

ASSOCIATION OF SOUTHEAST ASIAN NATIONS (ASEAN) ARBITRAL TRIBUNAL: YAUNG CHI OO
TRADING PTE LTD. V. GOVERNMENT OF THE UNION OF MYANMAR (AWARD)*

[March 31, 2003]

+Cite as 42 ILM 540 (2003)+

YAUNG CHI OO TRADING PTE LTD.,

v.

GOVERNMENT OF THE UNION OF MYANMAR

ASEAN I.D. Case No. ARB/01/1

AWARD

A. INTRODUCTION

1. A Notice of Arbitration was sent by a letter dated 29 June 2000 by Helen Yeo & Partners on behalf of Yaung Chi Oo Trading Pte. Ltd. ("YCO" or "the Claimant"), a company incorporated in Singapore, to the Managing Director of Myanmar Foodstuff Industries ("MFI"), an agency of the Union of Myanmar Ministry of Industry ("the Ministry"). This was followed by a second letter dated 31 August 2000, addressed to the Government of the Union of Myanmar ("Myanmar" or "the Respondent"). By a letter dated 28 February 2001, the President of the International Court of Justice was requested by the Claimant to appoint an arbitral tribunal.

2. By a letter dated 16 May 2001, His Excellency M. Gilbert Guillaume, President of the International Court of Justice, acknowledged receipt of the Notice of Arbitration. Acting in accordance with Article X(4) of the Agreement for the Promotion and Protection of Investments of 15 December 1987 (hereafter "the 1987 ASEAN Agreement"),¹ the Parties to the dispute having failed to agree within three months on a suitable body for arbitration, the President of the International Court as the Appointing Authority responded to the Claimant's request by making the required appointments. Specifically the President appointed Mr. James Crawford (Australia), Whewell Professor of International Law in the University of Cambridge; M. Francis Delon (France), a Member of the Conseil d'Etat, and Mr. Sompong Sucharitkul (Thailand), Distinguished Professor of International and Comparative Law at the Golden Gate University Law School, San Francisco, to constitute the Tribunal. The Members agreed among themselves that Professor Sucharitkul would be the President of the Tribunal. Mr. Christopher Jones of the Golden Gate University Law School acted as the Secretary to the Tribunal.

3. At the first meeting of the Tribunal with the Parties for preliminary procedural consultations, held in Bangkok on 1 September 2001, the Parties confirmed that the Tribunal was properly constituted. In the exercise of its power to control its own procedure, the Tribunal decided to apply, *mutatis mutandis*, the Arbitration (Additional Facility) Rules of the International Centre for the Settlement of Investment Disputes (ICSID) to the proceedings.

B. THE DISPUTE SUBMITTED TO ARBITRATION

4. On 29 November 1993, a Joint Venture Agreement was concluded between MFI and the State Industrial Organization of Myanmar, of the one part, and YCO, of the other part. The Agreement provided for the creation of a joint venture company, Myanma Yaung Chi Oo Company Ltd. (hereafter "MYCO"), "for the purpose of joint investment under the Union of Myanmar Foreign Investment Law." MFI was to contribute machinery and other items and the use of the land comprising the Beer Factory, Mandalay. YCO was to contribute specified amounts of capital within three years, as well as expertise, marketing, provision of foreign raw materials, etc., for the purposes of operating the brewery and promoting and distributing its products. Ownership shares were allocated 55% to MFI, 45%

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to YCO. Unless earlier terminated for cause, the term of the Agreement was five years, with provision for renewal for a further five year term with the approval of the Myanmar Foreign Investment Commission (hereafter "FIC"). The Parties were to apply to the competent authorities of the Government of the Union of Myanmar for a grant to MYCO of the right to manufacture and distribute beer and soft drinks, in Myanmar and abroad, for an initial term of five years. The issue of a permit under the Union of Myanmar Foreign Investment Law and Procedures was a condition precedent to the entry into force of the Agreement and the incorporation of the joint venture company. The Joint Venture Agreement was subject to the law and jurisdiction of the Union of Myanmar. For disputes concerning the interpretation and application of the Joint Venture Agreement, arbitration was available in Yangon pursuant to the Arbitration Act 1944 of Myanmar.

5. The relevant permissions and approvals having been obtained, on 1 October 1994 MYCO began operations. These were, according to the Claimant, highly successful; the output of the Mandalay Beer Factory increased greatly and MYCO made significant profits.

6. At the time of the conclusion of the Joint Venture Agreement, Myanmar was not a member of ASEAN. In 1997, Myanmar applied for ASEAN membership and was admitted. Pursuant to the Protocol of Admission, on 23 July 1997 Myanmar acceded to a number of existing ASEAN treaties, including the 1987 ASEAN Agreement and the Jakarta Protocol of 12 September 1996 ("the 1996 Protocol").² Subsequently Myanmar has played a full part in the work of ASEAN. In particular, it became a party to the Framework Agreement for the ASEAN Investment Area of 7 October 1998 ("the 1998 Framework Agreement"),³ which came into force for all ASEAN Member States on 21 June 1999.

7. By the latter part of 1997, a number of problems had occurred in the relationship between the parties to the Joint Venture Agreement. The Claimant alleged that between 17 December 1997 and 12 January 1998, armed agents of the Respondent seized the Mandalay Brewery. On 11 November 1998, according to the Claimant, a further armed seizure occurred. Certain bank accounts of the Claimant and of its Managing Director and principal shareholder, Mme. Win Win Nu, were frozen. On 28 November 1998, the initial five-year term for the joint venture expired, without having been renewed. On 11 February 1999, the Union of Myanmar Foreign Investment Commission appointed an inspector and manager of MYCO. On 29 September 1999, winding up proceedings were commenced before the Yangon Divisional Court in respect of the joint venture company; although this was opposed by the Claimant, a winding up order was made on 24 December 1999. The Claimant appealed against this order to the Supreme Court but was unsuccessful.

8. Negotiations having failed to produce any resolution of the dispute, on 29 June 2000 the Claimant commenced arbitration proceedings under Article X of the 1987 ASEAN Agreement. Briefly, the Claimant alleged that on or about 17 December 1997 the Respondent sent armed servants or agents to take over the Mandalay Brewery. Although control of the Mandalay Brewery was subsequently returned to the Investor on or about 12 January 1998, the interim seizure by the Respondent was said to have resulted in production stoppages and loss in profits. Following this alleged first armed seizure, the Claimant further alleged that on or about 11 November 1998, the Respondent sent around 60 armed servants or agents forcibly to take over control and management of the Mandalay Brewery. In its view, the subsequent domestic court proceedings were merely an attempt to legitimize the earlier expropriation of the Claimant's interests in the joint venture. The Respondent's conduct was thus, the Claimant alleged, in breach of substantive provisions of the 1987 Agreement, in particular Articles III, IV and VI.

C. THE ARBITRAL PROCEDURE

9. The first meeting of the Tribunal was held in Bangkok, Thailand on 1 September 2001. The Parties briefly outlined their respective positions, and in particular the Respondent set out a range of jurisdictional objections. The Tribunal laid down a timetable for written pleadings concerning jurisdiction, and the parties submitted pleadings within the timetable laid down.

10. Following a further exchange of written views between the parties, the Tribunal decided that the venue of the proceedings would be Bandar Seri Begawan, Brunei Darussalam. Brunei Darussalam is itself an ASEAN Member and a Party to the 1987 ASEAN Agreement and its Protocol, as well as the 1998 Framework Agreement.

11. The Tribunal held initial oral hearings at Bandar Seri Begawan on 4-5 January 2002, particularly on issues of jurisdiction.

At these initial hearings, the Claimant was represented by:

Professor M. SORNARAJAH, Chief Counsel, National University of Singapore (in the absence of Mr. Philip JEYARETNAM SC, Counsel, Helen Yeo & Partners, Singapore)

Mr. Tan Tian LUH, Helen Yeo & Partners, Singapore

Mme. Win Win NU, Managing Director, Yaung Chi Oo Trading Pte Ltd.

Mr. Carl-Erik LINDQVIST, Director, Yaung Chi Oo Trading Pte Ltd., and

Mr. Curt Torbjörn NORSTEDT, Brewery Consultant.

The Respondent was represented by:

Hon. G.P. SELVAM, Chief Counsel, Haq & Selvam, Singapore

Mr. Kyaw MYINT, Agent, Managing Director, Myanma Foodstuff Industries

Dr. Tun SHIN, Director General, Office of the Attorney General, Myanmar, and

U May DIN, Director, Office of the Attorney General, Myanmar.

