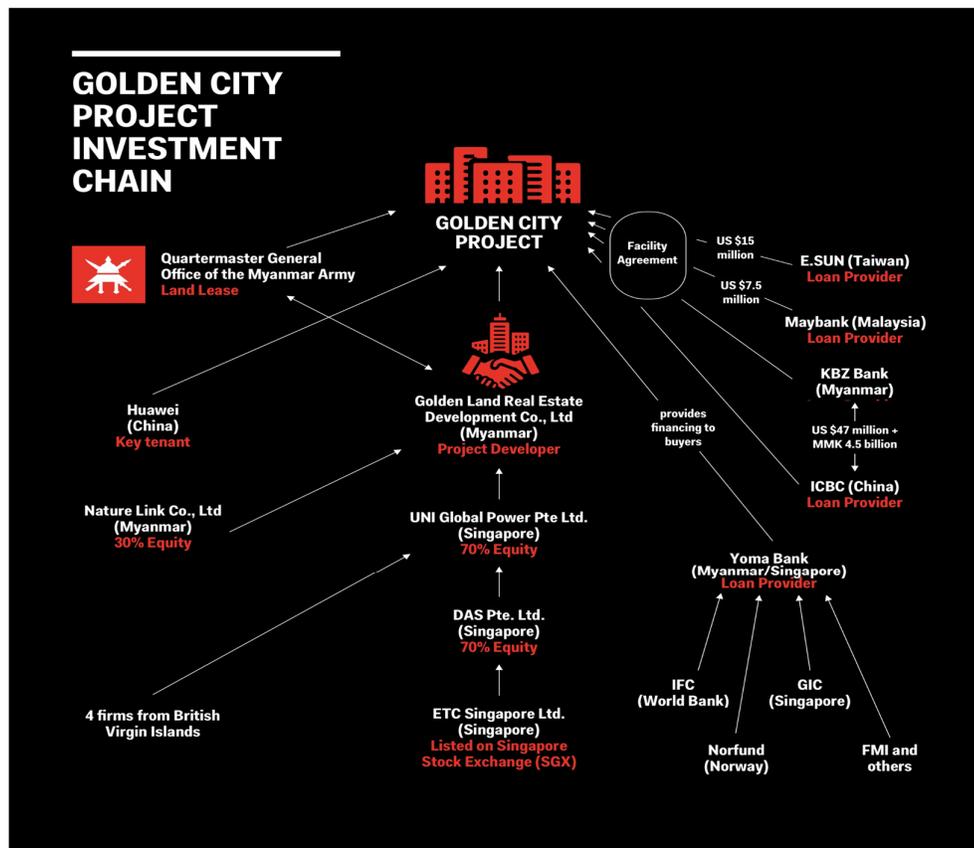
<sup>30</sup> Sponsors must maintain an independent relationship from the sponsored company and must conduct due diligence on the sponsored company. They may be subject to regulatory action for breaching rules. 'Catalist Sponsors & Companies', *Singapore Exchange* (Web Page) <<https://www.sgx.com/regulation/catalist-sponsors-companies>>.

<sup>31</sup> United Nations Human Rights Council, 'Governance Structure of MEHL and MEC', *Independent International Fact-Finding Mission to Myanmar* (Infographic, August 2019) <[https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFM-Myanmar/EconomicInterestsMyanmarMilitary/Infographic1\\_Governance\\_Structure\\_of\\_MEHL\\_and\\_MEC.pdf](https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFM-Myanmar/EconomicInterestsMyanmarMilitary/Infographic1_Governance_Structure_of_MEHL_and_MEC.pdf)>.

<sup>32</sup> 'Myanmar military files show systemic corruption and implicate international businesses', *Justice For Myanmar* (Web Page, 8 December 2020) <<https://www.justiceformyanmar.org/stories/myanmar-military-budget-and-procurement-files>>.

on the land using money transferred by ETC and raised on the SGX. Land lease payments were made under the contract in 2018 and 2020. The contract also provides for ongoing payments towards the lease until its conclusion in 2063 subject to an extension of up to 20 years, and many millions of dollars in payments to be made upon extension, with the eventual transfer of Golden City and its legal interests to the QMGO at the conclusion of the lease.<sup>33</sup>

39. Justice For Myanmar has alleged that ETC is using SGX to raise funds that are used in its business dealings with the QMGO and Ministry of Defence, contrary to international human rights law. Justice For Myanmar asked that the ETC be suspended from trading and cease payments to the Myanmar military. ETC responded that the Justice For Myanmar allegations amounted to “unverified conjecture” and that its investment in Golden City’s developer company, Golden Land, was made “in compliance with local laws and regulatory requirements,” and after “due diligence by one of the “big four” audit firms and legal due diligence by a Myanmar legal counsel”.<sup>34</sup>
40. The relevant relationships are captured in a Figure 1 below which was prepared by Justice For Myanmar. The depth and nature of those legal relationships varies.



<sup>33</sup> ‘Singapore’s ETC suspends trading to review Myanmar contracts’ (n 27).

<sup>34</sup> Ibid.

Figure 1: Golden City Project Investment Chain

41. On 26 February 2021, SGX initiated regulatory action against ETC. It asked ETC to respond to Justice For Myanmar’s allegations and cited, among other things, Practice Note 2B, paragraph 89(b) which states: “[E]ntities that may be involved in or connected with any money laundering, terrorist financing, or other illicit activities should not be listed”. ETC suspended trading pending the outcome of independent reviews conducted by Nexia and Kelvin Chia Partnership.
42. The language of “involved in or connected with” implies that a very broad analysis of risk is necessary.
43. The Nexia review, which concluded on 22 September 2021, found that transactions to and from Golden Land and ETC were made in the “ordinary course of business” to “finance the acquisition of Daya Bay Project, the acquisition of DAS for the Golden City project and for working capital requirements”.<sup>35</sup> The summary findings detailed three payments to the QMGO in Section 3.1.1: two payments in 2018 and one in 2020, totalling US\$5.035 million, for which the QMGO did not provide invoices.

### **B.3 Regulatory and legal framework - SGX expects high levels of due diligence**

44. SGX regulates the Catalist board using a set of internal rules called the Catalist Rules.<sup>36</sup> It is regulated by the Monetary Authority of Singapore (MAS), which oversees all financial institutions in Singapore, and the Commercial Affairs Department of the Singapore Police Force, the principal white-collar crime investigation agency.<sup>37</sup> SGX is also subject to domestic Singaporean legislation.<sup>38</sup> It is a holding company which can be characterised as a State Organ because it has

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<sup>35</sup> Nexia summary report. ETC also announced that its incumbent external auditors, Foo Kon Tan LLP, did not become aware of any material misstatements relating to payments investigated in the Nexia review that would require them to modify or withdraw their audit opinions in respect of the financial statements of the Company for the financial years ended 31 December 2016, 2016, 2017, 2018, and 2019. ‘Appointment of Independent Receiver’ (Announcement, Emerging Towns & Cities Singapore Ltd, 15 June 2021) <<https://links.sgx.com/FileOpen/ETC%20-%20Announcement%20-%20Appointment%20of%20KCP%20and%20Confirmation%20by%20FKT.ashx?App=Announcement&FileID=671238>>.

<sup>36</sup> Catalist Rules, *Singapore Exchange Ltd* <<http://rulebook.sgx.com/rulebook/catalist-rules>>.

<sup>37</sup> Baker McKenzie, ‘Global Financial Services Regulatory Guide’ (Regulatory Guide, July 2016) 304 <[https://www.bakermckenzie.com/-/media/files/insight/publications/2016/07/guide\\_global\\_fsrguide\\_2017.pdf?la=en,%20p%20304](https://www.bakermckenzie.com/-/media/files/insight/publications/2016/07/guide_global_fsrguide_2017.pdf?la=en,%20p%20304)>.

<sup>38</sup> *Monetary Authority of Singapore Act* (Singapore, cap 186, 1999 rev ed); *Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act* (Singapore, cap 65A, 2000 rev ed); *Terrorism (Suppression of Financing) Act* (Singapore, cap 325, 2003 rev ed); *Banking Act* (Singapore, cap 19, 2008 rev ed); *Securities and Futures Act* (Singapore, cap 289, 2006 rev ed); ‘ABS: Listings Due Diligence Guidelines’ (Guidelines, The Association of Banks in Singapore, 13 May 2016) <[https://abs.org.sg/docs/library/abs\\_listings\\_due\\_diligence\\_guidelines.pdf](https://abs.org.sg/docs/library/abs_listings_due_diligence_guidelines.pdf)>.

regulatory responsibilities delegated to it from MAS.<sup>39</sup> It is essentially the ‘frontline regulator’ for the stock and futures exchange marketplace in Singapore and therefore has an administrative function in the State system.<sup>40</sup>

45. Within SGX Practice Note 2B, Due Diligence (Rule 225(1)(c)) states:

(a) When preparing a listing applicant for admission or advising an issuer in a very substantial acquisition or reverse takeover, the sponsor should do the following.

Undertake due diligence including at a minimum, complying with the due diligence guidelines issued by **The Association of Banks in Singapore** where applicable, **or such other satisfactory and no less strict due diligence guidelines or processes**, in addition to any other appropriate due diligence.<sup>41</sup>  
[Emphasis added]

46. Within the referenced Association of Banks in Singapore Guidelines, section 2.1.2 entitled ‘Checks (which may include independent checks where reasonable and appropriate) and verifications’ includes:

(c) The issue manager should, in particular, conduct reasonable due diligence on an issuer that is incorporated, has significant operations, has major or controlling shareholders, or has major customers or suppliers in a specialised, restricted or niche industry, including an industry which is subject to specialised licensing requirements, and/or which operates within any jurisdiction that **(i) may traditionally have been vulnerable to corruption, (ii) is associated with international sanctions or other geopolitical risks;** and/or (iii) is subject to judicial systems that are comparatively and materially different from those in Singapore. Where reasonable and appropriate to do so, the issue manager should consider the appointment of a suitably qualified and experienced adviser and/or expert to advise on any issues relating to that industry and/or jurisdiction.<sup>42</sup> [Emphasis added]

47. Much of what we set out below in relation to legal risks, have the potential to fall within the checks that an SGX issue manager would be expected to undertake.

