

UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

DISPUTE SETTLEMENT

REGIONAL APPROACHES

6.3 ASEAN



UNITED NATIONS
New York and Geneva, 2003

NOTE

The Course on Dispute Settlement in International Trade, Investment and Intellectual Property consists of forty modules.

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WHAT YOU WILL LEARN

This Module presents an overview of dispute settlement in the Association of South-East Asian Nations (ASEAN).

After a brief introduction on the establishment of ASEAN and its fundamental principles, it focuses on the different methods used for the settlement of disputes between the Member States.

Member States have the possibility of referring these disputes either to the High Council, the Dispute Settlement Mechanism or to Arbitration.

The different procedures are explained with special attention to the Dispute Settlement Mechanism, which covers all possible disputes that may arise from a number of agreements adopted by ASEAN in the fields of trade, investment and intellectual property.

OBJECTIVES

After studying this module, the reader should be able to:

- List in chronological order the alternative methods of dispute settlement available to States Members of ASEAN to solve their economic disputes;
- Explain the rules that permit recourse to the Dispute Settlement Mechanism, and under what conditions; and
- Discuss the rules for the settlement of investment disputes in ASEAN.

1. INTRODUCTION

Establishment

The Association of South-East Asian Nations (ASEAN) was established on 8 August 1967 in Bangkok. The Member countries are Brunei Darussalam, Cambodia, Indonesia, Lao People's Democratic Republic, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Viet Nam.¹

The ASEAN region has a population of about 500 million, a total area of 4.5 million square kilometers, a combined gross domestic product of US\$ 737 billion, and a total trade of US\$ 720 billion.²

Objectives

The objectives of ASEAN are: i) the acceleration of economic growth, social progress and cultural development in the region through joint endeavours in the spirit of equality and partnership in order to strengthen the foundation for a prosperous and peaceful community of Southeast Asian nations, and ii) the promotion of regional peace and stability through abiding respect for justice and the rule of law among countries in the region, and adherence to the principles of the United Nations Charter.

Fundamental principles

The Treaty of Amity and Cooperation in Southeast Asia³ established the fundamental principles that guide the Members in their relations with one another. One of the principles is the settlement of differences or disputes in a peaceful manner.⁴

Economic cooperation

ASEAN has adopted more than 50 agreements aimed at trade and investment liberalization on the one hand and regional economic integration on the other. The agreements⁵ cover the following areas:

- Creation of an ASEAN Free Trade Area (AFTA);
- ASEAN industrial joint ventures and projects;
- Protection of investment;
- Services and intellectual property; and
- Cooperation in food and agriculture, fisheries and forestry, tourism, air services and energy.

Organs

The basic organs of ASEAN are: the Heads of Government, convened in summit and informal summit meetings; the Meetings of Ministers of Foreign Affairs, either in annual or special session; the Meeting, of Ministers of

¹ *The ASEAN Declaration (Bangkok Declaration), Thailand, 8 August 1967.*
<http://www.itcilo.it/english/actrav/telearn/global/ilo/blok/aseandec.htm>

² <http://www.aseansec.org/64.htm>.

³ *The Treaty of Amity and Cooperation in Southeast Asia, Indonesia, 24 February 1976.*
<http://www.itcilo.it/english/actrav/telearn/global/ilo/blok/aseantre.htm>

⁴ Article 2 (d).

⁵ *The text of the Agreements can be accessed on the ASEAN website:*
<http://www.aseansec.org>.

Economic Affairs and other ministerial meetings in various sectors, such as social, cultural, agricultural, fiscal, tourist or trade, and the AFTA Council. The third level of institutions is that of Meetings of Senior Officials, either political or economic, reporting to the competent ministerial body.

Secretariat

The meetings are serviced by a Secretariat, headed by a Secretary-General, assisted by two deputies, the heads of departments and their staff.