12. At the hearing on 5 January 2002, the Claimant requested the Tribunal to prescribe certain provisional measures. The Tribunal set time limits for the Claimant to submit in writing its application for provisional measures (21 January 2002), and for the Respondent to reply (4 February 2002). The Claimant submitted an Application for Provisional Measures within this time limit. The Respondent objected to this application, both on the grounds that the Tribunal lacked jurisdiction and as to the substance of the measures sought. In particular the Respondent argued that the Tribunal had no jurisdiction to interfere, and in any event should refrain from interfering, in pending liquidation and other legal proceedings in Myanmar.

13. In its Procedural Order No. 2 dated 27 February 2002 the Tribunal considered that there were arguable grounds on which its jurisdiction might be held to exist, at least under the 1987 ASEAN Agreement (para. 13). On the other hand, it held that in the circumstances (the joint venture having already been wound up), any possible loss arising to the Claimant by conduct of the Respondent contrary to the terms of the 1987 ASEAN Agreement could be repaired by monetary compensation, depending on the outcome of further proceedings on this case (para. 15). The Tribunal accordingly concluded that the Claimant had not established the necessity for provisional measures in the present circumstances. Nevertheless, it drew the attention of the parties to the obligation to refrain from any conduct which could aggravate or escalate the dispute (para. 16). For these reasons, the Tribunal unanimously rejected the Claimant's application for provisional measures. As to the further procedure, the Tribunal decided to join the issue of its jurisdiction to the merits of the dispute, and set time-limits for the Parties within which to submit their respective written pleadings on the merits of the case. These time-limits were further extended, at the request of the parties, by Procedural Orders Nos. 3 and 4. In the event the Parties submitted their respective pleadings within the time limits as so extended.

14. On 2 October 2002, the Tribunal issued Procedural Order No. 5, responding to a request for discovery made by the Respondent. Having reviewed the objections from the Claimant to the request, the Tribunal decided to grant the request for discovery of the audited accounts of the Claimant for the years 1993 to 2000, certified copies of which were to be made available as soon as possible. As to other documents sought, it reserved the issue of discovery and directed the Parties to bring all relevant documents ready for production (if so ordered) during the course of the oral proceedings to be held in Bandar Seri Begawan, Brunei Darussalam, on 5-8 January 2003.

15. Having received a request from the Claimant on 5 December 2002 for the revocation or variation of Procedural Order No. 5, and having reviewed the objections from the Respondent to the Claimant's request for revocation or variation, the Tribunal by Procedural Order No. 6 of 22 December 2002 denied the Claimant's application for revocation of Procedural Order No. 5 but suspended the operation of Order No. 5 until the start of the oral proceedings, at which point the Tribunal would consider the question of discovery as the first item on the agenda. The Tribunal confirmed that Procedural Order No. 5 remained fully in effect for all other purposes.

16. At the hearing in Brunei Darussalam on 5-8 January 2003, the Parties were represented as follows:

For the Claimant:

Professor M. SORNARAJAH, Counsel, National University of Singapore
Mr. Philip JEYARETNAM SC, Counsel, Rodyk & Davidson, Singapore
Mme. Win Win NU, Managing Director, Yaung Chi Oo Trading Pte. Ltd.
Mr. Carl-Erik LINDQVIST, Director, Yaung Chi Oo Trading Pte. Ltd., and
Mr. Curt Torbjörn NORSTEDT, Brewery Consultant

For the Respondent:

Hon. G.P. SELVAM, Chief Counsel, Haq & Selvam, Singapore
Ms. Anjali S. IYER, Counsel, Anjali Iyer & Associates, Singapore
Dr. Tun SHIN, Director General, Office of the Attorney General, Myanmar
U May DIN, Director, Office of the Attorney General, Myanmar
U Kyaw MYINT, Managing Director, Myanma Foodstuff Industries, and
Daw Htay Htay OO, Deputy Director of Finance, Myanma Foodstuff Industries

17. On the first day of the hearing, 5 January 2003, the Claimant agreed to submit a copy of its audited accounts for the years 1993 to 2000, upon the assurance given by the Respondent that the disclosed documents would not be used for any purpose other than those for which discovery was requested by the Respondent and granted by the Tribunal, in particular, to verify whether Claimant's alleged investments were "brought into, derived from and directly connected with investments brought into the territory" of the Respondent under Article II of the 1987 ASEAN Agreement. That assurance was unequivocally given by senior counsel for the Respondent.

18. During the hearing on 6-8 January 2003, the Parties presented their respective cases as to jurisdiction and the merits of the case, and replied to questions from the Tribunal.

19. On Wednesday 8 January 2003, the Tribunal declared the proceedings closed, subject to further submission by each Party of supplementary documentary evidence regarding the suspension, freezing or closing of various bank accounts in Myanmar. Both Parties submitted additional evidence on this point on 15 January 2003. A final round of written replies followed from each Party, dated respectively 22 and 23 January 2003.

D. THE ASEAN SYSTEM OF INVESTMENT PROTECTION

20. The Association of South East Asian Nations (ASEAN) was founded in 1967 by five States in South East Asia, Indonesia, Malaysia, Singapore, Thailand and the Philippines.⁴ Five other States in the region have since become Members: Brunei Darussalam (1984), Vietnam (1992), Myanmar (1997), Laos (1997) and Cambodia (1999). Its aim is to foster good relations among Member States and within the region, especially in the field of economic development.⁵ To this end, ASEAN has its own system of investment protection which was first established by the 1987 ASEAN Agreement.

21. It may be recalled that, whereas all the original ASEAN Members voted in favour of General Assembly Resolution 1803(XVII), proclaiming the principle of Permanent Sovereignty over Natural Resources, they all

abstained on Resolution 3281(XXIX), the Charter of Economic Rights and Duties of States, in view of its Article 2(2), which effectively denies the existence of any international standard of compensation for expropriation. ASEAN States from the beginning appear to have taken a more moderate collective position with regard to the protection of foreign investments, at any rate as concerns direct foreign investments coming from within ASEAN. Hence the purpose of the 1987 ASEAN Agreement, which applied specifically to investments among ASEAN Member States.

22. The conditions for a direct foreign investment to receive the more favourable protection envisaged in Article VI(1) of the 1987 ASEAN Agreement include specific approval in writing and registration for the purposes of the Agreement. In the case of new investments, Article II(1) provides that the Agreement only applies to "investments brought into, derived from or directly connected with investments brought into the territory of any Contracting Party by nationals or companies of any other Contracting Party which are specifically approved in writing and registered by the host country and upon such conditions as it deems fit for the purposes of this Agreement." In the case of existing investments (*i.e.* those made before the 1987 Agreement entered into force for the host State), under Article II(3) these must have been "specifically approved in writing and registered by the host country and upon such conditions as it deems fit for purposes of this Agreement subsequent to its entry into force." In both situations, a company investing in the host State must not only be incorporated in or constituted under the laws in force in the territory of another State Party, but must have its "place of effective management" in that State (Article I(1), definition of "company").

23. The 1987 Agreement was thus subject to important limitations in terms of its coverage, as compared with other bilateral and multilateral investment protection treaties. But it is the tradition of ASEAN progressively to introduce improvements or revisions to existing Agreements or Framework Agreements by way of subsequent Protocols. Examples include the Protocol to Amend the Agreement on the ASEAN Food Security Reserve, Bangkok, 20 October 1986; the Fourth Supplementary Agreement to the Memorandum of Understanding on the ASEAN Swap Arrangement, Katmandu, 21 January 1987, and the Protocol to Amend the Agreement on ASEAN Preferential Trading Arrangements, Bangkok, 15 December 1995.⁶ So with the 1987 ASEAN Agreement for the Promotion and Protection of Investments: in 1996, ASEAN Member States sought to deal with some of the lacunae in that Agreement by adopting the Jakarta Protocol, which is however not yet in force.⁷

24. By contrast, it is not the practice of ASEAN as a regional organization for earlier agreements to be impliedly amended by the conclusion of later agreements which do not refer to the earlier agreement. Even if, under the law of treaties, inconsistencies may arise between successive treaties relating to the same subject-matter and may have to be resolved,⁸ it must at least be presumed that the ASEAN Member States have not tacitly sought to amend or extend an earlier ASEAN Agreement by concluding a later agreement, at least if the later agreement is capable of operating independently of the earlier one.

25. These considerations are relevant to the interpretation of the 1998 Framework Agreement. This Agreement had its origins in the decision of the Fifth ASEAN Summit held in Bangkok on 15 December 1995. By the Summit Declaration, ASEAN Members agreed to "work towards establishing an ASEAN investment region which will help enhance the area's attractiveness and competitiveness for promoting direct investments."⁹ The Framework Agreement introduces the concept of "ASEAN investor", and it covers investments from sources within and outside the ASEAN region. It is to a significant extent programmatic, in particular in aiming at the extension of national treatment to ASEAN investors by 2010 and to all, including non-ASEAN, investors by 2020. Article 12 deals with "Other Agreements." It provides as follows:

"1. Member States affirm their existing rights and obligations under the 1987 ASEAN Agreement for the Promotion and Protection of Investments and its 1996 Protocol. In the event that this Agreement provides for better or enhanced provisions over the said Agreement and its Protocol, then such provisions of this Agreement shall prevail.