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<sup>39</sup> ‘About SGX RegCo’, *Singapore Exchange* (Web Page) <<https://www.sgx.com/regulation/about-sgx-regco>>; ‘Reply to PQ on the dual roles of SGX’, *Monetary Authority of Singapore* (Parliamentary Reply, 22 February 2001) <<https://www.mas.gov.sg/news/parliamentary-replies/2001/reply-to-pq-on-the-dual-roles-of-sgx--22-feb-2001>>.

<sup>40</sup> ‘About SGX RegCo’ (n 39); ‘Reply to PQ on the dual roles of SGX’ (n 39).

<sup>41</sup> ‘Practice Note 2B Guidelines for Preparing a Listing Applicant for Admission or Advising an Issuer in a Very Substantial Acquisition or Reverse Takeover’, *Singapore Exchange Rule Book* (Rules, 7 February 2020) <<http://rulebook.sgx.com/rulebook/practice-note-2b-guidelines-preparing-listing-applicant-admission-or-advising-issuer-very>>.

<sup>42</sup> ‘ABS: Listings Due Diligence Guidelines’ (Guidelines, The Association of Banks in Singapore, 13 May 2016) <[https://abs.org.sg/docs/library/abs\\_listings\\_due\\_diligence\\_guidelines.pdf](https://abs.org.sg/docs/library/abs_listings_due_diligence_guidelines.pdf)>.

48. We have not sought to assess any administrative law pathways for challenging decision making by SGX within domestic law, nor have we set out any international mechanisms for sanctions on Singapore as a state. Instead, we have focused on state responsibility for business and human rights, and risk-taking by SGX in its approval of listing arrangements, which in turn could affect its status on international markets.

## C. POTENTIAL ISSUES ARISING UNDER INTERNATIONAL LAW

### C.I UN Guiding Principles on Business and Human Rights

49. Business and human rights as a legal issue has international momentum.<sup>43</sup> The U.N. Human Rights Council<sup>44</sup> has unanimously endorsed the U.N Guiding Principles on Business and Human Rights<sup>45</sup> (**the Guiding Principles**) which comprise three pillars:

- Pillar 1 - the State duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication.
- Pillar 2 - the corporate responsibility to respect human rights, which means to avoid infringing on the human rights of others and addressing adverse human rights impacts with which they are involved; and
- Pillar 3 - the need for greater access by victims to effective remedy, judicial and non-judicial.

50. The Guiding Principles do not create new international law obligations or limit existing legal frameworks. They rather provide an authoritative statement on the relationship between business and human rights as well as standards for preventing and addressing the risk of adverse human rights impacts linked to business activity.

#### C.I.I Principle 7: State Responsibility - Singapore

51. Fundamental to interpreting the Guiding Principles is that states should be responsible for their actions and human rights obligations, in addition to protecting human rights in a commercial

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<sup>43</sup> 'Business and Human Rights', *Law Council of Australia* (Policy Agenda, 23 November 2016) <<https://www.lawcouncil.asn.au/policy-agenda/human-rights/business-and-human-rights>>.

<sup>44</sup> United Nations Human Rights Council (Web Page) <<https://www.ohchr.org/en/hrbodies/hrc/pages/home.aspx>>.

<sup>45</sup> *Guiding Principles on Business and Human Rights*, UN Doc HR/PUB/11/04 (2011) ('*Guiding Principles on Business and Human Rights*') <[https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf)>.

context. For example, states have responsibility in accordance with Principle 7 which provides that:

Because the risk of gross human rights abuses is heightened in conflict affected areas, States should help ensure that business enterprises operating in those contexts are not involved with such abuses including by... (c) Denying access to public support and services for a business enterprise that is involved with gross human rights abuses and refuses to cooperate in addressing the situation.

52. Principle 7 operates on two key assumptions: firstly, that the host state may be “unable to protect human rights adequately due to effective control”,<sup>46</sup> and secondly, in the absence of human rights protection and leadership by the host state, the other state party to business dealings has the responsibility to “assist... to ensure that businesses are not involved in human rights abuses”.<sup>47</sup>

53. Where Myanmar may be unwilling or unable to address its human rights violations, as the FFMM’s findings suggest, part (c) of Principle 7 should be considered. Knowing that Myanmar is a country in conflict, Singapore may not have fulfilled its obligations under Principle 7 of denying access to public support and services for a business enterprise involved in human rights violations. Given the ongoing relationship between ETC and the Myanmar military and, in light of the FFMM’s findings, it is at least arguable that Singapore can do more to comply with the Guiding Principles to ensure that it is not complicit in human rights abuses.

### **C.1.2 State Responsibility - Myanmar**

54. It could be said that Myanmar has breached its responsibilities under Principle 7 of the Guiding Principles. Notably, however, Myanmar has not issued warnings to States and organisations with which they intend to conduct business. If this is inaction on the part of Myanmar, this would be a breach of their responsibility to warn other parties of the “heightened risk of being involved with gross abuses of human rights”.<sup>48</sup>

### **C.1.3 Principles 13, 17, 18, and 19: Corporate Responsibility**

55. Corporate responsibility arises from several of the Guiding Principles. For example, Principle 13 provides that:

The responsibility to respect human rights requires that business enterprises:

1. Avoid causing or contributing to adverse human rights impacts through their own

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<sup>46</sup> Ibid 9.

<sup>47</sup> Ibid.

<sup>48</sup> Ibid 10.

- activities, and address such impacts when they occur;
2. Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.
56. Commentary provided for the Guiding Principles emphasises that activities are understood as both “actions and omissions”<sup>49</sup> and business relationships are to be interpreted broadly to encapsulate all potential business relationships.<sup>50</sup> One example is when the Thun Group of Banks attempted to limit their due diligence requirements by arguing their actions were not “contributing to harm” as their actions “lacked proximity”:<sup>51</sup> the late Professor John Ruggie, the author of the Guiding Principles, described such an interpretation as “arbitrary and inconsistent”<sup>52</sup> with the Guiding Principles, and noted that the concept of “proximity” is not found in the Guiding Principles.
57. Thus, to comply with this principle, ETC and SGX should avoid causing or contributing to adverse human rights impacts through their own activities, or activities linked to their business relationship, regardless of the multiple links in the supply chain of their funding for Golden City.
58. Principles 17 and 18 of the Guiding Principles relate to an organisation’s responsibility to conduct ongoing assessments to fulfil due diligence requirements. Due diligence should be completed “to identify, prevent, mitigate and account for how [organisations] address their adverse human rights impacts”.<sup>53</sup> In completing these assessments, organisations should “identify and assess any actual or potential adverse human rights impacts with which they may be involved, either through their own activities or as a result of their business relationships”.<sup>54</sup> Moreover, Principle 19 details that “in order to prevent and mitigate adverse human rights impacts, business enterprises should integrate the findings from their impact assessments across relevant internal functions and processes, and take appropriate action.”
59. These three principles attempt to curtail the complicity of organisations by requiring them to undertake proactive due diligence assessments.<sup>55</sup> Whilst ETC has initiated reviews by Nexia and

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<sup>49</sup> *Guiding Principles on Business and Human Rights* (n 45) principle 15.

<sup>50</sup> *Ibid.*

<sup>51</sup> John G Ruggie, *Comments on Thun Group of Banks Discussion Paper on the Implications of UN Guiding Principles 13 & 17 In a Corporate and Investment Banking Context* (Discussion Paper, 21 February 2017) 2

<[https://www.ihrb.org/uploads/submissions/John\\_Ruggie\\_Comments\\_Thun\\_Banks\\_Feb\\_2017.pdf](https://www.ihrb.org/uploads/submissions/John_Ruggie_Comments_Thun_Banks_Feb_2017.pdf)>.

<sup>52</sup> *Ibid* 3.

<sup>53</sup> *Guiding Principles on Business and Human Rights* (n 45) principle 15.

<sup>54</sup> *Ibid* principle 18.

<sup>55</sup> *Ibid* principles 18-19.

Kelvin Chia, it is not clear if ETC and SGX have conducted assessments to holistically consider the impact of investment in Myanmar. It is also unclear if ETC or SGX have attempted to apply 'leverage' within the investment chain in order to seek better human rights outcomes. Notably, an omission to conduct heightened due diligence and impact assessments may amount to a breach of Principle 19.

#### **C.1.4 Issues to be considered**

60. The Guiding Principles are not without legal remedy. They explicitly recognise the importance of access to effective judicial and non-judicial remedies. This is part of a global compliance network that includes the U.N. Global Compact<sup>56</sup> and which envisage companies doing business responsibly by aligning their strategies and operations on human rights, labour, environment and anti-corruption, and by taking strategic actions to advance broader societal goals, such as the United Nations Sustainable Development Goals.<sup>57</sup>
61. Under the Guiding Principles, each business organisation “should provide for or cooperate in their remediation through legitimate processes” in instances where they “identify that they have caused or contributed to adverse impacts”.<sup>58</sup> An “effective remedy” is not limited to financial compensation but can potentially take a number of substantive forms, such as apologies, restitution, rehabilitation, and punitive sanctions, as well as measures to prevent future harm such as injunctions and guarantees of non-repetition. The overarching aim should be “to counteract or make good any human rights harms that have occurred”.<sup>59</sup>
62. Nonetheless, despite the guidance, remedies often remain elusive due to the practical implications of investigating arrangements for preventing, detecting and remedying cases of business involvement in gross human rights abuses and the restrictions on access to justice for victims. The absence of enquiry, however, does not remove risk. If there is insufficient due diligence in a supply chain, then investment entities put themselves at risk of both criminal law and commercial liability, ranging from corruption to complicity.

