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Situation Of Foreign Investment In Myanmar Under Constitution Of The Republic Of The Union Of Myanmar (2008)

Aye Nge Soe
(School Of International Law, Xiamen University, China)

Abstract:
This article explores Myanmar's foreign investment landscape under the 2008 Constitution, focusing on legal guarantees, reforms, and treaty commitments. It examines constitutional provisions and the Myanmar Investment Law (2016), which offer protections for investors, including land use rights and safeguards against expropriation. The study also assesses Myanmar's obligations under Bilateral Investment Treaties (BITs) and ASEAN agreements, with emphasis on standards like National Treatment, Most-Favored Nation Treatment, and Fair and Equitable Treatment. A key arbitration case Yaung Chi Oo Trading v. Government of Myanmar is analyzed to illustrate how disputes are handled under international frameworks. Finally, the paper compares foreign investment trends before and after 2008, showing that legal reforms have contributed to increased investor interest, though challenges in implementation persist. The article highlights how constitutional and international legal structures influence foreign investment in developing countries.

Keywords: *Foreign Direct Investment (FDI), Myanmar Constitution 2008, Myanmar Investment Law 2016, Bilateral Investment Treaties (BITs), Investor-State Dispute Settlement (ISDS)*

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I. Introduction

In order to developed country, Myanmar has been implementing the market oriented economic system since 1988. From that time to the present day, Myanmar is inviting to the foreign investment to investment in her territory. The experience has shown that the economy of Myanmar is growth but not well. Because of the foreign investors did not invest in Myanmar as expected, the government of Myanmar find out a solution for this problem. Therefore, the government of Myanmar has provided new investment laws in order to be easy to invest in the territory of Myanmar after the promulgating the Constitution 2008. With regard to the foreign investment, the government promotes and encourages to the citizens to cooperate with the foreign investors in doing their businesses. In this article, we can see not only the constitutional provisions relating to foreign investment but also the legal reform relating foreign investment after promulgating the 2008 Constitution. This article aims the legal provisions for foreign investment under the 2008 Constitution and the legal effect on the foreign investment under the legal reform after promulgating the 2008 Constitution.

II. Constitutional And Legislative Foundations For Foreign Investment

Promulgation to the Constitution

After attaining independence, Parliamentary Democracy System was practiced in the State in accord with the 1947 Constitution of the Union of Myanmar. However, as democratic system could not be effectively materialized, the new Constitution of the Socialist Republic of the Union of Myanmar was drafted based on the single party system, and after holding a National Referendum, a socialist democratic State was set up in 1974. This Constitution came to an end because of the general situation occurred in 1988. The military take over the power of the State. The SPDC, the military dictators, ruled the country without a constitution, with mandate. However, on 29th May 2008, the SPDC announced that the State Constitution of the Republic of the Union of Myanmar has been ratified and promulgated by the National Referendum, which declares Myanmar to be a market economy.

The Provision relating to investment

Under the 2008 Constitution, the economic system of the Union is market economic system. The Union shall permit all economic forces such as the State, regional organizations, co-operatives, joint-ventures, private individual, so forth, to take part in economic activities for the development of national economy. It shall also protect and prevent acts that injure public interests through monopolization or manipulation of prices by an individual or group with intent to endanger fair competition in economic activities. In this Constitution, Myanmar

shall strive to improve the living standards of the people and development of investments. And so, the new government enacted the Myanmar Investment Law 2016 to invite foreign investment. Besides, the government shall not nationalize enterprises and not demonetize the currency legally in circulation. For national economic development of the country, the government may assist the access to technology, investment, machinery, raw material. If it is not contrary to the provisions of this Constitution and the existing laws, the government guarantees the right to ownership, the use of property and the right to private invention and patent in the conduction of business.

Relating to any of the economic activity prescribed to be carried out only by the Union Government, the Government may, for the interest of the Union, allow the Region government or the State government to form a joint venture with the Government of the Union and permit a co-operative organization, economic organization and an individual person to form a joint venture with the Government of the Union. Under this constitution, the foreign investors have the right to form a joint venture with the government. This Constitution is the basic Law of all laws of the Union of Myanmar.