Dispute settlement

In principle, disputes between Member States of ASEAN should be resolved as soon as possible through a process of consultations between the States concerned, without resorting to the use of force of any kind. Should settlement prove impractical or improbable, or unlikely within a reasonable period of time, recourse to the following alternatives is available for dispute resolution:

- The High Council
- The Dispute Settlement Mechanism
- Conciliation and arbitration

2. HIGH COUNCIL

The Treaty of Amity and Cooperation in South-East Asia (1976) proclaims the peaceful settlement of disputes as one of the fundamental principles guiding the conduct of the Members of ASEAN (Article 2(d)).

Members agree to settle disputes among themselves through friendly negotiations (Article 13). A Member may propose its good offices (Article 16). In the event no solution is reached, the parties to the dispute may agree (Article 16) to submit their difference to the High Council, comprising representatives at ministerial level (Article 14).

*The High Council examines the dispute and recommends to the parties appropriate means of settlement such as good offices, mediation, inquiry or conciliation. The High Council may also offer its good offices, or upon agreement of the Parties to the dispute, constitute itself into a committee of mediation, inquiry or conciliation. When it deems necessary, the High Council recommends appropriate measures for the prevention of a deterioration of the dispute or the situation (**Article 15**). The competence of the High Council covers disputes on economic matters.*

3. DISPUTE SETTLEMENT MECHANISM

Economic cooperation

The Framework Agreement on Enhancing ASEAN Economic Cooperation, adopted in Singapore on 25 January 1992,⁶ established the basis for regional cooperation in the areas of trade, industry, minerals, energy, finance, banking, food, agriculture, forestry, transport and communications (Article 2).

In the field of trade, an ASEAN Free Trade Area (AFTA) was to be established within 15 years (target subsequently reduced to 10 years). The ASEAN Economic Ministerial Meeting reviews progress in the implementation of the Framework Agreement (Article 8). The ASEAN Secretariat monitors the sectoral economic agreements adopted under the Framework Agreement (Articles 7 and 10).

Source

The Framework Agreement provides for the settlement of disputes as follows: any differences between the Member States concerning its implementation or application, or any arrangements arising therefrom, shall, as far as possible, be settled amicably between the Parties. Wherever necessary, an appropriate body shall be designated for the settlement of disputes (Article 9).

Decision

The ASEAN Ministers, recognizing the need to implement Article 9 of the Agreement, which calls for a strengthening of the mechanism for the settlement of disputes in the area of ASEAN economic cooperation, established in 1996 the Dispute Settlement Mechanism (DSM).⁷ This arrangement is patterned on the Dispute Settlement Understanding of the World Trade Organization.⁸

Scope

The DSM covers all disputes arising under the economic agreements adopted by the Member States of ASEAN, which are called “covered agreements”.⁹ In the application of the DSM, the parties are to take into account not only the rules and procedures of the DSM but also, as the case may be, the special and additional rules and procedures applicable under the applicable covered agreement (Article 1).

Consultations

A Member State is expected to accord adequate opportunity for consultations regarding any representations made by another Member State with respect to any matter affecting the implementation, interpretation or application of the Agreement or any of the covered agreements.

⁶ *The Framework Agreement on Enhancing ASEAN Economic Cooperation*, Singapore, 25 January 1992.

<http://www.aseansec.org/12474.htm>.

⁷ *Protocol on Dispute Settlement Mechanism*, Manila, 20 November 1996.

<http://www.aseansec.org/4924.htm>.

⁸ *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Marrakech, 15 April 1994.

http://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm.

⁹ For a list of the covered agreements, see Annex 1 to this Module.

Any differences should, as far as possible, be settled amicably between the Member States. Member States which consider that any benefit accruing to them, directly or indirectly, under the Agreement or any covered agreement is being nullified or impaired, or that the attainment of any objective of the Agreement or any covered agreement is being impeded as a result of a failure of another Member State to carry out its obligations under the Agreement or any covered agreement, may, with a view to achieving a satisfactory settlement of the matter, make representations or proposals to the other Member State concerned. The latter should give due consideration to the representations or proposals made to it.

If a request for consultations is made, the Member State to which it is addressed is required to reply to the request within 10 days after the date of its receipt, and enter into consultations within a period of no more than 30 days after the date of receipt of the request, with a view to reaching a mutually satisfactory solution (Article 2).