## **C.2 Corporate Reporting of Modern Slavery in Supply Chains**

63. Modern Slavery encompasses a wide range of exploitation including conduct amounting to

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<sup>56</sup> *United Nations Global Impact* (Web Page) <<https://www.unglobalcompact.org/>>.

<sup>57</sup> ‘The SDGS’, *United Nations Global Impact* (Web Page) <<https://www.unglobalcompact.org/sdgs>>.

<sup>58</sup> *Guiding Principles on Business and Human Rights* (n 45) principle 22.

<sup>59</sup> Ibid principle 25; Jennifer Zerk, ‘Corporate liability for gross human rights abuses: Towards a fairer and more effective system of domestic law remedies’ (Report prepared for the Office of the UN High Commissioner for Human Rights, 2012) <<https://www.ohchr.org/documents/issues/business/domesticlawremedies/studydomesticlawremedies.pdf>>.

‘ownership’ as a slave, forced marriage, forced labour and human trafficking. International law imposes obligations on signatory states to combat human trafficking and to protect victims. Some of these obligations are contained within international instruments, including the following:

- (a) Slavery Convention
- (b) Forced Labour Convention
- (c) Convention Against Torture
- (d) Convention Against Transnational Organized Crime and its Protocol to Prevent, Suppress and Punish Trafficking in Persons, Particularly Women and Children

64. There are also regional instruments such as the Council of Europe Convention on Action Against Trafficking in Human Beings (ECAT) and the ASEAN Convention Against Trafficking in Persons, Especially Women and Children (ACTIP). The objective is to protect and assist victims of modern slavery, with full respect for their human rights, in a context that is not limited. For example, there could be links with the smuggling of migrants and cybercrime.<sup>60</sup>

65. The U.N. Trafficking Protocol (**the Protocol**) to the UN Convention on Transnational Organised Crime defines human trafficking widely to include slavery and slavery-like practices. It is the first global legally binding instrument with an agreed definition on trafficking in persons. The intention is to facilitate convergence in national approaches about the establishment of domestic criminal offences that would support efficient international cooperation in investigating and prosecuting cases of trafficking in persons. The Protocol avoided separate definitions of slavery or forced labour or sexual exploitation which could inhibit legal and policy responses. The International Labour Organisation (**ILO**) Committee of Experts on the Application of Conventions and Recommendations (**CEACR**) has provided guidance on the scope of the definition of forced labour, stressing that it encompasses trafficking in persons for the purposes of labour and sexual exploitation, as defined by the Protocol.

66. We do note that corporate responsibility for slavery in supply chains can come with a commitment to remediation, that can, of itself reduce harmful impacts. It is not clear whether this is achievable in Myanmar.<sup>61</sup>

### Issues to be considered:

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<sup>60</sup> Felicity Gerry et al, ‘Module 14: Links between Cybercrime, Trafficking in Persons and Smuggling of Migrants’, *United Nations Office on Drugs and Crime* (Training Module, May 2019) <<https://www.unodc.org/e4j/en/tip-and-som/module-14/index.html>>.

<sup>61</sup> Australian Council of Superannuation Investors, *Modern Slavery: Risks, Rights and Responsibilities* (Report, February 2019) <<https://assets.kpmg/content/dam/kpmg/au/pdf/2019/modern-slavery-guide-for-companies-investors-feb-2019.pdf>>.

67. Evidence of Modern Slavery has been mapped in Myanmar.<sup>62</sup> Whilst there are significant gaps, studies indicate a range of exploitation including sexual exploitation and the use of child soldiers.
68. The U.N Guiding Principles on Business and Human Rights are applicable and provide standards for preventing and addressing the risk of adverse human impacts linked to business activity. The UK and Australia have implemented corporate reporting of due diligence requirements through the *Modern Slavery Act 2015* (UK) and the *Modern Slavery Act 2018* (Cth), respectively. Reporting obligations relate to the risk of modern slavery in the operations and supply chain of a reporting entity (and its owned and controlled entities), as well as the steps that it has taken to respond identified risks. In Australia, the reporting criteria are mandatory. Reporting entities must have a reasonable basis for any opinions expressed in their Modern Slavery statement, so it is important that reporting entities take the time to assess their risk.
69. It is not clear if the enquiries by or into ETC have considered these risks.

### **C.3 Due Diligence and the Associated Risks Related to OECD Guidelines for Multinational Enterprises**

70. While Singapore is not a member of the OECD group of nations, SGX has analogous due diligence requirements. Likewise, the SGX operates in a global market and investment concerns can have considerable effect. Accordingly, in addition to the expectations of the SGX practice note set out above, we have set out below some examples of litigation which ought to be considered as relevant to corporate risk.

#### **C.3.1 ANZ's settlement with Cambodian families displaced by Phnom Penh Sugar**

71. Inadequate due diligence can have a significant impact on the banking industry. For example, the ANZ granted a loan for a sugar plantation established by Phnom Penh Sugar, displacing local families from their farms. It had been the subject of public accusations of corrupt business relationships and poor labour practices since before the loan was granted. ANZ's own report commissioned to examine the environmental and social impacts of the project reportedly

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<sup>62</sup> Raudah Mohd Yunus et al, 'Modern Slavery Prevention and Responses in Myanmar: An Evidence Map' (Emerging Evidence Report No 4, CLARISSA, November 2020) <[https://opendocs.ids.ac.uk/opendocs/bitstream/handle/20.500.12413/15799/CLARISSA\\_Emerging\\_Evidence\\_Report\\_4.pdf?sequence=7&isAllowed=y](https://opendocs.ids.ac.uk/opendocs/bitstream/handle/20.500.12413/15799/CLARISSA_Emerging_Evidence_Report_4.pdf?sequence=7&isAllowed=y)>.

recommended a more thorough investigation in advance of making the loan.<sup>63</sup>

72. The Australian National Contact Point for the OECD Guidelines for Multinational Enterprises received and investigated the complaint. It commented that it was difficult to reconcile ANZ's decision to fund the sugar plantation with the risks the project faced. It found that ANZ's loan to Phnom Penh Sugar was inconsistent with both ANZ's own policies and the OECD's ethical business guidelines. ANZ faced significant reputational, legal, and financial consequences because of failing to conduct sufficient due diligence in advance of the loan. The then-CEO of ANZ testified at a widely reported parliamentary committee hearing about breaching the OECD guidelines and publicly admitted to considering compensation. He was grilled again by shareholders at ANZ's 2019 annual meeting and publicly admitted that the bank had failed to conduct proper due diligence on the project. ANZ reached a settlement with the affected families to donate the gross profits made by it from the \$40 million loan. It also sold its 55 per cent stake in the ANZ Cambodia branch, which had been established as a joint venture,<sup>64</sup> and "has committed to establishing a mechanism that is accessible to communities affected by the bank's clients operating around the world, and which meets international human rights standards for effectiveness".<sup>65</sup>
73. The ANZ case settled in 2020. It set a precedent in the OECD context for companies paying a heavy price for insufficient due diligence. It is likely to have ripple impacts on similar action taken by community members to hold companies accountable for human rights abuses. A similar OECD complaint was filed in 2019 against Dutch bank ING Group for financing alleged palm oil abuses, one of the first of its kind to allege that it had "contributed to" human rights abuses rather than being "linked to" them.<sup>66</sup> While Singapore is not an OECD member, SGX, RHT, and ETC should all be aware of these types of risks: due diligence is a routine practice among financial institutions, and adding effective human rights due diligence to those practices is a

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<sup>63</sup> Charlotte Grieve, "Important precedent": ANZ pays Cambodian families hurt by project it funded', *The Sydney Morning Herald* (online, 27 February 2020) <<https://www.smh.com.au/business/banking-and-finance/important-precedent-anz-pays-cambodian-families-hurt-by-project-it-funded-20200227-p544tw.html>>.

<sup>64</sup> Ibid; Shaun Turton, 'Australia's ANZ to compensate Cambodian families over land loss', *Nikkei Asia* (online, 28 February 2020) <<https://asia.nikkei.com/Business/Companies/Australia-s-ANZ-to-compensate-Cambodian-families-over-land-loss>>; 'ANZ agrees to landmark settlement with Cambodian farmers displaced by sugar company it financed', *Inclusive Development International* (Web Page, 26 February 2020) <<https://www.inclusivedevelopment.net/cambodia/anz-agrees-to-landmark-settlement-with-cambodian-farmers-displaced-by-sugar-company-it-financed/>>.

<sup>65</sup> 'Cambodia: Securing compensation for ANZ-backed land grab', *Inclusive Development International* (Web Page) <<https://www.inclusivedevelopment.net/cases/cambodia-sugarcane-land-grabs/>>.

<sup>66</sup> 'NGOs file OECD complaint against Dutch bank ING for financing alleged palm oil abuses; incl. company comments', *Business & Human Rights Resource Centre* (Blog Post, 10 July 2019) <<https://www.business-humanrights.org/en/latest-news/ngos-file-oecd-complaint-against-dutch-bank-ing-for-financing-alleged-palm-oil-abuses-incl-company-comments/>>.

prudent fiscal decision in the face of increased scrutiny,<sup>67</sup> particularly where companies are becoming more transparent about their due diligence policies and practices.<sup>68</sup>

### C.3.2 Japanese Business Entities Operating in Myanmar

74. In February 2021, Human Rights Watch raised considerable concerns over Japanese business entities involved in Y Complex, a high-end commercial development project situated in Yangon, Myanmar which also involved a “Build, Operate, Transfer (B.O.T) Land Lease Agreement.”<sup>69</sup> Human Rights Watch expresses concern that the “Japanese companies involved in the Y Complex project have not conducted effective human rights due diligence as called for by the UN Guiding Principles on Business and Human Rights.”<sup>70</sup>

### C.3.3 The LOTTE Corporation complaints

75. LOTTE Corporation is a major conglomerate in tourism, and a partner in the LOTTE Hotel, a Yangon project, in which it has 18.49% ownership. The hotel is built on Ministry of Defence-owned land in Yangon and leased on a build-operate-transfer basis.<sup>71</sup> The complaint alleged that LOTTE Corporation and the other four companies failed to prevent or mitigate adverse human rights impacts that are directly linked to their operations by virtue of their business relationships, that LOTTE Corporation did not adequately oversee its investment chain, and that LOTTE Corporation has continued its lease agreement with the Ministry of Defence.<sup>72</sup>

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<sup>67</sup> ‘Financial Services Human Rights Benchmark’, *The University of Sydney Law School* (Web Page, <<https://www.sydney.edu.au/law/our-research/research-centres-and-institutes/financial-services-human-rights-benchmark/research-and-results.html>>.