2. This Agreement or any action taken under it shall not affect the rights and obligations of the Member States under existing agreements to which they are parties.
3. Nothing in this Agreement shall affect the rights of the Member States to enter into other agreements not contrary to the principles, objectives and terms of this Agreement."

Article 17 applies the 1996 ASEAN Protocol on Dispute Settlement to "any dispute arising from, or any differences between Member States concerning the interpretation or application of this Agreement or any arrangement arising therefrom." The 1996 Protocol deals only with inter-state disputes, and is of course distinct from the provision for settlement of investment disputes under Article X of the 1987 ASEAN Agreement.

E. THE POSITIONS OF THE PARTIES AS TO JURISDICTION, ADMISSIBILITY AND THE MERITS OF THE DISPUTE

26. In its written and oral argument, the Respondent disputed the jurisdiction of the Tribunal on a range of grounds. Following the Tribunal's Order No. 2 joining issues of jurisdiction to the merits, the Respondent also presented extensive material, including witness statements and documents, concerning the merits of the dispute.

27. As to the Tribunal's jurisdiction, the Respondent made two general and preliminary objections, concerning first the absence of any contractual link or privity between the Parties, and secondly the failure of the Claimant to exhaust contractual remedies — specifically, arbitration against its joint venture partner, MFI, under the Joint Venture Agreement — as well as its alleged failure to exhaust other local remedies under Myanmar law. As to the 1987 Agreement, the Respondent argued that the Agreement was inapplicable to this investment because, by the time the Agreement entered into force for Myanmar, the Claimant was no longer effectively managed from Singapore as required by Article I(2). In any event, there had been no subsequent approval and registration of the investment as required by Article II(3). The Claimant for its part argued that effective control was required only at the time the investment was initiated (at which time the Claimant was effectively managed from Singapore). Alternatively, the Claimant's continuing compliance with the requirements of Singapore law for local companies (in particular, a resident director and filing of audited accounts) was sufficient, especially when combined with other activities of the Claimant such as procurement and shipment of supplies from Singapore, to amount to effective management. As to Article II(3), the Claimant argued that the continued valid approval of its investment under the Myanmar Foreign Investment Law, at a time when the 1987 Agreement was in force for Myanmar, involved subsequent approval of the investment. Alternatively, various acts by organs and agents of Myanmar, including receipt of reports and approval of imports for the purposes of the joint venture, were sufficient for this purpose.

28. As to the Framework Agreement, the Claimant argued that its investment met the criteria for an "ASEAN investment" in Article 1, which contains neither a requirement of specific approval nor of effective management, and that Article 12 of the Framework Agreement in effect applies all the provisions of the 1987 Agreement, in particular Article X, to ASEAN investments. The Respondent argued that the Framework Agreement was purely programmatic and prospective. It noted that the conduct of brewery operations was on Myanmar's Sensitive List in 1998, so that the investment could not have been accepted as an ASEAN investment in that year. It also argued that Article 12 of the Framework Agreement did not either expressly or by implication apply Article X of the 1987 Agreement — the international arbitration clause — to ASEAN investments.

29. Underlying the legal arguments as to jurisdiction under the two Agreements were certain disputes of fact. The Claimant stressed that it had made the investment required by the Joint Venture Agreement, although certain elements had been delayed and others by agreement modified in form. It stressed that in 1998 MFI had accepted that the full amount of foreign investment had been made; in its view, the Respondent's contrary arguments were only constructed after the dispute had arisen and did not reflect the actual relations between the joint venture partners. The Respondent on the other hand argued that the entire amount of the investment had been "round-tripped"; *i.e.* that it derived from cash flow generated in Myanmar from brewery sales, or from borrowings in Myanmar, including the investment in

Myanmar currency which was borrowed from the Managing Director's brother, a citizen and resident of Myanmar. It noted that a Myanmar court had accepted the brother's claim to be an equity investor in YCO. The Claimant denied that the investment sums in question had been round-tripped, and produced schedules of payments to MYCO. It accepted that the investments had been shown in its audited accounts as sales rather than equity, but argued that this accounting treatment was to be explained by the absence of issued shares in MYCO and was in any event not determinative of the factual issue whether an investment had been made.

30. A further disputed issue was whether the Parties had effectively agreed on an extension of the original 5 year term of the joint venture. The Claimant argued that the Board of Directors of MYCO had so agreed prior to November 1998, and it pointed to certain later documents emanating from agencies of the Respondent which assumed that an extension would or might be granted. At the least, the Claimant argued that it had a legitimate expectation of renewal which would have been realized but for the events of and subsequent to November 1998; since those events were in breach of the 1987 Agreement, it argued that damages should be assessed on the basis of a going concern.

31. In addition to the disagreements on questions of fact and law relating to jurisdiction, there was sharp disagreement between the parties on questions of fact going to the merits. The Parties set out their respective positions as to the alleged expropriation or military take-over of the Mandalay Brewery. The Claimant referred in particular to the freezing of its own bank accounts as well as of Mme. Win Win Nu and to the proceedings before the Court of Yangon for the winding up of MYCO; taken together, in its view, these involved a denial of justice by the Myanmar authorities. For its part, the Respondent noted the pending proceedings brought by MYCO against the Claimant and Mme. Win Win Nu before the High Court of Singapore alleging breach of fiduciary and other duties, and it referred to material which in its view substantiated these allegations.

32. The Tribunal sees no need at this point to take any position on these disputed questions of fact. Indeed, it should take care not to do so, given that many of these issues have been raised in the Singapore proceedings. Before the Tribunal there was a clear conflict of evidence on the question whether there was an armed or forcible take-over of the Mandalay brewery, either temporarily in 1997 or permanently as a result of the events of November 1998. Had it been necessary to decide the question, the Tribunal would have wished to hear further evidence from the Parties on at least some of these factual issues. The Tribunal notes, however, that attempts to convene the meetings of the Board of Directors failed before November 1998, that the Claimant's representatives refused to attend a further meeting, and that they subsequently requested the appointment of a third party to administer MYCO pending resolution of the dispute. This situation resembles that in *AMCO Asia v. Indonesia*, as interpreted and understood by the second Tribunal which dealt with that case,¹⁰ rather than an outright military seizure lacking any semblance of due process.

33. Furthermore, the Tribunal is far from persuaded that the decisions of the Myanmar Courts winding up of the joint venture company entailed a denial of justice, as that term has been defined in modern case-law.¹¹ Indeed, the Tribunal regards the outcome of the winding up application as inevitable, having regard to the state of relations between the joint venture partners. It is clear that YCO had no right to a second term in the absence of agreement by the joint venture partners and approval thereof by the FIC; moreover the process for obtaining such agreement and approval had hardly been started and in the time remaining before the end of the initial 5-year term stood little chance of completion. On the other hand, the Tribunal entertains real concerns as regards the process adopted by MFI and the Ministry in November 1998, despite the fact that there were unresolved issues between the joint venture partners. It is opportune to recall the conclusions drawn by the Myanmar investigator, U Hla Tun, which were by no means fully supportive of the Ministry's handling of the matter.¹² Thus, whether or not the Claimant could establish proof of a temporary take-over of the joint-venture in November in breach of Article VI of the 1987 ASEAN Agreement, there were acts which potentially raised questions about Article IV — assuming at this point that the 1987 ASEAN Agreement was applicable to the investment.

34. The Tribunal stresses that these views are entirely without prejudice to questions arising between the joint venture partners as to possible breaches of the Joint Venture Agreement by either. Many of these issues are *sub judice* in the Supreme Court of Singapore, or may be raised by way of counterclaim in those proceedings. It will be for the Supreme Court to deal with these in due course.

F. THE JURISDICTION OF THE TRIBUNAL

35. In the event, the key issue in the present case is whether jurisdiction can be established either under the 1987 ASEAN Agreement or under the 1998 Framework Agreement. To this issue the Tribunal now turns.

(a) Preliminary issues relating to Article X of the 1987 Agreement

36. As noted above, at the hearings on the preliminary objection the Respondent argued that there was no privity of consent as between the Claimant and the Respondent: in particular the Joint Venture Agreement was concluded between the Claimant and MFI, a separate corporate entity distinct from the State of Myanmar and capable of suing and being sued in its own name. Moreover, the Respondent stressed, the Joint Venture Agreement contained its own provision for dispute settlement in terms of Myanmar arbitration. In its view, MFI's role in the present dispute was to be sharply distinguished from that of the Ministry and the FIC.

37. The Tribunal notes that the Respondent's objection based on absence of privity between the parties was not actively pursued by the Respondent in the later pleadings. But neither was it formally withdrawn.