The President of the Union, in accord with the law, shall enter into, ratify or annul international, regional or bilateral treaties which require the approval of the Pyidaungsu Hluttaw, or revoke from such treaties and may enter into, ratify or annul international, regional or bilateral treaties which do not require the approval of the Pyidaungsu Hluttaw, or revoke from such treaties. Under Section 457 of this Constitution, the Republic of the Union of Myanmar can sue and be sued the name of the Republic of the Union of Myanmar. So, the foreign investors may sue the Union relating to their grievance or dispute if they believe in good faith that a decision of governmental department or governmental organization in respect of their investment was incorrectly made. Where a dispute is between investors, the investors are encouraged to settle their disputes amicably and in accordance with the terms of any agreement between them. If not, they may bring it to the court or arbitral proceedings.

Myanmar Investment Law concerning Foreign Investors

The Republic of the Union of Myanmar (hereinafter 'Myanmar') declared as an independent country on 4 January 1948. Myanmar promulgated three Constitutions: The Constitution of the Union of Burma (1947), Republic of the Union of Burma Constitution 1974, Constitution of the Republic of the Union of Myanmar (2008). At present, the Constitution 2008 is legally binding force through the country. According to the Constitution, Myanmar practices a market economy system. The State protects and prevents monopolization or manipulation of prices by individual or group with the intent to affect fair competition in the economy. Moreover, the Constitution ensures that the State shall not nationalize economic enterprises and demonetize the currency.

In the new democracy era, the Government nullified some laws which are not harmonize with the new economic system and enacted new laws to change and promote market economy. The Foreign Investment Law and the Myanmar Citizens Investment Law and were replaced by Myanmar Investment Law 2016 (MIL). The Arbitration Act of 1944 was nullified, and Arbitration Law was stipulated in 2016. The 1940 Companies Act was substitute by Myanmar Companies Law of 2017.

To be balance asset between local and foreign investors, some excerpts from MIL are as follow. Section 47 stated that "In dealing with the investors: (a) the Government shall accord to foreign investors and their direct investments, treatment no less favorable than it accords to Myanmar citizen investors in respect of the expansion, management, operation, and the sale or other disposition of direct investments according to this Law except any way stipulated in Laws, rules and notifications; (b) the Government shall accord, in like circumstances, to foreign investors and their direct investments from one country, treatment no less favorable than that it accords to investors of any other country and their direct investments in respect of establishment, acquisition, expansion, management, operation, and the sale or other disposition of direct investments."

According to section 48 of MIL, the Government guarantees to the investors fair and equitable treatment in respect of the followings: (a) the right to obtain the relevant information on any measures or decision which has a significant impact for an investor and their direct investment; (b) the right to due process of law and the right to appeal on similar measure, including any change to the terms and conditions under any license or permit and endorsement granted by the Government to the investor and their direct investment.

The foreign investor can use land in Myanmar in accordance with section 50 of Myanmar Investment Law. Foreign investor may lease land or building either from the government or government organizations or from owners of private land or building from commencing on the date of receipt of the permit or endorsement of the Commission up to an initial period of (50) years in accordance with the stipulation. After the expiry of the term of the right to use land or building or the period of right to lease of land or building permitted under section 50(b), a consecutive period of (10) years and a further consecutive period of (10) years extension to such period of lease of land or building may be obtained with the approval of the Myanmar Investment Commission.

The investor: may appoint of any citizen who is a qualified person as senior manager, technical and operational expert, and advisor in his investment within the Union in accordance with the Laws; shall appoint

them to replace, after providing for capacity building programs in order to be able to appoint citizens to different level positions of management, technical and operational experts, and advisors; shall settle disputes arising among employers, among workers, between employers and workers, and technicians or staff in the investment in accordance with the applicable laws.