<sup>68</sup> Emma Crates, ‘The role of the financial sector in eradicating modern slavery: CEOs respond to the Independent Anti-Slavery Commissioner’, *Independent Anti-Slavery Commissioner* (Report, September 2021) <<https://www.antislaverycommissioner.co.uk/media/1672/iasc-report-sep-2021-the-role-of-the-financial-services-sector-in-eradicating-modern-slavery.pdf>>.

<sup>69</sup> Joint Submission Concerning Japanese Business Entities Operating in Myanmar from Human Rights Now et al to the Working Group on Human Rights and Transnational Corporations and Other Business Enterprises, Office of the United Nations High Commissioner for Human Rights, 17 February 2021 <<https://www.hrw.org/news/2021/02/16/joint-submission-concerning-japanese-business-entities-operating-myanmar>>.

<sup>70</sup> Submission by Civil Society Organizations concerning Japanese Business Entities Operating in Myanmar to the Working Group on Human Rights and Transnational Corporations and Other Business Enterprises, Office of the United Nations High Commissioner for Human Rights, 17 February 2021 <<https://hrn.or.jp/eng/wp-content/uploads/2021/02/Joint-Submission-to-Mr.-Pesce-Feb-2021.pdf>>.

<sup>71</sup> Letter from Korean Civil Society in Solidarity with Rohingya, Korean Transnational Corporation Watch, and Justice For Myanmar to the United Nations Working Group on the issue of human rights and transnational corporations and other business enterprises (UNWG), November 2020, 7 <[https://uploads-ssl.webflow.com/5e691d0b7de02f1fd6919876/5fbee9c76160011b66a8fb59\\_Letter%20of%20Appeal%20to%20UNWG%20BnHR.pdf](https://uploads-ssl.webflow.com/5e691d0b7de02f1fd6919876/5fbee9c76160011b66a8fb59_Letter%20of%20Appeal%20to%20UNWG%20BnHR.pdf)>.

<sup>72</sup> Ibid 10; Justice For Myanmar, ‘Complaints filed against POSCO, LOTTE and three other South Korean corporations for contributing to human rights violations in Myanmar through military business’ (Press Release, 19 December 2020) 2 <<http://ow.ly/1OVq50CvfTi>>.

76. As set out above, the FFMM reports on the Ministry of Defence's economic interests, focusing heavily upon MEHL and its ties to the military.<sup>73</sup> Again, we believe this matter remains open.

#### Issues to be considered

77. All of the above examples require more detailed examination: For example, how has the proceeding been received? Has it impacted share prices and what have been the responses of domestic regulatory authorities?
78. ETC denies that its funds could have been used to commit human rights abuses, saying that under Myanmar law, the Quartermaster General must turn over all funds to the government's budget account.<sup>74</sup> However, it is not clear whether ETC has conducted an impact assessment pursuant to the higher standard required by the Guiding Principles, nor whether ETC has grievance mechanisms in place to address any actual adverse impacts on human rights resulting from their investments.<sup>75</sup>
79. Due diligence failures by ETC create risk which, in turn, should be of concern to SGX, as a corporation and arguably a state organ, and to the Singapore Government. Such failures are investment risks, as well as risks of being connected to human rights violations.<sup>76</sup> It is not just about rebuffing external pressures.

## C.4 UN International Law Commission - Responsibility of States for Internationally Wrongful Acts 2001

80. The United Nations International Law Commission produces Draft Articles on Public International Law which are considered to form a part of international customary law.<sup>77</sup> One such Draft Article is the *Responsibility of States for Internationally Wrongful Acts* 2001 (**Responsibility of**

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<sup>73</sup> SOMO representing 474 Myanmar CSOs vs. Telenor ASA (Complaint to OECD, 27 July 2021) 7 <<https://www.oecdwatch.org/complaint/somo-representing-474-myanmar-csos-vs-telenor-asa/>>.

<sup>74</sup> Tim McDonald, 'Myanmar coup: Could sanctions on the military ever work?', *BBC News* (online, 9 April 2021) <<https://www.bbc.com/news/business-56248559>>.

<sup>75</sup> Letter from Korean Civil Society in Solidarity with Rohingya, Korean Transnational Corporation Watch, and Justice For Myanmar to the United Nations Working Group on the issue of human rights and transnational corporations and other business enterprises (UNWG), November 2020, 11 <[https://uploads-ssl.webflow.com/5e691d0b7de02f1fd6919876/5fbee9c76160011b66a8fb59\\_Letter%20of%20Appeal%20to%20UNWG%20BnHR.pdf](https://uploads-ssl.webflow.com/5e691d0b7de02f1fd6919876/5fbee9c76160011b66a8fb59_Letter%20of%20Appeal%20to%20UNWG%20BnHR.pdf)>.

<sup>76</sup> '2020 Country Reports on Human Rights Practices: Burma' (Report, United States Department of State, 30 March 2021) <<https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/burma/>>.

<sup>77</sup> Kristen E Boon, 'Are Control Tests Fit for the Future?' (2014) 15(2) *Melbourne Journal for International Law* 12.

**States Articles**), which was subsequently adopted in the UNGA Resolution 56/83 in 2001.<sup>78</sup> These Articles particularly concern the attribution of responsibility to a state for conduct which amounts to a breach of international obligations.<sup>79</sup>

81. Under the Responsibility of States Articles, the conduct of a “state organ” can be connected back to the state authority itself: A state who “aids or assists” the commission of an international breach is held responsible. The consequence of this responsibility is a subsequent obligation to cease these actions, provide an assurance that it will not occur again, and a liability to pay full reparations for the injury caused.<sup>80</sup>

### Issues to be considered

82. Under these principles, Singapore as a state and consequently SGX as the responsible state organ may face a legal obligation to cease their transactions with ETC and an exposure to an obligation to pay reparations for the harm caused.
83. This legal, and therefore financial, risk arises if SGX is deemed to be a “state organ”, i.e., part of Singapore’s government system - and if they have aided or assisted in the commission of internationally wrongful acts.

## C.5 International Investment Law - Myanmar-Singapore Bilateral Investment Treaty

84. Singapore and Myanmar have a bilateral investment treaty (**BIT**) signed on 24 September 2019, although it has not yet entered into force.<sup>81</sup> The treaty defines “investment” broadly in Article 1 as “every kind of asset”, including an enterprise, shares, stocks, construction, permits, and business concessions. ETC’s status as a parent company in Golden Land, and Golden Land’s business dealings in relation to Golden City, could therefore raise a series of investment law issues, if the business arrangements remain alive at the time the BIT comes into force.
85. Although a detailed analysis is beyond the scope of this advice, in the event the BIT comes into force, Singapore and Myanmar, Article 8 provides for “all transfers relating to investments of an investor of the other Party in its territory to be made freely and without delay into and out of its territory”, subject to withholding funds legally through the operation of laws such as in “criminal

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<sup>78</sup> United Nations International Law Commission, ‘Responsibility of States for Intentionally Wrongful Acts’ (Draft Articles, 2001) <[https://legal.un.org/ilc/texts/9\\_6.shtml](https://legal.un.org/ilc/texts/9_6.shtml)>.

<sup>79</sup> Ibid arts 1, 2.

<sup>80</sup> Ibid arts 30, 31.

<sup>81</sup> *Agreement between the Government of the Republic of Singapore and the Government of the Republic of the Union of Myanmar on the Promotion and Protection of Investments*, opened for signature 24 September 2019 (not yet in force).

or penal offences and the recovery of proceeds of crimes” or in “ensuring compliance with orders or judgments in judicial or administrative proceedings”.<sup>82</sup> In light of these exceptions, where MEC is already subject to sanctions and further financial penalties may apply in the future, the entry into force of a BIT is likely to further complicate matters as the parties will be able to seek recourse in the Investor Grievance Mechanism<sup>83</sup> or arbitration, rather than litigation in a domestic court. Companies are already considering legal action arising from the consequences of the coup and the pandemic.<sup>84</sup> We add this material to remind those concerned that avoiding the complications of litigation or arbitration are desirable from a reputation and costs management perspective but also to observe that the risk of future complications flowing from the eventual entry into force of the BIT are relevant at the current time given that Golden City is a long term investment with a lease back arrangement running for some decades. It follows that SGX is likely to want to carefully review the financial arrangements around Golden City, with a view to minimising the risk of future as well as present complications.

## C.6 Commercial Liability - Construction Contracts

86. Investigations into ETC appear to have been limited to the contractual financial arrangements. Due diligence in relation to construction is a compliance mesh of international standards which include sustainable procurement (ISO20400), occupational health and safety (ISO45001), quality management (ISO9001) and sales of goods (U.N. Convention on Contracts for the International Sale of Goods (CISG)). As a party to the CISG since 1996, Singapore is bound by it under international law, and has taken steps towards its domestic implementation. The CISG deals with both contract formation and the obligations of the parties. It carefully balances the interests of the buyer and seller and provides a comprehensive set of remedies in case of non-performance.<sup>85</sup>

### Issues to be considered

87. One aspect of risk for any investment opportunity is whether the manner in which a product was produced or constructed complied with international standards to the extent that it is unlikely to give rise to litigation in such contexts. It is not necessarily enough to say that payments on a contract were conducted with due diligence. By trading with a military organisation that the FFMM found had engaged in human rights abuses, the circumstances of a construction project

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<sup>82</sup> Ibid art 8.