38. It must be stressed that that the present claim is not brought under the Joint Venture Agreement or as a private law claim under Myanmar law, which was the proper law of the Joint Venture Agreement. Rather it is brought under the 1987 ASEAN Agreement: the Claimant alleges a breach by the Respondent, the State of Myanmar, of substantive provisions of that Agreement. The question is not whether Myanmar law requires privity of contract, but whether international law does so in respect of a claim brought directly by an investor alleging a breach of an investment treaty.

39. In the Tribunal's view, this question is not to be answered by applying general principles of the law of diplomatic protection but by reference to the actual terms of the 1987 ASEAN Agreement. Like the other parties to that Agreement, the Respondent accepted jurisdiction over investment disputes in terms of Article X. That acceptance had effect from the date of the entry into force of the Agreement for the Respondent, *viz.*, 23 July 1997. Article X deals with arbitration of "any legal dispute arising directly out of an investment between any Contracting Party and a national or company of any of the other Contracting Parties." Article X was in force for the Respondent at the time when the Claimant commenced the present proceedings. In the Tribunal's view, mutuality thus exists between the Claimant and the Respondent — as it would have done in the converse case of a dispute between a company incorporated under the laws of Myanmar and Singapore as a host country of direct investments by a Myanmar company. In each case, of course, it is necessary that the investment and the investor come within the terms of the 1987 Agreement at the time of the commencement of the proceedings. But no general objection of lack of privity can be sustained. A dispute can arise directly from an investment whether or not the investment is made pursuant to a contract with the host State or one of its organs.

40. The Respondent also argued that the Claimant had failed to exhaust local remedies available to it, whether by arbitration under the Joint Venture Agreement or otherwise. However the Joint Venture Agreement does not deal with claims against the Government of Myanmar as such, and it envisages different proceedings and remedies from those which could be available in the event of an allegation of a breach of substantive provisions of the 1987 ASEAN Agreement itself. A case such as the present is not brought under the domestic law of Myanmar and does not require or involve espousal by the State of which the Claimant is a national. The 1987 Agreement nowhere provides that a Claimant must exhaust domestic remedies, whether against the host State or any specific entity within the host State, before proceedings are commenced under Article X. Conceivably the existence of a local remedy in Myanmar might

be relevant to the question whether there had been a breach of Article IV of the 1987 Agreement. But that is a matter going to the substance of the claim and not the Tribunal's jurisdiction.

41. The Tribunal accordingly concludes that neither the absence of prior contractual relations between the Parties nor the non-exhaustion of local remedies excludes its jurisdiction in the present case or renders the claim inadmissible as such. It notes that similar conclusions have uniformly been reached by tribunals under other bilateral and regional investment treaties as well as under the ICSID Convention.¹³

(b) The existence of an investment as defined by the 1987 ASEAN Agreement

42. The core jurisdictional issue here concerns the interpretation of Articles I and II of the 1987 ASEAN Agreement and their application to the facts of the dispute. Since Myanmar became a Party to the 1987 ASEAN Agreement only on 23 July 1997, after the commencement of the Joint Venture Agreement, the relevant provision is Article II(3). A number of distinct issues are raised: (i) was there a foreign investment originating from or made by the Claimant company; (ii) was Singapore "the place of effective management" of the Claimant company, as required by Article I(2) of the 1987 ASEAN Agreement; and (iii) was that investment specifically approved and registered in writing for the purposes of the 1987 ASEAN Agreement after 23 July 1997, as required by Article II(3)?

(i) Did the Claimant make a foreign investment in Myanmar?

43. The Claimant argued that on the evidence there could be no doubt that it had made an investment in Myanmar. It stressed that at the time there was no suggestion by the Myanmar representatives on MYCO's Board or by MFI that no inward investment had been made. Indeed the completion of the three year program of investment was specifically acknowledged by MFI. Even if (despite this acknowledgement) something less than the full amount of inward investment required by the Joint Venture Agreement had been achieved, this had no bearing on the question whether the Claimant had made an investment for the purposes of the 1987 ASEAN Agreement: at most it might be relevant to issues of the merits or to the quantum of recovery. Furthermore, the ultimate source of the funds used, or their accounting treatment for the purposes of Singapore law, were irrelevant for this purpose.

44. The Respondent disagreed. In its view, there had at no stage been any investment brought by Claimant into Myanmar within the meaning of Article II. In particular there was no evidence that the equity contribution of USD 6,300,000 due under the Joint Venture Agreement was actually made by the Claimant. Rather, in its view, the Claimant was initially "a front for other investors who were probably Myanmar nationals;" subsequently the balance of the investment (about USD 5,300,000) was made with monies belonging to MYCO which had been misappropriated; or at any rate with not-yet-distributed profits of MYCO which had their origin in Myanmar and therefore did not constitute direct foreign investment. The Respondent also suggested that part of the investment might have been made by Mr. Carl Lindquist, a Swedish citizen who is the husband of Mme. Win Win Nu, and that, coming from a non-ASEAN country, that portion of the investment could not be covered by the 1987 ASEAN Agreement. The Respondent also maintained that no investment had been recorded as such in YCO's accounts in Singapore; amounts had been recorded as sales to MYCO rather than as a capital contribution under the Joint Venture Agreement.

45. The Tribunal notes that there is an ongoing dispute between Mme. Win Win Nu and U Ye Myint, her brother, a Myanmar citizen, regarding the source of the Kyats 8,000,000 invested in local currency by the Claimant. It also notes that there are discrepancies between the audited accounts of YCO and the alleged investment made by this company in Myanmar, since this investment is not recorded as such in those accounts. However, the relevant issue for the purpose of jurisdiction under the 1987 ASEAN Agreement is whether there was an investment brought into Myanmar by a Singapore corporation. The Tribunal notes that the Parties to the Joint Venture Agreement accepted the existence of capital contributions made by the Claimant over a period of time, although there may have been unresolved questions regarding the full extent and form of these contributions. Furthermore, there is no doubt that both equipment and supplies were shipped from Singapore to Myanmar and paid for from YCO's resources. There was thus a substantial inward direct investment into Myanmar. The Tribunal is not convinced that the investment was

made entirely either by third parties, by money remitted from Myanmar or from non-ASEAN countries, or through the "round-tripping" scheme allegedly operated by the Claimant. In short the Tribunal is of the view that an investment has been brought into Myanmar by the Claimant, such as to qualify as an "investment" within the meaning of that term as broadly defined in Article I (3) of the 1987 ASEAN Agreement. It is not necessary for the purposes of jurisdiction precisely to quantify the amount of the investment.¹⁴

(ii) Was the Claimant effectively managed from Singapore within Article I(2) of the 1987 Agreement?

46. Under Article I(2) of the 1987 ASEAN Agreement . . .

"the term 'company' of a Contracting Party shall mean a corporation, partnership or business association, incorporated or constituted under the laws in force in the territory of any Contracting Party wherein the place of effective management is situated."

YCO was incorporated in the Republic of Singapore in 1988, well before the time of the investment, and it is still registered under Singapore law. During that time it has submitted audited accounts and otherwise complied with the requirements of the Singapore Companies Act. While this fact was admitted by the Respondent, it argued that there was no effective management of YCO in the Republic of Singapore throughout the duration of the investment and that, since YCO did not meet the effective management requirement under the 1987 ASEAN Agreement, its investment was not covered by the Agreement.

47. As to the interpretation of Article I(2), the Parties expressed conflicting views. For the Claimant, the test of effective management may not be fully relevant in States Parties that, like the Republic of Singapore, apply the test of incorporation to determine corporate nationality. It is in the first place for the State of incorporation to determine what constitutes effective management of its companies: since Singapore law emphasizes incorporation and ensures effective management in Singapore through duties imposed under the Companies Act, companies incorporated under Singapore law should be deemed to be effectively managed in Singapore for the purposes of the 1987 ASEAN Agreement. In any event, the Claimant added, the test of effective management, however it might be construed, only had to be satisfied at the time the investment was initiated.

48. For its part, the Respondent stressed the actual language of Article I(2) of the 1987 Agreement. Article I(2) provides, in terms, for a double-barreled test, involving incorporation and effective management. To focus exclusively on what the relevant company law required for incorporation would be to rewrite Article I(2). Moreover the test had to be met "at all material times," including at the time of the alleged violation. For example, the Respondent noted that the term "companies" recurs in Article VI of the Agreement, which embodies the substantive standard of compensation for expropriation. Only companies as defined in Article I(2) benefit from that provision and hence they must be effectively managed from the State of incorporation at the time of the alleged expropriation.