Good offices, conciliation or mediation

The parties to a dispute may at any time agree to good offices, conciliation or mediation. They may begin and be terminated at any time. Once procedures are terminated, a complaining party may then proceed to raise the matter with the Senior Economic Officials' Meeting (SEOM) (Article 3 (1)).

If the parties to the dispute agree, procedures for good offices, conciliation or mediation can continue while the settlement of the dispute proceeds in another forum (Article 3(2)).

The Senior Economic Officials Meeting

If the consultations fail to settle the dispute within 60 days from the date of receipt of the request for consultations, the matter can be raised at the SEOM, which may either establish a panel, or, where applicable, present the matter to the special body in charge for its consideration. Alternatively, the SEOM may decide to deal with the dispute itself, in order to seek an amicable settlement, without appointing a panel (Article 4).

Establishment of a panel

The SEOM should establish a panel¹⁰ no later than 30 days after the date on which the dispute has been brought before it. It makes the final determination as regards the size, composition and terms of reference of the panel. The panel is required to make an objective assessment of the dispute before it, including an examination of the facts of the case and the conformity of the disputed measure with the relevant provisions of the Agreement, or any covered agreement. It can also present such other findings as will assist the SEOM in making a ruling provided for under the Agreement or any covered agreement (Article 5).

Functions of a panel

The panel has the power to decide on its own procedures in relation to the rights of the Parties to be heard. Its deliberations are confidential. It is required

¹⁰ For more information on the working procedures of panels see Annex 2 to this Module.

to submit its findings to the SEOM within 60 days of its formation, with a possible extension of 10 days in exceptional cases. Within that time period, the panel must give adequate opportunity to the Parties to review the report before its submission to the SEOM. The panel can seek information and technical advice from any individual or body it deems appropriate (Article 6).

Consideration of report

The SEOM should consider the report of the panel and make a ruling on the dispute within 30 days, with a possible extension of 10 days in exceptional cases. The parties to the dispute can be present during the deliberations, but they do not participate in the ruling, which is made by a simple majority (Article 7).¹¹

Appeal

An appeal on the ruling by the SEOM may be submitted to the ASEAN Economic Ministers (AEM) within 30 days of the SEOM's ruling. The AEM, as an appellate body, is required to make a decision within 30 days of the appeal, with a possible additional 10 days in exceptional cases. Economic Ministers of the Members to a dispute can be present during the deliberation, but they cannot participate in the decision of the AEM, which shall decide by a simple majority. The decision of the AEM is final and binding on the Parties to the dispute (Article 8).

Compliance with rulings or decisions

Since prompt compliance with the rulings of the SEOM or the decisions of the AEM is essential in order to ensure an effective resolution of disputes, Member States who are parties to a dispute are expected to comply with the ruling or decision, as the case may be, within a reasonable period of time (Article 8(3)).

States Parties to a dispute, are required to agree on what constitutes a reasonable period of time, but this should not exceed 30 days from the day of the SEOM's ruling or the AEM's decision. The Member States concerned should submit to the AEM or the SEOM, as the case may be, a status report in writing on the progress made in implementing the ruling or the decision (Article 8(3)).

Compensation and suspension of concessions

If the Member concerned fails to bring the measure found to be inconsistent with the Agreement or any covered agreement into compliance therewith, or otherwise comply with the SEOM's rulings or the AEM's decisions, within a reasonable period of time, the Member concerned should, if so requested, and no later than the expiry of the reasonable period of time, enter into negotiations with the party that invoked the dispute settlement procedures, with a view to agreeing on mutually acceptable compensation. If no satisfactory compensation has been agreed within 20 days after the date of expiry of the reasonable period of time, the Party that invoked the dispute settlement procedure may request authorization from the AEM to suspend the application to the Member concerned of concessions or other obligations under the Agreement or any

¹¹ *The simple majority rule constitutes an inevitable departure from ASEAN normal practice of consensus or mushawara (or muzyawarah, according to a different transliteration) in reaching decisions. It appears to be a valid exception to the general rule, as it is seeking to settle a dispute between Member States of ASEAN.*

covered agreements (Article 9(1)). However, neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the Agreement or any covered agreements (Article 9(2)).