<sup>83</sup> Harish Mehta, ‘Foreign companies in Myanmar may seek legal action for losses’, *The Business Times* (online, 15 July 2021) <<https://www.businesstimes.com.sg/opinion/foreign-companies-in-myanmar-may-seek-legal-action-for-losses>>.

<sup>84</sup> Ibid.

<sup>85</sup> ‘United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG)’, *United Nations Commission on International Trade Law* (Web Page) <[https://uncitral.un.org/en/texts/salegoods/conventions/sale\\_of\\_goods/cisg](https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg)>.

within Myanmar ought to be the subject of very close oversight to be satisfied that investment in it does not carry the risk of fiscal imprudence through the execution and life of the project.

88. It is not clear if the enquiries made by or into ETC have considered any risks arising from the wider construction, employment, or contractual arrangements.

## C.7 Commercial Liability - Torts

89. Potential commercial liability under tort-based regimes come with considerable legal, financial, practical, and procedural barriers to accessing judicial remedies for claimants. However, these are not always insurmountable as the recent decision in *Vedanta Resources PLC and another v Lungowe and others* [2019] UKSC 20 has revealed: in that case, it was argued that a parent company can be held accountable under civil law for human rights violations and environmental harm caused by its foreign subsidiary and that Vedanta Resources, a UK company, owed a duty of care to villagers living in the vicinity of its Zambian subsidiary, Konkola Copper Mines Plc (KCM). Ruling on a procedural appeal, and upholding the jurisdiction of the UK courts, the UK Supreme Court held that 1826 Zambian villagers had jurisdiction to pursue their case against both parent and subsidiary companies based in the UK.<sup>86</sup>

90. Whilst international standards were not explicitly referred to in the decision, the court also held the UK was the “*proper place in which to bring the claim*” and clarified that Vedanta’s submission to the jurisdiction of the Zambian courts did not prevent the claimants from continuing in England. The ‘proper place’ test requires a summary examination of connecting factors between the case and the jurisdictions in which it could be litigated. Even if a foreign jurisdiction is found to be the proper place, the Court can still permit service of English proceedings if cogent evidence shows there is a real risk that substantial justice would not be obtainable. In this regard, the Court identified two key issues:

- (a) First, the practical impossibility of funding in Zambia due to the claimants being unable to obtain legal aid or conditional fee agreements; and
- (b) Second, that Zambia lacks legal teams with sufficient experience and resources for the claim.

91. The case presents significant implications for future questions on parent company responsibility

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<sup>86</sup> Laura Green and David Hamer, ‘Corporate Responsibility for Human Rights Violations: UK Supreme Court Allows Zambian Communities to Pursue Civil Suit Against UK Domiciled Parent Company’, *EJIL:Talk!* (Blog Post, 24 April 2019) <<https://www.ejiltalk.org/corporate-responsibility-for-human-rights-violations-uk-supreme-court-allows-zambian-communities-to-pursue-civil-suit-against-uk-domiciled-parent-company/>>.

for the negligent actions of subsidiaries. Part of the jurisdictional challenge involved a determination of whether the claimants had raised a triable issue, or whether their case had no real prospects of success. Vedanta asserted the latter, arguing that nothing it had done gave rise to a duty of care and that it was “*merely an indirect owner of KMC, and no more than that*”, at [17]. The parent company further asserted that the imposition of a duty would involve a “*novel and controversial extension*” of the existing law of negligence, which would require deeper scrutiny than that performed by the lower courts.<sup>87</sup>

92. The Court disagreed on both points and found that the claimants did have prospects of success. It held, at [49], that the parent/subsidiary relationship creates an opportunity for the parent to “*take over, intervene in, control, supervise or advise the management of the relevant operations*” of the subsidiary. and that Vedanta both laid down and actively implemented the operational standards through training, monitoring and enforcement.<sup>88</sup>

### Issues to be considered

93. The overarching point for multinational entities is that an examination of compliance with domestic regulations will not absolve those in the chain of control of corporate acts or omissions which lead to harm, even in other countries. In principle at least, the questions for Singaporean entities can be summarised as follows:
- (a) Could it be argued that there are victims of human rights abuses that give rise to a tort-based claim by the actions of the Myanmar military?
  - (b) What are the connecting factors as between the Myanmar military within Myanmar and the entities within Singapore?
  - (c) Are there connecting factors as between the entities in Singapore and UK entities?
  - (d) Would the victims suffer a lack of substantial justice in Myanmar?
94. We have not particularly examined domestic law remedies within Singapore or Myanmar but have assumed that domestic law remedies for victims are patchy and unpredictable. The *Vedanta* precedent shows that supply chains that can be connected to the UK may face liability for tortious conduct. It is a common law development at least similar to the *Alien Torts Claim Act 1789*. Since June 2021, the decision of the US Supreme Court in *Nestlé USA, Inc. v. Doe*, No. 19-416, consolidated with *Cargill, Inc. v. Doe*, No. 19-453, means that the use of the Alien Torts Act does

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<sup>87</sup> Ibid.

<sup>88</sup> Ibid.

come with some significant restrictions around proving a domestic nexus;<sup>89</sup> there does remain some jurisdiction for US federal courts to hear lawsuits filed by non-US citizens for torts committed in violation of international law.<sup>90</sup>

95. In terms of global governance by networks of connected businesses facing a compliance mesh in a range of jurisdictions, the approach of the UK and US Supreme Courts remain highly relevant to the assessment of corporate risk.
96. It is not clear if the enquiries by or into ETC have considered these risks.

## C.8 Commercial Liability - Land Disputes

97. A full treatise on land law is beyond the scope of this advice but the risk of such litigation should not be excluded from consideration by SGX. We note, for example, the case of *John Doe I et al. v. UNOCAL Corp. et al.* brought under the auspices of the U.S. Alien Tort Statute. It was eventually settled out of court with an agreement to improve living conditions in the region and to provide compensation, following several interim decisions leaving open the potential of parent company liability for its subsidiaries.<sup>91</sup> Other actions may well be commenced in Singapore given the volume of Myanmar-related business conducted by Singaporean companies.

### Issues to be considered

98. It is not clear if the enquiries by or into ETC have considered risks of land disputes. For example, it is not clear if on the ground community consultation has been made without undue pressure.

## C.9 Criminal Liability

99. Laws on complicity can be wide enough so investigations can engage in the assessment of individual conduct, not only corporate conduct.<sup>92</sup> This can encompass international or domestic criminal liability and liability in jurisdictions with extra-territorial or universal jurisdiction. Connection to war crimes, terrorism, organised crime or international bribery and corruption

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<sup>89</sup> 'Supreme Court Limits Extraterritorial Reach of The Alien Tort Statute', *Gibson Dunn* (Blog Post, 17 June 2021) <<https://www.gibsondunn.com/supreme-court-limits-extraterritorial-reach-of-the-alien-tort-statute/>>.

<sup>90</sup> 'The Alien Tort Statute', *The Centre for Justice & Accountability* (Web Page) <<https://cja.org/what-we-do/litigation/legal-strategy/the-alien-tort-statute/>>.

<sup>91</sup> *John Doe I et al v UNOCAL Corp et al* (Ca, 14 September 2004) (Ruling on UNOCAL Defendants' Motion for Judgment) <http://www.internationalcrimesdatabase.org/Case/992/Doe-I-et-al-v-UNOCAL-et-al/>

<sup>92</sup> Felicity Gerry, 'Australia must do more to ensure Myanmar is preventing genocide against the Rohingya', *The Conversation* (online, 29 October 2020) <<https://theconversation.com/australia-must-do-more-to-ensure-myanmar-is-preventing-genocide-against-the-rohingya-147451>>.

through financial institutions may be relevant crimes for investigation. Examples include the following:

- (a) The risk of atrocity crimes has been the subject of serious concern in Myanmar:<sup>93</sup> On 14 November 2019, Pre-Trial Chamber III of the International Criminal Court (**ICC** or the **Court**) authorised the Prosecutor to proceed with an investigation for the alleged crimes within the ICC's jurisdiction in the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar (**the situation in Bangladesh/Myanmar**).
- (b) Terrorism and terrorist financing: The Special Advisory Council for Myanmar has labelled the Myanmar military as a “terrorist group” that should be brought before the International Criminal Court, and funds flowing to it should be cut via a global sanctions regime.<sup>94</sup> Whilst there is no agreed international definition of terrorism, it is widely accepted that it relates to criminal activity motivated by extreme religious, political or ideological causes. The international Convention for the Suppression of the Financing of Terrorism was adopted by the UN General Assembly of the United Nations in resolution 54/109 of 9 December 1999. Singapore is not a signatory but has given notice in accordance with some provisions that it has established jurisdiction over certain offences. Put shortly, the funding of terrorism is a Singaporean concern.<sup>95</sup> The financing of terrorism is also subject to domestic criminal law provisions in other jurisdictions (some with extraterritorial effect or universal jurisdiction) where money is intentionally collected or provided, or an individual is reckless about whether the money will be used to facilitate or engage in a terrorist act.
- (c) Money laundering: We note that The Monetary Authority of Singapore (MAS) is currently engaged in the launch of the Collaborative Sharing of Money Laundering / Terrorism Financing Information and Cases (COSMIC) to enable financial institutions to digitally warn each other about unusual activity in customer accounts. Singapore is also a member of the Financial Action Task Force (FATF), the global money laundering and terrorist financing watchdog. The inter-governmental body sets international standards that aim to prevent these illegal activities and the harm they cause to society. As a policy-making body, the FATF works to generate the necessary political will to bring

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<sup>93</sup> Asia Pacific Centre, ‘Atrocity Crimes Risk Assessment Series: Myanmar’, (Risk Assessment, Volume 9, November 2019) <[https://r2pasiapacific.org/files/4156/Risk\\_Assessment\\_myanmar\\_vol9\\_november2019.pdf](https://r2pasiapacific.org/files/4156/Risk_Assessment_myanmar_vol9_november2019.pdf)>.