The Government guarantees not to nationalize any investment carrying out in accordance with the law. Except under the following conditions, the Government guarantees not to take any measures which expropriate or indirectly expropriate or is likely to effect a result in the termination of an investment: (a) actually necessary for the interest of the Union or its citizen; (b) non-discriminatory manner; (c) measures in accordance with the applicable Laws; (d) prompt, fair and adequate payment of compensation. A fair and adequate compensation shall be designated as an equivalent to the market value prevailing at the time of expropriation of the investment. However, that designation shall be based on a fair consideration of public interest as well as the interests of the private investor, and shall take into account the present and past conditions of investment, the reason for expropriation of the business or property, the fair market value of the investment, the purpose of expropriating the business or property, the profits acquired by the investor during the term of investment, and also the duration of the investment.

Under section 2 defined the words investor, foreign investor and investment. 'Investor' means a Myanmar Citizen investor or foreign investor who invests within the Union in accordance with the Law. 'Foreign Investor' means a person who invests within the Union and is not a citizen. In this expression, foreign companies, branch offices and other enterprises established and registered in accordance with the Myanmar Companies Law and enterprises formed in accordance with the laws of any other country are also included. Investment means any assets owned or controlled by the investor in accordance with this law. According to section 40, 'investment' are also included: (a) enterprise; (b) moveable property, immovable property and rights related to property, cash, pledges, mortgages and liens, machinery, equipment, spare parts, and related tools; (c) shares, stocks, and debentures, (promissory note of a company); (d) intellectual property rights under any laws, including technical knowhow, patent, industrial designs, and trademarks; (e) claims to money and to any performance under contract having a financial value; (f) revenue-sharing contract, or production, management, construction, rights under contracts, including turnkey; (g) assignable rights granted by relevant laws or contract, including the rights of exploration, prospecting and extraction of natural resources. One of the purposes of Myanmar Investment Law is to protect the investors and their investment business in accordance with law. As mentioned above, it can be clearly seen that Myanmar Investment Law assures that the balance benefits between local investor and foreign investor in Myanmar.

Investment and Foreign Investment

In many countries of the world, foreign investment has been encouraged in the hope that the influx of foreign capital will engineer economic growth in their countries. International investment law is seemed to promote and protect the activities of private foreign investor. The investors are either individuals or companies. Mostly, the investor is a company but at time individuals also act as investors. Under the new MIL 2016, there are two kinds of investors, Myanmar citizen investor and foreign investor, who invest within the Union in accordance with the Law. Myanmar citizen investor means a citizen who invests within the Union including the Myanmar companies and branch offices, and other enterprises established and registered in accordance with the MCL 2017. The foreign investor means a person, is not a citizen, who invests within the Union including the foreign companies, branch offices and other enterprise established and registered in accordance with the MCL 2017 and also enterprises formed in accordance with the laws of any other country.Under China-Myanmar BIT, every kind of asset invested by the investor of on contracting party in the territory of the other contracting party in accordance with the laws of such other contracting party is called the investment which particularly includes movable and immovable property and other property rights; share, debentures, stock, and any other kind of participation in companies; claims to money or to any other performance having an economic value associated with an investment; and intellectual property rights.Under MIL 2016, the investment means any assets owned or controlled by the investor in accordance with the law and foreign investment is any direct investment made by the foreign investor within the Union. In addition, the investment also includes enterprise; moveable property, immoveable property and rights related to property; shares, stocks and debentures of a company; intellectual property rights; claims to money and to any performance under contract having a financial value; and revenue-sharing contract, or production, management, construction, right under contracts; and assignable rights granted by the relevant laws or contract.

III. International Treaty Commitments And Investor-State Dispute Resolution

National Treatment (NT) and Most Favored Nation Treatment (MFN)

Bilateral Investment Treaty (BIT) is an international agreement between two countries. A BIT regulates the rights and duties of both foreign investor and host country for the promotion and protection of their investment

flow between the state parties. One of the main contents of BIT is actionable standards of conduct that is applied by governments in their treatment of foreign investors. The actional standards of conduct include,fair and equitable treatment,protection from expropriation, and free transfer of means and full protection and security. According to BIT, foreign investments are entitled to be treated as favorably as their local investors and other foreign companies. Foreign investors have the duty to obey certain limited terms, and provisions of the treaty, on the other hand, they are entitled to the better ofnational treatment or most favored nation (MFN) treatment. BITs provide limits on the expropriation of investments and entitlement to seek compensation. "Expropriation" is not measured by physical profits and it is a wide range of measures that deprive the investor of the economic value of its investment.