Role of the Secretariat

The Secretariat assists the panels, especially on the procedural aspects of the matters dealt with. It also provides secretarial and technical support, and monitors and maintains under surveillance the implementation of the SEOM's rulings and the AEM's decisions (Article 11 (2)).

Most importantly, the Secretariat may offer its good offices, conciliation or mediation with a view to assisting Members to settle a dispute (Article 11).

Maximum time frame

The total period for the resolution of a dispute is 290 days (Article 10).

Cases

So far there has been no case law.

Summary:

- **The Protocol on the Dispute Settlement Mechanism of 1996 provides for a period of 60 days of consultations, following which, in the absence of an amicable settlement, a whole gamut of procedures for dispute settlement may be invoked, including good offices, fact-finding, conciliation or mediation, if the parties to the dispute agree. The SEOM can establish a panel within 30 days and the panel submits its findings to the SEOM within 60 days of its formation. The SEOM considers the report of the panel and adopts a ruling by a simple majority vote within 30 days. An appeal can be made to the AEM within 30 days of the SEOM's ruling.**
- **The AEM is expected to reach a decision within 30 days, and its decision is final and binding on the Parties. The decision may entail an award of compensation or an authorization for the suspension of concessions or other obligations under the covered agreement. Compliance is the primary objective. The process allows for very little delay: a solution must be found within 290 days from the beginning of the dispute.**

4. CONCILIATION AND ARBITRATION

<u>Source</u>	The ASEAN Ministers, recognizing that the acceleration of industrialization of the region requires the increased flow of technology and investments, adopted an Agreement for the Promotion and Protection of Investments in 1987. ¹²
<u>Objectives</u>	The Agreement provides for the protection of investments against measures of expropriation on the one hand, and for guarantees for the repatriation of capital, profits and earnings on the other, for the nationals and companies of the Members.
<u>Scope</u>	<p><i>The Agreement is applicable to investments brought into, or derived from, or directly connected with, investments brought into the territory of a Member by nationals or companies of another Member, and 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.”</i></p> <p>(Article II(1))</p>
<u>Treatment</u>	<p>Each Member should, within its territory, ensure full protection of the investments made in accordance with its legislation by investors of the other Member and should not impair by unjustified or discriminatory measures the management, maintenance, use, enjoyment, extension, disposition or liquidation of such investments.</p> <p>All investments made by investors of a Member are to be accorded fair and equitable treatment in the territory of another Member. This treatment is to be no less favourable than that granted to the investor of the most favoured nation.</p>
<u>Expropriation and compensation</u>	Investments made by nationals or companies of a Member can not be subject to expropriation or nationalization or any measure equivalent thereto, except for public use or in the public interest, and under due process of law, on a non-discriminatory basis and upon payment of adequate compensation. Such compensation should amount to the market value of the investment affected that prevailed immediately before the measure of dispossession became public knowledge, and it should be freely transferable in freely usable currencies from the host country. The compensation is to be determined and paid without undue delay. The national or company affected has the right to a prompt review by a judicial body or some other independent authority of that Member (Article VI(1)).
<u>Repatriation of capital and earnings</u>	Each Member, subject to its laws, should allow, without unreasonable delay, the free transfer in a freely usable currency of the capital, net profits and other forms of earnings (Article VII(1)).

¹² The ASEAN Agreement for the Promotion and Protection of Investments, Manila, 15 December 1987. <http://www.aseansec.org/8007.htm>.

Subrogation

If a Member makes payment to one of its nationals or companies under a guarantee it has granted in respect of an investment made in the territory of another Member, the latter should, without prejudice to the rights of the former, recognize the assignment of any right, title or claim of such national or company to the former and the subrogation of the former to any such right, title or claim. This, however, does not necessarily imply recognition on the part of the latter of the merits of the case or the amount of the claim arising from it (Article IX and X).