<sup>94</sup> Ben Doherty, ‘Myanmar military a ‘terrorist group’ that should face international court, advisory council says’, *The Guardian* (online, 30 March 2021) <<https://www.theguardian.com/world/2021/mar/30/myanmar-military-a-terrorist-group-that-should-face-international-court-advisory-council-says>>.

<sup>95</sup> *International Convention for the Suppression of the Financing of Terrorism*, opened for signature 10 January 2000, 2178 UNTS 197 (entered into force 10 April 2002).

about national legislative and regulatory reforms in these areas.<sup>96</sup> Financial institutions are generally required to undertake customer due diligence (CDD) measures when: (i) establishing business relations; (ii) carrying out occasional transactions; (iii) there is a suspicion of money laundering or terrorist financing; or (iv) the financial institution has doubts about the veracity or adequacy of previously obtained customer identification data. The CDD measures to be taken include: (a) identifying the customer and verifying that customer's identity using reliable, independent source documents, data or information; (b) identifying the beneficial owner and taking reasonable measures to verify the identity of the beneficial owner, such that the financial institution is satisfied that it knows who the beneficial owner is. For legal persons and arrangements this should include financial institutions understanding the ownership and control structure of the customer; (c) understanding and, as appropriate, obtaining information on the purpose and intended nature of the business relationship; and (d) conducting ongoing due diligence on the business relationship and scrutiny of transactions undertaken throughout the course of that relationship to ensure that the transactions being conducted are consistent with the institution's knowledge of the customer, their business and risk profile, including, where necessary, the source of funds.

- (d) Human trafficking: Many jurisdictions have criminal laws in place that carry extra territorial jurisdiction for human trafficking, which is widely defined to include sex trafficking and all forms of slavery and slavery-like practices. This can cover the individual conduct of military personnel in the use and exploitation of people such as for sexual services, as well as wider systemic issues, such as the use of child soldiers.<sup>97</sup>
- (e) Genocide: On 4 July 2019 the ICC's Office of the Prosecutor filed a request for authorization of an investigation into the crimes against the Rohingya. Specifically, the scope of the request was limited to investigation of those crimes in which at least one element occurred in Bangladesh (which is a party to the Rome Statute), and those that took place within the 2016 and 2017 "clearance operations," as well as other crimes "sufficiently linked" to these events. In November 2019 Pre-Trial Chamber III of the ICC authorized the Chief Prosecutor to proceed with an investigation into crimes under the ICC's jurisdiction. The Chamber determined that "there exists a reasonable basis to believe widespread and/or systematic acts of violence may have been committed that could qualify as the crimes against humanity of deportation across the Myanmar-

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<sup>96</sup> 'Who we are', *Financial Action Task Force* (Web Page, 2020) <<https://www.fatf-gafi.org/about/membersandobservers/>>.

<sup>97</sup> Financial Action Task Force, 'International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations' (Recommendations, June 2021) <<http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf>>.

Bangladesh border and persecution on grounds of ethnicity and/or religion against the Rohingya population.” We note that a full referral to the ICC by the UN Security Council has not occurred.<sup>98</sup>

100. MAS has already fined Asiatic Trust Singapore S\$1.1million for serious breaches of its anti-money-laundering and counter-terrorism finance requirements between 2007 and 2018.<sup>99</sup> It is likely to be watching SGX’s actions carefully, given that SGX exercises regulatory responsibilities delegated by MAS.

### Issues to be considered

101. It is unclear whether these risks have been considered by SGX. It is also not clear if the enquiries by or into ETC have considered the wide scope of criminal law and what risks might arise for both corporate and individual liability. This would necessitate an understanding of the law of complicity in domestic and international law, which is not necessarily settled.

## C.10 Commercial Liability - Genocide

102. It is worth noting that the treatment of the Rohingya in Myanmar by the military has been described as genocide.<sup>100</sup> The Genocide Convention does not explicitly distinguish between natural and legal persons when referring to holding “persons” accountable for committing genocide, although prosecution for individual criminal liability for corporate officers is more likely and less complex. However, there should be no assumption that no corporate entity will ever face criminal liability for complicity in genocide. In September 2021, France’s highest court of appeal upheld charges against Lafarge Cement Syria for its complicity in the crimes against humanity in Syria’s civil war. Parent company Holcim Limited denied that its Syrian subsidiary was responsible for approximately USD\$15.3 million ending up in the pockets of jihadist groups including the Islamic State. The multibillion dollar company alleged that the Syrian subsidiary only intended to pay middlemen to negotiate with armed groups to allow the movement of staff and goods inside the war zone, however the Court of Cassation overturned the decision of the lower court to dismiss charges brought against the company, stating that: “*one can be complicit in*

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<sup>98</sup> ‘Q&A: The Gambia v. Myanmar, Rohingya Genocide at The International Court of Justice, May 2020 Factsheet’, *Global Centre for the Responsibility to Protect* (Policy Brief, 21 May 2020) <<https://www.globalr2p.org/publications/myanmarqav2/>>.

<sup>99</sup> Ben Butler, ‘Offshore provider accused of failing to follow money laundering rules’, *The Guardian* (online, 4 October 2021) <<https://www.theguardian.com/news/2021/oct/03/offshore-provider-accused-of-failing-to-follow-money-laundering-rules>>.

<sup>100</sup> Hannah Beech, Saw Nang and Marlise Simons, ‘Kill All You See’: In a First, Myanmar Soldiers Tell of Rohingya Slaughter’, *New York Times* (online, 8 September 2020) <<https://www.nytimes.com/2020/09/08/world/asia/myanmar-rohingya-genocide.html>>.

*crimes against humanity even if one doesn't have the intention of being associated with crimes committed.”*

### Issues to be considered

103. It is not clear if the enquiries by SGX or the reviews into ETC have considered these risks.

## C.11 Sanctions

104. Singapore has not imposed sanctions on Myanmar on the basis that it would hurt ordinary citizens, preferring to engage through ASEAN.<sup>101</sup>
105. Currently, there are no international sanctions imposed on Myanmar as a state,<sup>102</sup> but U.S. sanctions have been placed on the Myanmar State **Administrative Council** (SAC) which is designated for being a political subdivision, agency, or instrumentality of the Government of Myanmar. Individual military officials have also been designated.<sup>103</sup> There are also sanctions on the MEC, Myanma Economic Holdings Ltd (**MEHL**), and powerful individuals of Myanmar by the UK, US, Canada and the EU. In addition, the UK has extended sanctions to include the British Virgin Islands.<sup>104</sup>
106. The US imposed Executive Order 14014 “Blocking Property With Respect to the Situation in Burma”<sup>105</sup> in response to the coup of 1 February 2021, freezing current and future US-held or -controlled assets of “any foreign person... determined to operate in the defense sector of the Burmese economy... or to be a political subdivision, agency, or instrumentality of the Government of Burma... or to have materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of any person whose property and interests in property are blocked pursuant to this order... or to be owned or

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<sup>101</sup> Aravindan (n 23).

<sup>102</sup> It does implement and enforce UN Security Council sanctions using domestic legislation and regulations. See ‘Targeted Financial Sanctions: List of Designated Individuals and Entities’, *Monetary Authority of Singapore* (Web Page) <<https://www.mas.gov.sg/regulation/anti-money-laundering/targeted-financial-sanctions/lists-of-designated-individuals-and-entities>>; ‘Targeted Financial Sanctions: Overview’, *Monetary Authority of Singapore* (Web Page) <<https://www.mas.gov.sg/regulation/anti-money-laundering/targeted-financial-sanctions>>.

<sup>103</sup> ‘Treasury Sanctions Governing Body, Officials, and Family Members Connected to Burma’s Military’ (Press Release, United States Department of the Treasury, 17 May 2021) <<https://home.treasury.gov/news/press-releases/jy0180>>.

<sup>104</sup> *The Misappropriation (Sanctions) (Overseas Territories) Order 2020* (UK); *The Myanmar (Sanctions) (Overseas Territories) Order 2021*, *British Virgin Islands Financial Services Commission* (Web Page, 29 April 2021) <<https://www.bvifsc.vg/library/international-sanctions/myanmar-sanctions-overseas-territories-order-2021>>; ‘Response to SGC Queries on 8 June 2020 Announcement’, *Emerging Towns & Cities Singapore Ltd* (Announcement, 8 June 2020) <<https://links.sgx.com/FileOpen/ETC%20Announcement%20-%20Response%20to%20SGX%20Queries.ashx?App=Announcement&FileID=617770>>.

<sup>105</sup> *Blocking Property with respect to the Situation in Burma* (Executive Order of the President of the United States of America) 86(28) Fed Reg 9429 (10 February 2021).

controlled by, or to have acted or purported to act for or on behalf of, directly or indirectly, the military or security forces of Burma or any person whose property and interests in property are blocked pursuant to this order.” MEC is listed as such a person.<sup>106</sup>

107. The implications of intentionally targeted<sup>107</sup> US sanctions are wide-ranging. They empower the US Treasury Department’s Office of Foreign Assets Control to freeze all property and interests in property for sanctioned persons that are in the United States or in the possession or control of US persons. They also prohibit all transactions by US persons or within the US involving property or interests in property of sanctioned persons.<sup>108</sup>
108. On 1 April 2021, the UK also sanctioned MEC and identified subsidiaries through the *Global Human Rights Sanctions Regulations 2020*,<sup>109</sup> made under the *Sanctions and Anti-Money Laundering Act 2018* (UK)<sup>110</sup> in part for the 1 February coup and serious human rights violations against Rohingya. These Regulations freeze funds or economic resources owned or controlled by sanctioned persons, require reports of any findings or additional information that would facilitate compliance with the Regulations, and require the provision of any information concerning the frozen assets as requested. Information reported to OFSI may be passed on to other regulatory authorities or law enforcement.<sup>111</sup>
109. Sanctions have also been applied in the EU, under Council Regulation (EU) No 401/2013 concerning restrictive measures in view of the situation in Myanmar/Burma and repealing Regulation (EC) No 194/2008,<sup>112</sup> to freeze the funds and economic resources of MEC and any entities it owns or controls, and to prohibit directly or indirectly making available any funds or economic resources.
110. Golden City lease payments are capable of being caught by international sanctions, attracting further unwanted attention about the probity and origins of funds. Where sanctions impose reporting obligations, confidential information may be released to third parties, potentially

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<sup>106</sup> Anthony J Blinken, Secretary of State, ‘Sanctions on Two Burmese Entities in Connection with the Military Regime’ (Media Release, United States Department of State, 25 March 2021) <<https://www.state.gov/sanctions-on-two-burmese-entities-in-connection-with-the-military-regime/>>.

