

Singapore may be internationally liable and obliged to pay reparations for harm caused by SGX-listed company's payments to Myanmar army, leading international barrister says

October 20, 2021: A legal memorandum from leading international barrister Felicity Gerry QC found that international law and guidance places due diligence obligations on the Singapore Exchange (**SGX**), and possible liability on the Monetary Authority of Singapore and the Singapore Government, in relation to companies doing business with the Myanmar military.

The legal memo found that Singapore has an international legal obligation “to investigate, prevent and cease transactions that amount to wrongful acts”, which are applicable to business transactions with the Myanmar military and its business interests.

Legal remedies would be “easily pursued and enforced” against SGX if the Myanmar military’s financial organs are found to be in breach of international laws and/or compliance regulations including international human rights and humanitarian law.

The legal memo authored by Felicity Gerry QC, counsel on the list at the International Criminal Court and at the Bar of England and Wales and Victoria, Australia, and Daye Gang, also of the Victorian Bar in Australia, focussed on the listing of Emerging Towns & Cities Singapore (**ETC**), the developer of the Golden City complex, under a build-operate-transfer agreement with the Myanmar Army’s Quartermaster General’s Office (**QMGO**). The memo was written at the request of the Australian Centre for International Justice and Justice For Myanmar.

In February, SGX initiated regulatory actions against ETC after Justice For Myanmar published an investigation into payments to the Myanmar army, implicating funds raised on the SGX. ETC has commissioned two independent reviews: one by Nexia TS Advisory into contractual payments to the QMGO and fundraising; and another by Kelvin Chia Partnership into the applicability of sanctions and compliance with “applicable laws”.

However, the legal memorandum finds these reviews may not address international law risks in light of the 2019 UN Independent International Fact-Finding Mission on Myanmar (**FFMM**) report into the Myanmar military’s economic interests, and ongoing atrocity crimes.

The legal memo also raised the possibility of reputational and sanctions risks for the SGX, its regulator the Monetary Authority of Singapore, and by extension, the Singapore Government, should it not prevent continued payments from ETC to the Myanmar army.

Yadanar Maung, Justice For Myanmar spokesperson:

“This legal memorandum raises urgent questions for SGX and the Singapore government. As the memo points out, Singapore has been the largest foreign investor in Myanmar. ETC is just one of many Singapore companies that have commercial ties to the Myanmar military junta and its conglomerates. The memo shows that there could be serious legal consequences for Singapore authorities if they continue to turn a blind eye to the complicity of Singapore companies in the Myanmar military’s atrocity crimes. We welcome SGX’s regulatory actions against ETC and appeal to SGX and MAS to stop ETC’s payments to the Myanmar army. The Singapore government must end the use of its territory as a base for business with the criminal Myanmar military.”

Rawan Arraf, Executive Director at the Australian Centre for International Justice:

“This wide-ranging legal memorandum demonstrates the necessity for the Singapore Exchange and Singaporean authorities to seriously examine their obligations under international law, to include global governance compliance. As part of their examination of the issues, consideration must be made to providing effective redress to those that may have been harmed by business with the Myanmar military. More broadly, businesses operating in Myanmar need to undertake their due-diligence obligations broadly and seriously, and to ensure they promptly end all commercial ties with the Myanmar military and its business interests.”

According to the memo, potential international law issues arising from ETC’s continued listing on the SGX include:

- state and corporate responsibility under the UN Guiding Principles on Business and Human Rights;
- due diligence risks associated with the OECD Guidelines for Multinational Enterprises;
- supply chains and modern slavery;
- state responsibility for internationally wrongful acts;
- implications arising out of the Singapore-Myanmar bilateral investment treaty;

- commercial liability risks in relation to genocide, construction contracts, torts and land disputes;
- criminal liability risks in relation to atrocities, the crime of genocide, human trafficking, terrorist financing and money laundering;
- international sanctions risks;
- risks arising out of applying bribery, corruption legal frameworks
- potential risks of breaches of the Convention on the Rights of the Child, of which Singapore is a signatory; and
- breaches of international humanitarian law.

The legal memo was published today by ACIJ and Justice For Myanmar, and has been sent to Singapore Exchange Limited, the Monetary Authority of Singapore, Emerging Towns and Cities Singapore Limited and ETC's sponsor, RHT Capital Pte. Ltd.

An excerpt of Nexia's report was published on September 22.

Download the legal memorandum by Felicity Gerry QC and Daye Gang here.

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While the memorandum should be read in full, we highlight some key quotes from the legal memorandum 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.

Authored by Felicity Gerry QC and Daye Gang

Insufficiency of ETC's independent reviews (para 34)

"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 sponsors of listed entities."

Due diligence in relation to SGX listings (para 48)

"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."

Singapore's obligations under Principle 7 of the UN Guiding Principles (para 53)

"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."

SGX and ETC corporate responsibility obligations under the UN Guiding Principles (para 57; 62)

"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.”

“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.”

Singapore and the OECD Guidelines (para 73)

“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 prudent fiscal decision in the face of increased scrutiny, particularly where companies are becoming more transparent about their due diligence policies and practices.”

Due diligence risks under the OECD Guidelines (para 78; 79)

“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.”

“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. It is not just about rebuffing external pressures.”

Legal risks related to the Myanmar-Singapore Bilateral Investment Treaty (para 85)

“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 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. 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.”

Commercial liability related to contracts (para 87)

“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 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.”

Commercial liability under torts-based regimes (para 93; 95)

“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?”*

“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.”

Potential criminal liability (para 99-101)

“Laws on complicity can be wide enough so investigations can engage in the assessment of individual conduct, not only corporate conduct. 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 through financial institutions may be relevant crimes for investigation.”

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

“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.”

International sanctions risk (para 110; 112-113)

“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 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.”

“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. 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.”

“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.”

Implications for SGX and the Singapore government under the International Law Commission Articles on the Responsibility of States for Internationally Wrongful Acts (para 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. 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.”

Obligations under the Convention of the Rights of the Child (para 121-123)

“Singapore, therefore, has an obligation to ensure that SGX does not facilitate or aid the infringement of children’s rights. 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.”

“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.”

“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. The obligation on Singapore also extends to violations which occur in foreign territory, as the Convention does not limit jurisdiction. As stated by the Committee on the Rights of Child, states “must ensure that all business enterprises, including transnational corporations operating 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”. 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.”

Bribery and corruption (para 126)

“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, 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 be addressed in the context of SGX’s financing of lease payments to the QMGO.”

Obligations under international humanitarian law (para 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. 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 teeth where necessary, 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.”

Conclusion (para 133-135)

“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.”

“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.”

“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.”