Settlement of disputes between Members

Members may hold consultations on any matter relating to an investment covered by the Agreement (Article X). They should settle amicably disputes concerning the interpretation or application of the Agreement, and a settlement should be reported to the AEM (Article IX(1)). If no settlement is reached, the dispute should be submitted to the AEM for resolution (Article IX(2)).

The procedures above are applicable in the case of subrogation, where a Member makes payment to any of its nationals or companies under a guarantee it has granted in respect of an investment in the territory of another Contracting Party (Article VIII).

Settlement of disputes between a Member and nationals or companies of another Member**General principle:**

Any legal dispute, arising directly out of an investment, between a Member and a national or company of another Member should, as far as possible, be settled amicably between the parties to the dispute (Article X (1)).

Conciliation or arbitration:

If the investor and the government of the host country have not been able to reach an amicable settlement within six months of its being raised, then either party can elect to submit the dispute for conciliation or arbitration, and such election is binding on the other party (Article X(2)). The parties then decide, by mutual agreement, on the dispute settlement body, which can be one of the following:

- a) The International Center for Settlement of Investment Disputes (ICSID);
- b) The United Nations Commission on International Trade Law (UNCITRAL);¹³
- c) The Regional Arbitration Centre at Kuala Lumpur;¹⁴ or
- d) Any other regional centre for arbitration in ASEAN¹⁵ .
(Article X(2)).

¹³ UNCITRAL has adopted Conciliation and Arbitration Rules (see General Assembly Resolution 35/52, 4 December 1980 and General Assembly Resolution 31/198, 15 December 1976). Arbitration or conciliation is conducted under these Rules, and UNCITRAL does not administer the proceedings.

¹⁴ This is one of the Regional Centres for Arbitration under the auspices of the Asian African Legal Consultative Committee. See AALCC Resolution XIX (7) adopted at its 19th Session in Doha, Qatar, in January 1978; and the Arbitration Rules of the Kuala Lumpur Regional Centre for Arbitration.

¹⁵ See, for example, the Singapore International Arbitration Centre, www.sin.org.sg, and the Vietnam International Arbitration Centre established in 1993.

Appointment of arbitrators:

If the parties cannot agree within a period of three months on a suitable body for arbitration, an arbitral tribunal consisting of three members should be formed. The parties to the dispute appoint one member each, and these two members then select a national of a third Member State to be the chairperson of the tribunal, subject to the approval of the parties to the dispute. The appointment of the members and chairperson are to be made within two months and three months respectively from the date of the decision to form such an arbitral tribunal (Article X(3)).¹⁶

Appointing authority:

In the event that the arbitral tribunal is not formed within six months, either party to the dispute may, in the absence of any other relevant arrangement, request the President of the International Court of Justice to make the required appointments (Article X(4)).

Decision:

The arbitral tribunal reaches its decision by a majority of votes and that decision is binding on the parties (Article X(5)).

Rules of procedure:

The arbitral tribunal should determine its own procedures (Article X (5)).

Costs:

The parties to the dispute are required to bear the cost of their respective members on the arbitral tribunal, and share equally the cost of the chairperson and other costs (Article X (5)).

Cases

At the time of writing, one dispute case had been submitted under the Agreement: between *Yaung Chi Oo Trading Pte. Ltd.* (Claimant Investor) and the *Government of Myanmar* (Respondent). H.E. Judge Gilbert Guillaume, President of the International Court of Justice, acting pursuant to Article X(4) of the Agreement, appointed on 16 May 2001 an arbitral tribunal of three arbitrators: Mr. James Crawford (Australia), Mr. Francis Delon (France), and Mr. Sompong Sucharitkul (Thailand). The arbitrators, having accepted their appointment, elected Mr. Sompong Sucharitkul to serve as President of the arbitral tribunal.