49. The Tribunal has no doubt that, in the case of companies, the 1987 ASEAN Agreement requires both local incorporation and effective management; there is no justification for ignoring either requirement. Where the Agreement is content to rely on local law as a basis for eligibility, as with the concept of "nationals" in Article I(1), it says so expressly. The very fact that the 1998 Framework Agreement has dropped the effective management requirement in its definition of "ASEAN investor" is a further indication of the point. Since the test of effective management is used in order to give a definition of a company making an investment, it is logical to apply it, in the first place at least, at the time the investment is made. Where the investment is made over a period of time, as in the present case, effective management of the investing company at the place of incorporation may be required throughout this period. On the other hand, although the legal requirements of the State of incorporation will not necessarily be sufficient, there is no reason to ignore those requirements in assessing whether there was effective management.

Moreover, a tribunal should be slow to hold that a company which was effectively managed from the place of incorporation at the time an investment was made has subsequently lost treaty protection precisely because key personnel have been engaged in giving effect to the investment in accordance with the terms of the joint venture agreement. This could lead to arbitrary results and would disfavour small investors who may play a significant role in intra-ASEAN investment.

50. Turning to the facts, the Claimant argued that YCO was effectively managed in Singapore before the investment was made, and that this continued throughout the duration of the joint venture. After Mme. Win Win Nu moved to Myanmar in order to manage the Mandalay Brewery, YCO continued to operate through a resident director under the control of Mme. Win Win Nu. There were annual meetings of directors. The accounts were audited annually in Singapore. In addition, the company organized shipments of equipment and supplies to Myanmar from Singapore.

51. The Respondent conceded that YCO was effectively managed in Singapore at the time the Joint Venture Agreement was signed, but argued that after Mme. Win Win Nu, YCO's "directing mind and will," moved to Myanmar, YCO was no longer effectively managed in Singapore. Instead it became a post-box used to make payments to third parties and to organize transshipments of supplies. The fact that there was a resident director in Singapore, that there were annual meetings of directors, and that the accounts were audited in Singapore had no meaning since these were minimum legal requirements under Singapore law. Furthermore, there was evidence that YCO invoices to MYCO were actually made out in Yangon by YCO Yangon, a Myanmar corporation also controlled by Mme. Win Win Nu; that after 1994 all board meetings were held by circulation and that no staff were employed in Singapore apart from Mme. Win Win Nu's youngest sister, who was the nominal resident director. In other words, after Mme. Win Win Nu moved to Myanmar, YCO was an empty shell lacking any effective local management or any local business activities.

52. It appears that the requirement of effective management of the investing company in the place of incorporation was primarily included in the 1987 ASEAN Agreement to avoid what has been referred to as "protection shopping"; *i.e.*, the adoption of a local corporate form without any real economic connection in order to bring a foreign entity or investment within the scope of treaty protection. There is no evidence of such a scheme in the present case, and none was suggested by the Respondent. YCO was incorporated in the Republic of Singapore in 1988. It was a small company, being essentially a family business owned by Mme. Win Win Nu. But the 1987 ASEAN Agreement applies to companies of whatever size, and it does not have regard to the nationality of the company's shareholders. Significant changes in management may be inevitable for a small company which is called on to make a substantial, single-handed investment in another ASEAN country. There is no doubt that YCO was effectively managed in Singapore by Mme. Win Win Nu before it entered into the Joint Venture Agreement. Since it was Mme. Win Win Nu's business, the activity of the company and the way it was managed changed considerably when she moved to Myanmar. She continued to manage the company from Myanmar, sending instructions to the resident director in Singapore, and procurement for MYCO became YCO's major business activity. The Tribunal sees no reason to disregard requirements of local law, such as the existence of a resident director and the required annual auditing of accounts, as indicia of effective management. These are aspects of management, even if they may also coincide with legal requirements. In the case of YCO there was continuous procurement from Singapore, there was an address in Singapore and a continuously resident director in Singapore. In the Tribunal's view, there is a presumption that "effective management" once established is not readily lost, especially since the effect will be the loss of treaty protection. By moving to Myanmar to run the joint venture company, Mme. Win Win Nu was doing precisely what she was expected to do under the Joint Venture Agreement. This situation lasted at least until 1998 when the investment was completed. In its ultimate assessment, and despite the dramatic change in the level of "effective management" in Singapore after Mme. Win Win Nu moved to Myanmar, the Tribunal is nonetheless not persuaded that YCO did not continue to be "effectively managed" from Singapore, within the meaning of the 1987 ASEAN Agreement, for the duration of the investment.

(iii) **Was the investment specifically approved in writing after 23 July 1997 as required by Article II(3) of the 1987 Agreement?**

53. As noted already, under Article II(1) of the 1987 ASEAN Agreement the investment must be "specifically approved in writing and registered by the host country and upon such conditions as it deems fit for the purposes of this Agreement." Under Article II(3), an investment made prior to the entry into force of the Agreement for the host State is only covered by the Agreement if it was "specifically approved in writing and registered by the host country and upon such conditions as it deems fit for the purpose of this Agreement subsequent in its entry into force." The Claimant and the Respondent expressed conflicting views regarding the interpretation of both provisions.

54. For the Claimant, all that Article II requires is specific approval of the investment in writing and registration by the host country as a foreign investment. This condition was met since the investment was approved in writing by the FIC, an organ of Myanmar. There is no indication in the Agreement that a special procedure for registration is required for the purposes of Article II. There is also nothing in the practice of the ASEAN States Parties to the Agreement that might substantiate such an additional requirement. The only ASEAN State which has such a procedure is Singapore, and this because it does not have any general procedure for the approval or registration of foreign investment. Lacking such a procedure, the Singapore authorities evidently thought it useful to create a special administrative procedure for the purposes of the 1987 Agreement. Myanmar did not introduce such a special registration process after it became a party to the Agreement; it continued to rely on its general system of approval and registration under the Myanmar Foreign Investment Law. In these circumstances the Claimant argued that the applicable procedure for the purposes of Article II is the existing procedure under the law of Myanmar for approval of foreign investments. This is a detailed and demanding procedure which provides the host country with full control of whether and on what terms a foreign direct investment is made. Furthermore, Myanmar has informed the ASEAN Secretariat, the depositary for the 1987 Agreement, that obtaining consent under the Foreign Investment Law and the Companies Act of Myanmar is sufficient for the purposes of the Agreement. The Claimant's investment having been specifically approved as a foreign investment by Myanmar under this procedure, it should be regarded as having been specifically approved and registered by the host country within the meaning of Article II.

55. The Respondent argued that Article II of the 1987 ASEAN Agreement had to be interpreted in accordance with its actual language, and that this requires approval specifically "for the purposes of this Agreement." Moreover in the case of investments already in existence at the time the 1987 Agreement entered into force for Myanmar, Article II (3) requires that the approval be given after that date. At no stage did the Claimant seek or receive approval of its investment for the purposes of the 1987 Agreement. In any event, by 23 July 1997 difficulties had already arisen with the joint venture and it is clear that no further approval would have been given by the FIC. Although there is no special form or procedure in Myanmar for obtaining approval for the purposes of the 1987 Agreement, that Agreement does not oblige Myanmar to set up such a special procedure. Since all foreign investments made in Myanmar needed FIC approval, it was sensible to extend the FIC approval procedure to cover Treaty protection as well. This was not a deficiency in the domestic law of Myanmar: there was a procedure that could be used to seek treaty protection, yet the Claimant had not availed itself of that procedure at the relevant time. Myanmar, like other ASEAN States, had given information to the ASEAN Secretariat on its investment law after the signing of the 1998 Framework Agreement, but this information was not given in connection with the 1987 ASEAN Agreement and it could not be interpreted as representing that approval of a foreign investment given under the Myanmar law before the entry into force of the 1987 ASEAN Agreement was sufficient for the purposes of Article II(3).

56. The Claimant admitted that its investment had to qualify under Article II(3) for the purpose of Treaty protection, since it had been made prior to the entry into force of the 1987 ASEAN Agreement for Myanmar. Initially it argued that there has been "continuing approval" given by the Respondent to the investment for the duration of the Joint Venture Agreement, which continued after 23 July 1997. It also argued that after this date there has been several acts of approval of the investment given by the Respondent, in particular through decisions taken by the Board of Directors of MYCO, which included representatives of the Respondent. The Claimant concluded that since Myanmar

had neither set a specific procedure of approval under Article II of the 1987 ASEAN Agreement nor made public any specific requirements in this regard, those acts should be seen as equivalent to the specific approval required by Article II(3).

57. In reply, the Respondent stressed that although no specific procedure for approval and registration existed in Myanmar for the purpose of the 1987 ASEAN Agreement, it was nonetheless necessary for any foreign investor seeking treaty protection specifically to apply for it to the authorities of Myanmar. Such an application would have been entertained by the FIC, even if in the present case it was clear that it would not have been granted because of the difficulties that had arisen. In the Respondent's view, it was open to a State Party to the 1987 ASEAN Agreement to approve an investment as foreign investment under its legislation while denying approval for treaty protection: the tests to be met were not identical in the two cases. But even assuming that acts of the FIC after 1997 in pursuance of an existing investment could qualify as an approval and registration for the purposes of Article II(3), they had to be unequivocal and in writing. In fact there was no such act of approval in evidence.