<sup>107</sup> ‘U.S. Relations with Burma’ (n 7).

<sup>108</sup> ‘United States Targets Leaders of Burma’s Military Coup Under New Executive Order’ (Press Release, United States Department of the Treasury, 11 February 2021) <<https://home.treasury.gov/news/press-releases/jy0024>>.

<sup>109</sup> *The Global Human Rights Sanctions Regulations 2020* (UK) <<https://www.legislation.gov.uk/uksi/2020/680/made>>.

<sup>110</sup> ‘UK sanctions list’ (Publication, Government of the United Kingdom, 30 September 2021) Myanmar, Entity 6 <<https://www.gov.uk/government/publications/the-uk-sanctions-list>>; Office of Financial Sanctions Implementation, ‘Myanmar’ (Financial Sanctions Notice, HM Treasury UK, 29 April 2021) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/982603/Notice\\_Myanmar\\_290421.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/982603/Notice_Myanmar_290421.pdf)>.

<sup>111</sup> ‘Global Human Rights’ (Financial Sanctions Notice, HM Treasury UK, 1 April 2021) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/975437/Notice\\_Global\\_Human\\_Rights\\_010421.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/975437/Notice_Global_Human_Rights_010421.pdf)>.

<sup>112</sup> Council Regulation (EU) No 401/2013 concerning restrictive measures in view of the situation in Myanmar/Burma and repealing Regulation (EC) No 194/2008.

without the knowledge or consent of the business. This is a particular concern in the case of Singapore, which has since 1988 found Myanmar an attractive target for foreign investment. ETC and its chain of subsidiaries are theoretically a subject for sanction. What is publicly known about its lease payments to the QMGO has already been concerning enough for ETC to engage its own independent reviewers. There are likely to be more financial relationships under investigation that would, if substantiated and passed on to interested parties, place ETC at greater risk of being captured by sanctions.<sup>113</sup>

111. It is not clear to what extent the enquiries by SGX or the reviews into ETC have considered these risks.

### **Issues to be considered**

112. SGX and RTE, as fundraiser and sponsor respectively for ETC, face a need to assess risk of sanctions-avoidant depression in funding for projects with companies known to be affiliated with the Myanmar military.<sup>114</sup> Depending on the amount of funds it raises across its whole offering, Mainboard and Catalist alike, it is also theoretically a subject of sanction for having provided financial support for MEC.
113. On both fronts, it is desirable that SGX assess the risk of being sanctioned itself, or its risks arising from listing companies at risk of sanction.<sup>115</sup>
114. It is not clear if the enquiries by SGX or the reviews into ETC have considered these risks.

## **C.12 International Law Commission Articles on the Responsibility of States for Internationally Wrongful Acts**

115. If SGX can be characterised as a state organ, there are consequential state responsibilities. SGX is likely to fall into this characterisation given its role as a “frontline regulator” with the “responsibility of upholding fair, orderly and transparent marketplace by regulating market participants”.<sup>116</sup> The SGX is directly overseen by MAS, the statutory regulator and supervisor of

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<sup>113</sup> Atkins (n 2).

<sup>114</sup> Financial institutions have already taken drastic action. See Hugh Bohane, ‘Foreign Investors Reassess Ties with Myanmar’, *VOA News* (online, 9 April 2021) <[https://www.voanews.com/a/east-asia-pacific\\_foreign-investors-reassess-ties-myanmar/6204358.html](https://www.voanews.com/a/east-asia-pacific_foreign-investors-reassess-ties-myanmar/6204358.html)>.

<sup>115</sup> On 4 March 2021, the US Commerce Department’s Bureau of Industry and Security established restrictions on exports and re-exports to Myanmar. See Anthony J Blinken, ‘Promoting Accountability and Responding to Violence against Protestors in Burma’ (Press Statement, United States Department of State, 10 March 2021) <<https://www.state.gov/promoting-accountability-and-responding-to-violence-against-protestors-in-burma/>>.

<sup>116</sup> ‘About SGX RegCo: Overview’, *Singapore Exchange* (Web Page) <<https://www.sgx.com/regulation/about-sgx-regco>>.

financial institutions in Singapore.<sup>117</sup> The regulation of the stocks and futures exchange marketplace is maintained dually by both MAS and SGX.<sup>118</sup>

116. The SGX maintains and administers the rules and by-laws of the marketplace, subject to MAS approval. MAS maintains the functions of pursuing legal action against listed companies, supported by the surveillance and reporting functions of the SGX. SGX therefore performs the role of administering the financial sector laws within the stock exchange in Singapore and demonstrates an executive/administrative exercise of power under the mandates of the MAS.<sup>119</sup> Hence, any action which is taken by SGX may well be attributable to Singapore as a state, which can be held internationally liable.<sup>120</sup>
117. SGX's initial calls for an investigation following Justice For Myanmar's reports demonstrates that SGX had sufficient concerns over ETC involvement in Myanmar following the FFMM and the Justice For Myanmar reports.<sup>121</sup> It follows that, in its listing assessment, SGX is likely to need to consider any breach of the Articles by assisting in the commission of an internationally wrongful act, such as by aiding or assisting Myanmar.<sup>122</sup>

### Issues to be considered

118. Singapore in turn is faced with a correlated obligation to investigate, prevent and cease transactions that amount to wrongful acts. Accompanying this is also possible obligations to pay reparations for harm caused by funding the QMGO.<sup>123</sup> In both instances, there may be likelihood that SGX, as the overseer of these actions, is condemned or further regulated as a result. The failure to further investigate or prevent ETC's transactions may cause the MAS to shift to a stance of needing greater oversight over SGX than what SGX Reg-Co provides, and may even impact the discretion SGX have over its listing and oversight policies.
119. It is not clear if the enquiries by SGX or the reviews into ETC have considered these risks.

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<sup>117</sup> 'Supervisory Approach and Regulatory Instruments', *Monetary Authority of Singapore* (Web Page) <<https://www.mas.gov.sg/regulation/MAS-Supervisory-Approach-and-Regulatory-Instruments>>; *Monetary Authority of Singapore Act* (Singapore, cap 186, 1999 rev ed) s 4.

<sup>118</sup> 'About SGX RegCo: Overview', *Singapore Exchange* (Web Page) <<https://www.sgx.com/regulation/about-sgx-regco>>; 'Reply to PQ on the dual roles of SGX' (n 39).

<sup>119</sup> 'Reply to PQ on the dual roles of SGX' (n 39); *Responsibility of States for Internationally Wrongful Acts*, GA Res 56/83, UN Doc A/RES/56/83 (28 January 2002, adopted 12 December 2001) annex ('*Responsibility of States for Internationally Wrongful Acts*') arts 4, 5.

<sup>120</sup> *Responsibility of States for Internationally Wrongful Acts* (n 119) arts 1, 2.

<sup>121</sup> Thomas H Andrews, *Report of the Special Rapporteur on the situation of human rights in Myanmar*, UN Doc A/HRC/46/56 (4 March 2021).

<sup>122</sup> *Responsibility of States for Internationally Wrongful Acts* (n 119) art 16.

<sup>123</sup> *Ibid* art 31.

## C.13 Application of Convention on the Rights of the Child

120. Singapore is a State Party to the Convention on the Rights of the Child, which mandates that all States must take “all appropriate measures” to ensure that children do not face discrimination or punishment.<sup>124</sup> This goes beyond legislation to include any other measure necessary to ensure the protection of children’s rights.<sup>125</sup> The State’s obligation extends to businesses which operate on their soil and to the impacts of their business activities.<sup>126</sup> That is, the State must ensure that businesses they oversee have practices which respect the rights of children and that the business must not undermine the State’s ability to protect the rights of children.<sup>127</sup> Singapore, therefore, has an obligation to ensure that SGX does not facilitate or aid the infringement of children’s rights.<sup>128</sup> If Singapore fails to meet this obligation it is in breach of the Convention and may need to take necessary recourse to prevent this. This may include the imposition of penalties upon SGX for failing to meet human rights standards in allowing ETC to operate on the market.
121. The Special Rapporteur Report indicates that children are being harmed in Myanmar as a result of the ongoing armed conflict.<sup>129</sup> Children have been used as human shields. Children are being indiscriminately killed and are 34% of the casualties from unexploded ordinances. Schools are unable to open in the midst of conflict.<sup>130</sup>
122. Where ETC are engaging in commercial transactions which fund or otherwise support the Myanmar military - they are at risk of being complicit in the ongoing harm perpetuated against children within this conflict.
123. International law, through the Convention, recognises that every child has the right to life, and that states will do what is necessary to the extent possible to ensure their survival.<sup>131</sup> The obligation on Singapore also extends to violations which occur in foreign territory, as the Convention does not limit jurisdiction.<sup>132</sup> As stated by the Committee on the Rights of Child, states “must ensure that all business enterprises, including transnational corporations operating

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<sup>124</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 2 (“UNCRC”).

<sup>125</sup> *Ibid* art 4.

<sup>126</sup> Committee on the Rights of the Child, *General Comment No 16: State obligations regarding the impact of the business sector on children’s rights*, UN Doc CRC/C/GC/16 (17 April 2013) (“*General Comment No 16*”).

<sup>127</sup> *Ibid*.

<sup>128</sup> *Ibid*.

<sup>129</sup> Thomas H Andrews, *Report of the Special Rapporteur on the situation of human rights in Myanmar*, UN Doc A/HRC/46/56 (4 March 2021).