As the matter was *sub judice* at the time of writing, it was premature to disclose details about the dispute. Suffice it to state that it is a dispute relating to an investment by a company of one ASEAN State in the territory of another ASEAN State. The Tribunal was seized of the matter and had adopted its

¹⁶ In the absence of any reference to conciliation in Article X(3) it is unclear whether conciliators can be appointed in the same way in the event the parties agree on conciliation as the agreed method of dispute settlement.

rules of procedure based *mutatis mutandis* upon the ICSID Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Proceedings. The President of the tribunal serves as the head of its secretariat.

The tribunal held its first meeting with the parties in September 2001 in a neutral ASEAN capital. The first hearing on the jurisdiction of the tribunal took place in another neutral ASEAN capital in January 2002. The tribunal decided to join some of the preliminary objections to the merits. The parties had submitted their respective memorial, counter-memorial, reply and rejoinder and the hearing on the merits was scheduled to be held in the second neutral ASEAN capital in early 2003.¹⁷

Protocol to Amend the 1987 Agreement for the Promotion and Protection of Investments, Jakarta, 12 September 1996.

The Protocol adds the ASEAN Dispute Settlement Mechanism (DSM) as an alternative modality for resolving disputes between States under the Agreement (Article 4).

Summary:

- **Disputes arising under the Agreement for the Promotion and Protection of Investments (1987) and its Protocols can be settled either**
 - a) **by consultation, negotiation and mediation,**
 - b) **by conciliation or arbitration, or**
 - c) **under the Dispute Settlement Mechanism.**

¹⁷ *Protocol to Amend the Agreement for the Promotion and Protection of Investments, Jakarta, 12 September 1996.*
<http://www.aseansec.org/6465.htm>.

5. EVALUATION

ASEAN countries have endeavoured not only to prevent the occurrence of disputes between themselves, but have also done their utmost to provide for their peaceful and expeditious settlement should disputes arise.

In the political area, under the Treaty of Amity and Cooperation in Southeast Asia in 1976, there have been hardly any reported cases of disputes brought before the High Council.¹⁸ The Heads of Government and the ASEAN Foreign Ministers, who meet more than once a year, discuss developments affecting the region. At these meetings, they have often reiterated their determination to continue to work for the promotion of peace, stability and progress in South-East Asia, thus contributing towards world peace and harmony.

With regard to the Protocol on the Dispute Settlement Mechanism of 1996,¹⁹ there are no reports that a dispute has been submitted to either the Senior Economic Officials Meetings (SEOM) or the ASEAN Economic Ministers (AEM). Thus the ASEAN Secretariat may well have succeeded in preventing likely disputes by enabling their amicable settlement.

The Agreement for the Promotion and Protection of Investments²⁰ establishes procedures for the settlement of disputes (i) between Member States and (ii) between a Member State and a national, individual or corporation of another Member State.

Disputes between ASEAN States with regard to the interpretation and application of the Agreement can be settled amicably by diplomatic means through the process of negotiation, under Article IX. On the other hand, disputes between nationals or companies of Members arising directly out of their investments in another Member are less likely to be resolved through consultation or mediation. Article X of the Agreement provides for conciliation or arbitration to be conducted at one of several dispute settlement bodies, either of the region or of an international organization, with the necessary time limits within which to form an arbitral tribunal or conciliation body. In addition, a possible stalemate in appointing the arbitrators is avoided by reference to the President of the International Court of Justice as an appointing authority in case of disagreement about the presiding arbitrator.

In the area of dispute settlement, ASEAN has borrowed from existing models and methods for various types of disputes and their resolution. ASEAN has been more concerned with inducement to compliance and harmony than the imposition of sanctions and involuntary measures of constraint, believing strongly in the dictum that prevention is better than cure. This may largely account for the paucity of differences or serious disputes in the region.

¹⁸ See *supra* footnote 3.

¹⁹ See the Manila Summit, adopting the Protocol on DSM for ASEAN, 20 November 1996, discussed *supra*.

²⁰ See *supra* footnote 12.