BITs grant to foreign investors the right to free transfer of funds into and out of the host country without delay using a market rate of exchange. This covers for not only funds but also all transfers related to an investment. Full protection and security requirements not only abstention by the host State from physically damaging foreign investment, but also positive measures to protect foreign investment, against harm caused by private actors. Dispute under BIT will be governed by the provisions of the relevant treaty and international law. The special feature of BIT is that it allows for an alternative dispute settlement mechanism. It means that if the rights of an investor have been violated by another investor, an investor can submit to international arbitration or often can recourse to International Center for the Settlement of Investment

Fair and equitable treatment

Different tribunals have provided different understandings of what constitutes fair and equitable treatment. According to the UNCTAD, the most common contents of the FET decided by tribunal includes, prohibition against arbitrary and unreasonable decision-making; prohibition against denial of justice; prohibition against discrimination and abusive treatment of investors; protecting the investors legitimate expectation against the host state's capacity to regulate for public purposes. The broad interpretation of the substantive content is usually aimed at limiting the effect of interference of regulatory or administrative government measures, which on the hand may prove taxing on developing countries seeking to implement objectives for development or protecting the public in certain ways and thus seems to infinitely expand the liability threshold. Additionally, there is yet to develop a consensus on a legal test to legitimize and solidify its contours, especially in arbitration.

The FET and FPS principles have been entrenched into international treaty practice by the internationalization of investment law and treaties, some unqualified and others compiled into the International Minimum Standard (IMS), which states that foreign property should be accorded protections not by national standards, but rather customary international rules of fairness and equitability. Scholars have attributed the backlash against international ISDS to the supposed boundless and flexible protections clauses like the FET provides investors, especially in regards to the limits on the right to regulate the domestic environment by Developing Countries. In particular tax-related ISDS claims have highlighted the need to strike a balance between contractual/treaty obligations towards investors and the sovereign right of states to reform taxation laws in order to capture revenues that could contribute substantially to economic and social development and transformation. In one of the cases brought against YAUNG CHI 00 TRADING PTE LTD., Vs. GOVERNMENT OF THE UNION OF MYANMAR. The dispute was arisen from an interim seizure and a judicial winding up order of a joint venture company in Myanmar.

On 29 November 1993, a Joint Venture Agreement was concluded between Myanmar Foodstuff Industries (MFI) and the State Industrial Organization of Myanmar, of the one part, and MYCO, of the other part. Myanmar Yaung Chi Oo Company Ltd. (hereafter "MYCO") is a company incorporated in Singapore.

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.

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. 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.

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% 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.

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. 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.

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.

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.

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. 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.

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.

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.

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. 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. 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. 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.

The ASEAN System of Investment Protection

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. 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. The conditions for a direct foreign investment to receive the more favorable 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 11(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 11(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 1(1), definition of "company"). 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. 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. 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.

The Jurisdiction of The Tribunal.

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.

Preliminary issues relating to Article X of the 1987 Agreement

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. 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. 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. 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. 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. 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.

The Tribunal's conclusion

The Tribunal accordingly concludes that the Claimant's investment does not qualify as such under Article 11(3) of the 1987 ASEAN Agreement. 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. 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. "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. 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. 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 dat. The Tribunal unanimously holds that it lacks jurisdiction in the present case. For the foregoing reasons, the Tribunal unanimously DECIDES, that it has no jurisdiction in respect of the present claim; that each party shall bear its own costs, and shall bear equally the fees, costs and expenses of the Tribunal and the Secretariat. The contracting parties of 1987 ASEAN Agreement are Brunei Darussalam, the Republic of Indonesia, Malaysia, the Republic of the Philippines, the Republic of Singapore, and the Kingdom of Thailand 1987 ASEAN Agreement was not signed by Myanmar. At the time of the conclusion of the Joint Venture Agreement. Myanmar was not a member of ASEAN. Myanmar becomes a member of ASEAN on 23 July 1997.Article 28 of the Vienna Convention on the Law of Treaties of 1969, which 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. "As these reasons, Myanmar did not breach the 1987 ASEAN Agreement. The allegation of Claimant MYCO was insufficient to sue.