<sup>130</sup> *Ibid* 7 [40]-[43].

<sup>131</sup> UNCRC (n 124) art 6.

<sup>132</sup> *General Comment No 16* (n 126).

within their borders, are adequately regulated within a legal and institutional framework that ensures that they do not adversely impact on the rights of the child and/or aid and abet violations in foreign jurisdictions”.<sup>133</sup> Therefore, where Singapore has the ability to regulate a transnational corporation, as it does in this instance with MAS regulating SGX and ETC, the state has the obligation to ensure that ETC does not engage in activities which aid breaches of Convention rights.

### Issues to be considered

124. It is not clear if Singapore would take action to protect the rights of children in Myanmar, such as preventing investment, condemnation, and penalties for failing in due diligence, but SGX is aware of ETC’s connection to the situation in Myanmar through the FFMM.
125. It is not clear if the enquiries by SGX or the reviews into ETC have considered these risks.

## C.14 Bribery, Corruption, and Applicable Legal Frameworks

126. In relation to ETC, we acknowledge there appear to be no public allegations of bribery,<sup>134</sup> although the US Department of State 2020 Country Reports on Human Rights Practices: Burma characterises some of the investigative findings of Justice For Myanmar as expositions of corruption.<sup>135</sup> We also note that in 2015, a report by ESCAP found that Corruption has been found to be the most severe obstacle to business operations, according to a survey of over 3,000 firms in Myanmar.<sup>136</sup> Bribery may be carefully disguised through a series of opaque transactions, such as in the recent conviction of Petrofac Limited and its former Head of Sales,<sup>137</sup> and may therefore not have been detected among transactions audited for an independent review commissioned by ETC. It is therefore worth exploring how investigative findings of bribery may

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<sup>133</sup> Ibid.

<sup>134</sup> We do note that the ETC-commissioned Nexia review was limited to payments it could verify using bank invoices, because no formal written invoices were issued. See ‘Independent Review Report: Executive Summary’ (Report, Emerging Towns & Cities Singapore and Nexia TS) <<https://links.sgx.com/FileOpen/ETC-%20Independent%20Review%20Report%20-%20Summary%20Section.ashx?App=Announcement&FileID=684284>>.

<sup>135</sup> ‘2020 Country Reports on Human Rights Practices: Burma’ (Report, United States Department of State, 30 March 2021) 34-35.

<sup>136</sup> Aaron Soans and Masato Abe, ‘Bribery, Corruption and Bureaucratic Hassle: Evidence from Myanmar’ (Working Paper No 152/2015, The Asia-Pacific Research and Training Network on Trade, August 2015) <[https://www.unescap.org/sites/default/files/AWP\\_152.pdf](https://www.unescap.org/sites/default/files/AWP_152.pdf)>.

<sup>137</sup> ‘Serious Fraud Office secures third set of Petrofac bribery convictions’ (Case Update, Serious Fraud Office UK, 4 October 2021) <<https://www.sfo.gov.uk/2021/10/04/serious-fraud-office-secures-third-set-of-petrofac-bribery-convictions/>>.

be addressed in the context of SGX's financing of lease payments to the QMGO.

127. States, in their own capacity and in coalitions of intergovernmental organisations, have introduced legislation and conventions to prevent and address corruption and bribery:
- (a) All OECD member states, and 8 non-OECD countries have adopted the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which is aimed at reducing corruption in developing countries by encouraging sanctions against bribery in international business transactions carried out by companies based in the Convention member countries.
  - (b) The UN Convention against Corruption (UNCAC) was adopted by the General Assembly of the UN in 2003 as part of its global programme against corruption. Its aim is to prevent and combat corruption efficiently and effectively and to encourage and enhance international cooperation.
  - (c) The UK *Bribery Act 2010* came into force on 1 July 2011. It affects corporate entities based in both the UK and overseas. The offences of active or passive bribery, or bribery of an FPO, also apply to acts of bribery committed outside the UK, as long as: (a) the act or omission in question would have amounted to an offence if it had occurred within the UK; and (b) the person whose acts or omissions form part of an offence has a close connection with the UK (for example: British citizens; British nationals (overseas); individuals ordinarily resident in the UK; and British overseas citizens or bodies incorporated under the law of any part of the UK). However, the real extra-jurisdictional reach of the Act lies in the section 7 corporate offence of failure of a commercial organisation to prevent bribery. A commercial organisation may face prosecution where a person associated with it bribes another person; and the bribe was made with the intention of obtaining or retaining business, or an advantage in the conduct of business, for that organisation. Section 7 liability is not limited to the parent company. Knowledge on the part of the organisation is not a requirement. It covers bribery in both the UK and abroad and applies to both UK and overseas businesses (including the British Virgin Islands as mentioned above). There is a complete defence if the organisation can show that "adequate" procedures designed to prevent bribery were in place. It follows that organisations are expected to adopt a risk-based approach to managing bribery risks.<sup>138</sup>

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<sup>138</sup> Ashurst, 'Bribery and Corruption: UK Guide' (Quick Guide, April 2021) <<https://www.ashurst.com/en/news-and-insights/legal-updates/quickguide---bribery-and-corruption/>>.

## Issues to be considered

128. It is not clear if the enquiries by SGX or the reviews into ETC have considered these risks.

## C.15 International Humanitarian Law

129. Non-international armed conflicts exist in Myanmar on a case-by-case basis where the *Tadić* principle is fulfilled: that there is “protracted armed violence between governmental authorities and organized armed groups or between such groups within a State”.<sup>139</sup> Some armed conflicts within Myanmar may satisfy this definition.
130. Myanmar is party to the four Geneva Conventions of 1949, but not to the Additional Protocols of 1977. The case of *The Gambia v Myanmar* is ongoing and orders have been handed down requiring provisional measures of Myanmar to prevent acts of genocide pending a full hearing on the merits.<sup>140</sup> Where there are cross-border elements to the conflict, such as Rohingya people being deported to Bangladesh, the Rome Statute of the International Criminal Court and the customary rules of international criminal law may also apply. Without going into each potential situation of non-international armed conflict, the Myanmar military, as the military in government, have at least a case to answer that some of their acts are in breach of international humanitarian law.
131. If there are findings of breach and the QMGO are financially implicated in those breaches, companies in financial relationships with the QMGO will have enabled them by financing breaches of international humanitarian law. General Assembly Resolution 60/147 of 16 December 2005 on “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law” provides guidance that States should enable domestic judgments for reparation against entities liable for harm suffered because of gross violations of international human rights law and serious violations of international humanitarian law.<sup>141</sup> Any such breach in which the QMGO is implicated attracts remedies that would be easily pursued and enforced in a situation such as the one in which SGX finds itself now: in a highly mature and competent jurisdiction with independent judicial authority, where the MAS is a regulator with

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<sup>139</sup> *Prosecutor v Dusko Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1, 2 October 1995) [70].

<sup>140</sup> ‘Myanmar: implement “provisional measures” order of the International Court of Justice without delay’ (Press Release, International Commission of Jurists, 23 January 2020) <<https://www.icj.org/wp-content/uploads/2020/01/Myanmar-International-Court-of-Justice-Press-Release-2020-ENG.pdf>>.

<sup>141</sup> *United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, GA Res 60/147, UN Doc A/RES/60/147 (21 March 2006, adopted 16 December 2005) <<https://www.ohchr.org/en/professionalinterest/pages/remedyandreparation.aspx>>.

teeth where necessary,<sup>142</sup> and Singapore and its companies have been the largest foreign investor in Myanmar since 1988. SGX runs the real risk of being financially liable for reparations in a future where the Myanmar military and its financial organs, such as the QMGO and MEC, may be found responsible for grave breaches of international human rights or humanitarian law.

### Issues to be considered

132. It is not clear if the enquiries by SGX or the reviews into ETC have considered these risks.

## D. CONCLUSION

133. The above represents what we have been able to put together for the purposes of engagement with SGX in the time available. The sections are thematically organised but not set out in a hierarchy, and we accept there may be omissions. The core theme is that due diligence in a global marketplace is an onerous and important exercise that requires attention to a range of legal problems and risks and financial markets are at the core of ensuring corporate integrity and responsibility for human rights abuses.
134. We conclude that there is a range of international law and guidance applicable to any arrangement to invest in Myanmar where a report such as the FFMM's has been produced. The FFMM findings engage the need for those business entities potentially connected to human rights abuses to seriously consider the risks for sanctions, criminal liability, commercial claims, and loss of trust and integrity. To assess those risks, due diligence must go beyond mere fact of payments to a particular entity. Indeed, we have set out the SGX Practice Note which places responsibilities on sponsors to carry out wide ranging due diligence checks, and the Association of Banks in Singapore Guidelines, which place a significant burden on issue managers to conduct reasonable due diligence on an issuer operating within Myanmar which is both **vulnerable to corruption and associated with international sanctions or other geopolitical risks**. We have endeavoured to set out where and how diligent enquiries ought to be directed. We accept that there are legal challenges and obstacles. Equally, there are remedies and risks which are very real for Singapore as a state, SGX as a holding company, global financial actor, and potential state organ, and ETC as a listed investment entity, together with its sponsor.

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<sup>142</sup> Butler (n 99).

135. We acknowledge that we do not have access to the enquiries currently undertaken into the ETC payments but, faced with the FFMM report, this legal memorandum sets out some of the due diligence requirements in the context of “entities that may be involved in or connected with any money laundering, terrorist financing, or other illicit activities should not be listed”. While the issues to be considered are broad and wide-ranging, in essence the global marketplace has developed to a stage where financial entities are expected to engage in the wider issues of corporate responsibility we have outlined.

A handwritten signature in black ink, appearing to read 'Felicity Gerry QC', with a long, sweeping underline that extends to the left and then curves back under the signature.

**Felicity Gerry QC \***

**Daye Gang \***

13 October 2021

\* Liability limited by a scheme approved under Professional Standards legislation.