58. The Tribunal notes that under Article II of the 1987 ASEAN Agreement, there is an express requirement of approval in writing and registration of a foreign investment if it is to be covered by the Agreement. Such a requirement is not universal in investment protection agreements: it does not apply, for example, under the 1998 Framework Agreement. In this respect Article II goes beyond the general rule that for a foreign investment to enjoy treaty protection it must be lawful under the law of the host State. The Tribunal noted that a requirement of specific approval and registration already existed under the legislation of certain parties to the 1987 Agreement, especially those with centrally-managed economies. This was, and remains, the situation in Myanmar where no foreign investment can be made without specific approval of the Government of Myanmar acting through the FIC. Under the Foreign Investment Law this approval is given in writing after a thorough process. In the Tribunal's view, this process is in substance that described in Article II(1) of the 1987 ASEAN Agreement. In its Procedural Order no. 2, the Tribunal indicated that on the information currently available as to the practice of the various parties to the 1987 ASEAN Agreement, including the Respondent, it was not inclined to interpret the Agreement as requiring a special procedure for registration for the purposes of Article II. The Tribunal is reinforced in this view by the further information provided. It appears that no party to the Agreement which has a general legal requirement for the approval of foreign investment has felt it necessary to set up, in addition, a special procedure for the purposes of Article II. It is true that there is such a procedure in Singapore. But even there it was not specifically designed exclusively for the purposes of the 1987 ASEAN Agreement. Moreover the situation in Singapore is different because foreign investments can be made freely there without any requirement of approval or registration.

59. No doubt a Party to the 1987 ASEAN Agreement could establish a separate register of protected investments for the purposes of that Agreement, in addition to or in lieu of approval under its internal law. But if Myanmar had wished to draw a distinction between approval for the purposes of the 1987 ASEAN Agreement and approval for the purposes of its internal law, it should have made it clear to potential investors that both procedures co-exist and, further, how an application for treaty protection could be made. At the least it would be appropriate to notify the ASEAN Secretariat of any special procedure. None of these things was done. In the Tribunal's view, if a State Party to the 1987 ASEAN Agreement unequivocally and without reservation approves in writing a foreign investment proposal under its internal law, that investment must be taken to be registered and approved also for the purposes of the Agreement. In other words, when a foreign investment, brought into Myanmar by a national or a company of a Party to the 1987 ASEAN Agreement, has been approved and registered in writing as such by the relevant authorities under the laws of Myanmar after the entry into force of the Agreement for Myanmar, this investment should be deemed specifically approved in writing and registered for the purposes of Article II(3), and it is entitled to treaty protection.

60. It follows from this interpretation of Article II that — had the 1987 ASEAN Agreement been in force for Myanmar in 1993 when the Joint Venture Agreement was signed — the Claimant's investment would have been protected. But, under Article II(3), a further test has to be met. In the present case the investment was approved and

most of it had been effectively made before 23 July 1997, when the 1987 ASEAN Agreement entered into force for Myanmar. It follows from the actual language of Article II(3) that investments made before that date are not automatically covered, even if they were approved in writing and registered under the law of the host State when they were made. It is not uncommon for investment protection treaties to apply to pre-existing investments, but the extent to which the 1987 ASEAN Agreement does so is expressly stated in Article II(3). It is true that the procedure for giving approval under Article II(3) is not spelled out, and there appear to be no indications to be drawn from ASEAN practice on this point. But effect must be given to the actual language of Article II(3), which requires an express subsequent act amounting at least to a written approval and eventually to registration of the investment. The mere fact that an approval and registration earlier given by the host State continued to be operative after the entry into force of the 1987 ASEAN Agreement for that State is not sufficient.

61. This interpretation leaves open the possibility that the Respondent might have given some subsequent approval in writing which was sufficient for the purposes of Article II(3). Indeed — on the basis of the interpretation of Article II(1) which the Tribunal has adopted — the Respondent agreed that this could be so. Examples might be the renewal of the Joint Venture Agreement for a further term of five years, or the formal approval by the FIC of an amendment to the Joint Venture Agreement under the Foreign Investment Law. But, the Respondent stressed, there was no evidence of any such act in writing adopted by the competent authorities.

62. In its Procedural Order No. 2, the Tribunal indicated that it needed additional information of whether further acts of approval of the investment were adopted by the Myanmar after 23 July 1997. After an exchange of arguments in the written and oral proceedings, the Tribunal can only conclude that there is no evidence of any such acts. No formal approval of the investment under Article II(3) was requested by the Claimant after the entry into force of the 1987 ASEAN Agreement. Nor was there any voluntary or gratuitous approval offered, let alone registered in writing by the Respondent. The Tribunal cannot accept the Claimant's argument that the decisions taken by MYCO's board of directors after 23 July 1997 satisfied the requirements of Article II(3). First, it is very difficult to accept that either MYCO through its board of directors, or individual directors, could have acted on behalf of the Respondent. Furthermore the decisions taken by the board of directors were managerial in character. None of them can be construed as entailing the official approval of the investment (or any part of it) by Myanmar itself, let alone as substituting for the written registration of the investment.

(iv) The Tribunal's conclusion

63. The Tribunal accordingly concludes that the Claimant's investment does not qualify as such under Article II(3) of the 1987 ASEAN Agreement.

(e) Was the investment protected by reference to the 1998 Framework Agreement?

64. Alternatively, the Claimant argued that it was entitled to protection under the 1998 Framework Agreement, which in its view extended both substantive protection and arbitral jurisdiction over claims brought by ASEAN investors as defined in Article 1. The Claimant stressed that the concept of "ASEAN investor" requires neither specific approval nor effective management from the State of the claimant's nationality. In effect, the Claimant argued, the Framework Agreement expanded the scope of the 1987 Agreement, including its Article X, to cover all ASEAN investors as defined in Article 1 with respect of all direct investments referred to in Article 2; the Framework Agreement, in accordance with its object and purpose and the declared intention of its framers, applies to existing as well as future investments, and in consequence the Claimant became entitled to invoke arbitration under Article X of the 1987 Agreement with respect to its existing investment. The Respondent, for its part, denied each of these propositions. In its view, the Framework Agreement was "programmatic" in character; it had no retrospective effect and accordingly did not apply to existing investments; in any event there was no express provision in the Framework Agreement extending the entitlement to invoke arbitration under Article X to all ASEAN investors as defined and none could be implied.

65. The Tribunal has already referred to the Framework Agreement and set it in the context of the development of an ASEAN policy for the protection and promotion of investments. In this respect the Jakarta Protocol of 12 September 1996 is of importance, even though it is not yet in force. In the preamble to the Protocol, the ASEAN Member States recognized "the need to update the Agreement to reflect the rapid development in the global investment environment and the commitment which Member Countries had offered under the various international and regional investment agreements." As noted already, the Protocol made provision for simplification of investment procedures and the approval process and for transparency in the laws and regulations of the Contracting Parties. It extended the provisions of the ASEAN Dispute Settlement Mechanism to the settlement of disputes under the 1987 ASEAN Agreement arising between Member States. Consequentially, the arbitration clause, Article X, was renamed "Disputes between Contracting Parties and Investors of Other Contracting States" but was otherwise maintained. The Protocol was clearly expressed and intended to amend the 1987 Agreement.

66. By contrast, the Framework Agreement of 7 October 1998 is apparently a free-standing Agreement, which is not expressed to amend any earlier agreement. It is true that it bears a relationship to the 1987 Agreement. In particular in the third preambular paragraph the ASEAN Member States, by now including Myanmar, affirmed "their commitment to the 1987 ASEAN Agreement for the Promotion and Protection of Investments and its 1996 Protocol to enhance investor confidence for investing in ASEAN." According to the fifth preambular paragraph, the Member States sought "to realize the vision of ASEAN to establish a competitive ASEAN Investment Area through a more liberal and transparent investment environment by 1st January 2010." But these affirmations do not in themselves address the relation between the two Agreements, still less do they present the 1998 Framework Agreement as an amendment or extension of the legal effect of the earlier Agreement.

(i) **Two preliminary issues**

67. Before turning to Article 12 of the Framework Agreement, on which the Claimant principally relied, two preliminary issues need to be resolved. As noted, the Respondent argued that the Framework Agreement was "programmatic" in character and that it had no application to existing investments.