IV. Policy Reforms And Investment Trends Post-2008

Legal Reform relating to foreign investment under the 2008 Constitution

As Myanmar underwent different regime of administration, the authority who took the power of the State enacted laws for foreign investment reflecting their political and economic policies. The initial Foreign Investment Law 1988 was promulgated soon after in 1988, the military government took the State Power, together with the 1989 Notification No.1 on the implementation thereof and coupled with the Myanmar Citizen Investment Law 1994, encouraged an investment boom from Japan in the mid-1990s.Despite the introduction of the 1988 FIL, until recent years, foreign investment opportunities were limited due in no small part to the international sanctions regime imposed against Myanmar. The government of the President U Thein Sein took over the state's power in 2011 from the general election of 2010 under the 2008 Constitution of the Union of the Republic of Myanmar and then, began the reforms relating to foreign investment. Myanmar recently revised its foreign investment law in 2012 to attract foreign investors and their capital. Firstly, the President U Thein Sein singed the highly anticipated new Foreign Investment law into law on 2nd November 2012. This law superseded the previous Foreign Investment law of 1988 and provided for greater incentives in an attempt to attract increased foreign direct investment into Myanmar. However, according to the reforming the social, economic and political sectors in Myanmar, the new government has enacted Myanmar Investment Law on 18th October 2016. The Myanmar FIL 2012 and the Myanmar Citizens Investment Law are replaced by this law. The objective of this law is to promote environmentally and socially sustainable economic growth and diversification of the productive sector of the Union. This law encourages responsible business and responsible investment among domestic and foreign investors. It reduces discretion in the admission of investment that investors are free to invest in most economic sectors, while a limited number of sectors will be subject to some form of screening and approval process. A few sectors of investment will be subject to restrictions on foreign participation and others will be subject to the national interests or national policy objective test. The foreign investor may invest in any legitimate form of enterprise, in any economic sector within the Union of Myanmar with the exception of the sectors covered in restrictions to invest in sensitive sectors. The government guarantees to all investors fair and equitable treatment. The foreign investment who obtains permit or endorsement under this law has the right to obtain a long-term lease of land or building from the owner in order to do investment in accordance with the stipulations.

Comparing the situation of the foreign investment before Constitution and after Constitution

Under the 2008 Constitution, U Thein Sein, the former President, government came to power and he made a major policy of reforms including anti-corruption, currency exchange rate, foreign investment laws and taxation. The foreign investment of Myanmar increased from US$302.350 million in 2009- 2010 to US$ 19997.968 million in 2010- 2011. The government enacted the Foreign Investment Law in November 1988 to attract the FDI which allowed 100% ownership for foreign companies. After enacting that law, the government had attracted 18 foreign enterprises with the total investment of $ 449.487 million in 1989-1990 period. In comparing the situations of the foreign investment for three years between before the 2008 Constitution's enforcement and after 2008 Constitution's enforcement, we can see the total investment of US$ 1460.066 million in 2007-08 to 2009-10 and the total investment of US$ 26061.895 million in 2010-11 to 2012-13. It's clear that the total foreign investment flowing into Myanmar before the Constitution is more than the total foreign investment flowing after the Constitution.

V. Conclusion

As Myanmar underwent different regime of administration, the authority who took the power of the State enacted laws for foreign investment reflecting their political and economic policies. In 1988 the SLORC, the military government, took over the state power and introduced the market economy reforms, permitted the modest

expansion of the private sector and allowed the foreign investment under the FIL 1988. In addition, the military government had promulgated the 2008 Constitution. Under this Constitution, the civilian governments have, after 2011, practiced the multi-party democratic system as political system and also practiced the market economic system. The government of Myanmar has provided new investment laws in order to be easy to invest in the territory of Myanmar. In addition, the procedures and requirements for foreign investment have been amended in order to be interested by the foreign investors to invest their investment in Myanmar. After the promulgating the 2008 Constitution, the situation of FDI of Myanmar has been increased that the previous periods. So, the 2008 Constitution plays the vital role in order to increase the situations of foreign investment.

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