68. As to the first issue, there was certainly a "programmatic" element to the Framework Agreement, reflected in particular in Article 7 which provides for the progressive opening up of industries of investments by ASEAN investors subject to a "Temporary Exclusion List" and a "Sensitive List" to be established by each Member State. Article 7 provides that both lists are to be the subject of periodic reviews, and that the Temporary Exclusion Lists are to be phased out by specified dates. But the Framework Agreement also lays down immediate obligations for Member States, including an "immediate" national treatment obligation in favour of ASEAN investors for industries not included in the Temporary Exclusion List or the Sensitive List (Article 7(1)(b)), and an "immediate and unconditional" obligation to extend most favoured nation treatment to investors and investments of other Member States (Article 8, subject to the limited exceptions in Article 9). Accordingly the Tribunal cannot accept the view that the provisions of the Framework Agreement are purely prospective and programmatic and are incapable of having immediate legal effects in accordance with their terms. As the Joint Press Release of the Inaugural Meeting of the ASEAN Investment Council stated on 8 October 1998, Member States have created "a substantial and binding Framework Investment Agreement on establishing the ASEAN Investment Area."¹⁵

69. As to the second issue, there is a question whether the Framework Agreement applies to existing investments, *i.e.* to investments already approved under the laws of the host State as at the date of entry into force of the Framework Agreement on 21 June 1999. The Respondent argued that it does not, invoking the presumption against the retrospective interpretation of treaties. It referred to Article 28 of the Vienna Convention on the Law of Treaties of 1969, which reflects the rule of general international law on the point. This provides:

"Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of entry into force of the treaty with respect to that party."

70. However, the issue is not whether the Framework Agreement is to have retrospective effect in the sense of altering vested rights or imposing new obligations with respect to acts completed before its entry into force. It is whether the Agreement applies to situations still existing in 1999 and continuing thereafter. If an investment within the meaning of Article 2 of the Framework Agreement had ceased to exist prior to 21 June 1999, nothing in the Agreement would apply retrospectively so as to alter the legal rights and obligations of the former parties to the investment. But the Claimant argued that its investment was still in existence at that date, and stressed that the present proceedings were not commenced until 2000. There was thus no question of retrospectivity and no infringement of the principle stated in Article 28 of the Vienna Convention.

71. There is still, however, a question of interpretation of the Framework Agreement. An Agreement dealing exclusively with the approval of new investments or the entry of new participants to industries in ASEAN host States would not apply to existing investors or participants with respect to their existing operations. The reason would not be because of the presumption against retrospectivity but because the "act", "fact" or "situation" to which the Treaty in terms applied would not have occurred at a time when the Convention was in force. The question is accordingly one of determining the scope of application of the Framework Agreement, unaided by any presumption.

72. In this respect a number of provisions are relevant. The definition of "ASEAN investor" in Article 1 refers to a person "making an investment in another Member State" to which certain conditions apply; this is equivocal but might be taken as referring only to persons making investments in future. On the other hand, there are provisions which more clearly point the other way. In accordance with Article 2, the Agreement is to cover "all direct investments" (with two exceptions not relevant here). The Framework Agreement is not limited in its scope to situations of initial entry. Thus the term "measures" is broadly defined in Article 1, and the obligations of national treatment and most-favoured nation treatment in Articles 7 and 8, which are stated to be "immediate", apply "with respect to all measures affecting investment including but not limited to the admission, establishment, acquisition, expansion, management, operation and disposition of investments." The preamble and Article 12 refer to the 1987 Agreement, which for its part did deal expressly with existing investments. If the parties to the Framework Agreement had wished to exclude existing investments or to include them only in certain cases, they could have done so, whether by adopting the model of Article II(3) of the 1987 Agreement or in some other way. A further indication can be derived from Article 12 itself. Under Article 12, "[in] the event that this Agreement provides for better or enhanced provisions over the said Agreement and its Protocol, then such provisions of this Agreement shall prevail." By 1998, the 1987 Agreement applied to a significant number of existing investments. The exclusion of such investments from the future benefits of the Framework Agreement would have substantially restricted the scope of Article 12, and adversely impacted on the investors concerned by comparison to more recent entrants.

73. The object and purpose of the Framework Agreement was, *inter alia*, to "progressively reduce or eliminate investment regulations and conditions which may impede investment flows and the operation of investment projects in ASEAN" (Article 3(a)(iv)), to encourage "a freer flow of capital, skilled labour and professionals, and technology amongst Member States" (Article 4(e)), and "to ensure transparency and consistency in the application and interpretation of their investment laws, regulations and administrative procedures in order to create and maintain a predictable investment regime in ASEAN" (Article 5(b)). To say the least, it is more consistent with achieving these goals, and thus with the cumulative and liberalising character of the Framework Agreement, to interpret it as applying in accordance with its terms to existing as well as future investments.

74. Moreover the application of the Framework Agreement to existing investments is supported by authoritative statements of ASEAN Member States. The Joint Press Release of the Inaugural Meeting of the ASEAN Investment Council of 8 October 1998 stated that "[e]xisting and potential investors will benefit from the AIA agreement in, among others, the following ways," and the list of items following includes "a more liberal and competitive investment regime."¹⁶ Whether or not this statement is to be considered as part of the *travaux préparatoires* of the Framework Agreement, it is clearly an authoritative statement made by relevant ministers of ASEAN Member States, including the Myanmar Minister of Industry, as to their intentions at the time of the conclusion of the Agreement.

75. For all these reasons, the Tribunal concludes, the Framework Agreement must be considered as applying to ASEAN investments lawfully in existence in a host State at the time the Framework Agreement entered into force for that State.

(ii) **The scope and operation of the Framework Agreement**

76. On this basis the Claimant argued that the effect of the 1998 Framework Agreement was to introduce a new, general and more extensive concept of "ASEAN investor" and of "direct investment" in place of the more restrictive concepts contained in Articles I and II of the 1987 Agreement.

77. There is a clear contrast between the 1987 and 1998 Agreements in terms of their respective scope of application. Article II of the 1987 Agreement, entitled "Applicability or Scope", begins with the words "This Agreement *shall apply only* to investments . . ." Article 2 of the 1998 Framework Agreement, entitled "Coverage", begins with the words "This Agreement *shall cover all* direct investments other than . . ." (emphasis added). Taking the effect of Articles I and II of the 1987 Agreement together, it applies, so far as is relevant here, only to investments made by companies effectively managed in an ASEAN Member State, which investments have been specifically approved in writing and registered by the host country and subject to any conditions the host country may impose. By contrast, the 1998 Framework Agreement does not mention any requirement of effective management nor any requirement of specific approval and registration, and it treats any ASEAN equity as equivalent to local equity for the purpose of satisfying local equity requirements under the laws of the host country. Thus the Claimant argued, and the Respondent did not dispute, that the present investment would have been covered by Article 2, and that the Claimant would be considered an "ASEAN investor", if the investment had been made after 1999.

78. To establish that the Framework Agreement applies to existing investments, and that the Claimant could be considered an "ASEAN investor" in terms of that Agreement, is, however, not sufficient to establish the Tribunal's jurisdiction. The question is not simply one of the interpretation of definitional terms and concepts contained in Articles 1 and 2 of the Framework Agreement. A definition, however broad or narrow, does not in itself have legal operation or effect; it has to be applied by the substantive provisions of the instrument concerned. Here the Claimant relied principally on Article 12 of the Framework Agreement; it also relied on the immediate and unconditional most-favoured-nation treatment under Article 8. The Tribunal will consider these arguments in turn.

79. The terms of Article 12 were set out above. Article 12(1) is the relevant provision for present purposes.¹⁷ It affirms the existing rights and obligations of Member States under the 1987 Agreement and the 1996 Protocol. It then specifies:

"In the event that this Agreement provides for better and enhanced provisions over the said Agreement and its Protocol, then such provisions of this Agreement shall prevail."

According to the Claimant, the more liberal definitions and concepts of Articles 1 and 2 of the Framework Agreement are themselves "better and enhanced provisions" for the purposes of Article 12. To give Article 12(1) any other meaning would, in its view, deprive it of any effect. The Respondent, on the other hand, argued that Article 12(1) merely reaffirms the substantive provisions of the Framework Agreement, and has no operative effect of its own. Alternatively, the Respondent argued, Article 12 does not have the effect of extending the operation of the procedural provisions of the 1987 Convention, in particular Article X, whatever substantive effects it might have.

80. In the Tribunal's view, there is no warrant for reading Article 12 as a provision which amends the 1987 Agreement and extends it to a much wider range of cases. No doubt the parties to the 1998 Framework Agreement could have done this, but there is no indication from the *travaux préparatoires* of the Agreement or otherwise that this was their intention. As noted above, it is common practice within ASEAN to adopt protocols amending earlier agreements, and they did so for the 1987 Agreement in 1996.¹⁸ By contrast the 1998 Framework Agreement is capable of operating in its own terms, and is not dependent for its meaning or operation on any provision of the 1987

Agreement. Article 12 itself can be interpreted as an ordinary saving clause. In light of the general practice of ASEAN with respect to successive agreements, this is its natural and preferable interpretation.

81. This view appears to be taken in the official literature of ASEAN. The ASEAN Secretariat has produced a booklet containing all four ASEAN agreements on investment.¹⁹ Under the heading "Purpose of the Agreements", the introduction to the booklet distinguishes between "Agreements relating to Investment Protection" and containing, *inter alia*, the 1987 Agreement, and "Agreements Enhancing Investment Cooperation, Facilitation, Promotion and Liberalisation", which include the 1998 Framework Agreement. It concludes by saying that:

"The two types of investment agreements are complementary to each other. Together, they provide investors with an enhanced investment environment."

82. In the end, in the Tribunal's view, the essential difficulty is that the concepts of "investment" (1987) and "ASEAN investment" (1998) are distinct and separate, and there is no indication of any intention on the part of the ASEAN Members to substitute one for the other in 1998 or to merge or fuse them. The definition of "investment" in the 1987 Agreement focuses on local incorporation and effective management, and pays no regard to the ultimate source of the funds used. By contrast the concept of "ASEAN investment" focuses on the source of equity and on local content requirements. The two Agreements are clearly intended to operate separately. On this basis, Article 12(1) should not be interpreted as applying *de novo* the provisions of the 1987 ASEAN Agreement, including Article X, to ASEAN investments. It simply makes it clear that in relation to any investment which is covered by both Agreements, the investor is entitled to the benefit of both and thus of the most beneficial treatment afforded by either. The Tribunal accordingly concludes that Article 12(1) of the Framework Agreement does not give the Claimant any new rights in relation to the present claim.

83. Subsidiarily, the Claimant argued that jurisdiction could be attracted on the basis of the most-favoured nation clause contained in Article 8 of the Framework Agreement, read in conjunction with the bilateral investment treaty between Myanmar and the Philippines concluded on 17 February 1998.²⁰ However Article IX of that Agreement provides for arbitration of investment disputes pursuant to the UNCITRAL Rules, with a different appointing authority from the one designated in Article X of the 1987 ASEAN Agreement. As the Tribunal pointed out in its Order No. 2, if a party wishes to rely on the jurisdictional possibility affirmed by an ICSID Tribunal in *Maffezini v. Kingdom of Spain*,²¹ it would normally be incumbent on it to rely on that possibility, and on the other treaty in question, at the time of instituting the arbitral proceedings. That was not done in this case. In any event, in the Tribunal's view, there is no indication that there would be arbitral jurisdiction on these facts under any BIT entered into by Myanmar which was in force at the relevant time. Correspondingly, there is no possible basis for such jurisdiction under Article 8 of the Framework Agreement.

84. In the light of these conclusions, it is not necessary for the Tribunal to consider how the Framework Agreement, which entered into force only on 21 June 1999, would apply to actions most of which were taken before that date.²²

G. CONCLUSIONS

85. For the reasons stated in the preceding paragraphs, the Tribunal unanimously holds that it lacks jurisdiction in the present case.

86. As these reasons will have indicated, the system of investment protection established by the 1987 ASEAN Agreement and enhanced by the parallel provisions of the 1998 Framework Agreement raises difficult questions. The Tribunal wishes to place on record the professionalism and attention to detail which both Parties have shown in the presentation of their respective cases in the course of this, the first ASEAN investment arbitration.

87. As to the question of costs, the Tribunal notes that neither party sought costs at the end of the oral proceedings. For its own part, the Tribunal concludes that no order should be made in relation to the costs of the parties or the fees and expenses of the Tribunal. Each party has succeeded in part in terms of the issues which were argued before the Tribunal, even if in the result the Claimant fails on grounds essentially unrelated to the merits of its underlying claim.

AWARD

For the foregoing reasons, the Tribunal unanimously DECIDES:

- (a) That it has no jurisdiction in respect of the present claim;
- (b) That each party shall bear its own costs, and shall bear equally the fees, costs and expenses of the Tribunal and the Secretariat.

PROFESSOR SOMPONG SUCHARITKUL
President of the Tribunal

PROFESSOR JAMES CRAWFORD, SC, FBA
Member

JUDGE FRANCIS DELON
Member

Christopher — Jones Secretary

31 March 2003

ENDNOTES

1. Agreement among the Governments of Brunei Darussalam, the Republic of Indonesia, Malaysia, the Republic of the Philippines, the Republic of Singapore, and the Kingdom of Thailand for the Promotion and Protection of Investments, Manila, 15 December 1987: text at (1988) 27 *International Legal Materials* 612. The title was amended to read "ASEAN Agreement for the Promotion and Protection of Investments" by the Jakarta Protocol of 12 December 1996.
2. Protocol to Amend the Agreement for the Promotion and Protection of Investments, Jakarta, 12 September 1996: text at <<http://www.aseansec.org/1950.htm>>.
3. Framework Agreement on the ASEAN Investment Area, Makati, The Philippines, 7 October 1998: text at <<http://www.aseansec.org/2280.htm>>.
4. See Declaration constituting an Agreement establishing the Association of South-East Asian Nations (ASEAN), Bangkok, 8 August 1967: 1331 *United Nations Treaty Series* 236.
5. See S Sucharitkul, "ASEAN Society: A Dynamic Experiment for South-East Asian Regional Co-operation" (1993) 1 *Asian Ybk of International Law* 113. See further <www.aseansec.org>.
6. (1996) 35 *International Legal Materials* 1086. See also the earlier Protocol on Improvements on Extension of Tariff Preferences under the ASEAN Preferential Trading Arrangements, Manila, 15 December 1987: text in (1988) 27 *International Legal Materials* 619.
7. Although Myanmar also acceded to the Jakarta Protocol, the Protocol is not in force because it has not been ratified by the Philippines.
8. Cf. Vienna Convention on the Law of Treaties, 23 May 1969, 1155 *United Nations Treaty Series* 331, Article 30.
9. Text in (1996) 35 *International Legal Materials* 1067 at 1069.
10. (1990) 1 *ICSID Reports* 569.

11. See, e.g., the *ELSI* case, *United States of America v. Italy*, ICJ Reports 1989 p. 15; *Azinian v United Mexican States*, (1998) 5 *ICSID Reports* 269; *Mondev International Ltd v United States of America*, Award of 11 October 2002, <www.state.gov/documents/organization/14442.pdf>, and *ADF Group Inc. v United States of America*, Award of 9 January 2003, <<http://www.state.gov/s/l/c3754.htm>>.
12. U Hla Tun, "Investigation into the Affairs of Myanmar Yaung Chi Oo Company Ltd. (State JV Company), Final Inspection Report under Section 138 of the Myanmar Companies Act", 23 June 1999.
13. See, e.g., *American Manufacturing & Trading, Inc. v Republic of Zaire* (1997) 5 *ICSID Reports* 11 at 25-26.
14. Cf. *Tradex Hellas SA v Republic of Albania*, (1999) 5 *ICSID Reports* 70 at 88-93.
15. Inaugural Meeting of the ASEAN Investment Area (AIA) Council, Manila, 8 October 1998, Joint Press Release, reprinted in P. Davidson (ed.), *Trading Arrangements in the Pacific Rim. ASEAN and APEC* (Oceana, NY, Release 98-4, December 1998) Doc. I.B.12.e.
16. Inaugural Meeting of the ASEAN Investment Area (AIA) Council, Manila, 8 October 1998, Joint Press Release, reprinted in P. Davidson (ed.), *Trading Arrangements in the Pacific Rim. ASEAN and APEC* (Oceana, NY, Release 98-4, December 1998) Doc. I.B.12.e.
17. Article 12(2) preserves "the rights and obligations of the Member States under existing agreements to which they are parties." The Respondent argued that the effect of paragraph (2) was to preserve its right under the 1987 Agreement not to be subjected to arbitration in respect of investments not falling within the scope of Article II of that Agreement. In the Tribunal's view, however, to read paragraph (2) as applying to the 1987 Agreement would contradict paragraph (1), which deals specifically with the 1987 Agreement and provides that the provisions of the 1998 Agreement shall prevail to the extent that they make "better or enhanced provisions" for investments. Paragraph (2) as a general provision should not be read as negating the specific terms of paragraph (1).
18. See above, paragraph 23.
19. The booklet is available at <www.aseansec.org/view.asp?file=/economic/invest/hb_intro.htm>.
20. Agreement between the Government of the Republic of Philippines and the Government of the Union of Myanmar for the Promotion and Reciprocal Protection of Investments, Manila, 17 February 1998: *ICSID Release* 2001-1. The Agreement entered into force on 11 September 1998.
21. ISCID Case No. ARB/97/7, decision on jurisdiction of 25 January 2000, 5 *ICSID Reports* 396.
22. Cf. *Mondev International Ltd v United States of America*, Award of 11 October 2002, <www.state.gov/documents/organization/14442.pdf>.