6. TEST YOUR UNDERSTANDING

After studying this module, the reader should be able to answer the following questions:

1. List the methods available to State Members of ASEAN to resolve their economic disputes.
2. Is the High Council competent to examine and make recommendations on a dispute concerning an investment or a trade issue?
3. Are there basic differences between the ASEAN Dispute Settlement Mechanism and the Dispute Settlement Understanding of the World Trade Organization?
4. Discuss the options available to a national or a company of an ASEAN Member to find a solution to a dispute with a government of another Member of ASEAN.
5. Discuss the role of the ASEAN Secretariat in the solution of trade investment disputes.
6. What is the DSM's scope of competence *ratione materiae*?
7. Can investment disputes be handled under the DSM?

7. CASES

Case I

An investment dispute between a State Party to the 1987 ASEAN Agreement for the Promotion and Protection of Investments and an investor, national or company of another State Party.

Facts

Y, a national of State B, set up a trading company, X, in State A, where she took up residence. Both A and B are Parties to the 1987 ASEAN Agreement for the Promotion and Protection of Investments. The trading company X was incorporated in 1990 under the laws of State A, and was conducting trading activities from State A with State B as well as other States. In 1992, the trading company X entered into a joint-venture agreement with M, a State enterprise under ministerial control of State B, to produce and distribute beverages and foodstuffs. The joint venture was approved by the Board of Foreign Investment of State B and was registered as such, with X taking a 45 percent share in the company. The joint venture was to continue for a period of five years, with an option to apply for renewal subject to agreement by the State enterprise (partner in the joint venture) and final approval by the Board of Foreign Investments and the Ministry of Industry of State B. Before the end of the five-year period, Y applied for renewal of the joint-venture agreement, but this agreement was left to expire.

Y then instituted arbitral proceedings against the government of State B for alleged violation of Articles III(2) and VI of the 1987 ASEAN Agreement for the Promotion and Protection of Investments.

Questions

1. What can Y do, as claimant investor, to establish the existence of “investment” in State B, by company X incorporated in State A?
2. What is the last resort for Y in the event of failure of consultations if State B declines to submit to arbitration under Article X (3)?
3. Is the trading company X, by virtue of its incorporation in State A, entitled to protection under the 1987 Agreement? Should there be additional requirements or qualifications to support entitlement?
4. Besides the place of incorporation, which is in State A, what else has Y to prove to bring the company X within the scope of Article I (2)?
5. At what period or periods must Y prove that A was, or is, at all times a company with a place of “effective management” within State A?
6. Is the fact of approval and registration as a “foreign investment” by the Board of Industry of State B sufficient to find jurisdiction under Article II (1), if State B was not a party to the 1987 Agreement until 1997?

7. Are there specific approvals in writing and registration by the host country exclusively for the purpose of the 1987 Agreement?
8. How could investments made prior to the entry into force of the 1987 Agreement, be covered by the protection of that agreement? What must be done subsequent to its entry into force for State B in late 1997?
9. Explain and illustrate the different types of protection afforded by Article III (1) and (2): General Obligations and by Article VI(1) and (2): Expropriation and Compensation. In this hypothetical case, is non-renewal of an expired joint-venture agreement a breach of either Articles III or VI?

Case 2

Interpretation and application of the E-ASEAN Framework Agreement, 28 November 2000.

Facts

Article 6 of this Framework Agreement provides in paragraph 2 that Member States shall eliminate duties and non-tariff barriers on intra-ASEAN trade in ASEAN ICT (Information and Communications Technology) products in three tranches: 1 January 2003, 1 January 2004 and 1 January 2005 (for the Founding Members and Brunei Darussalam), and five years later in each tranche for Cambodia, the Lao People's Democratic Republic, Myanmar and Viet Nam, that is on 1 January 2008, 2009 and 2010. The ICT products falling under the three tranches shall be submitted to the ASEAN Secretariat. The first tranche took effect from 1 January 2003. Hypothetically, only three of the first six members could comply with this provision, the other three were not yet ready to implement the first tranche on the target date. On the other hand, of the four new Member States, one was prepared to advance the applicable date by two or three years.

Questions

1. What if the differences between Member States concerning the interpretation and application of Article 6(2) of this agreement could not be settled by consultations between the Member States concerned under Article 10(1), then will all the procedures available under the DSM Protocol be called into play under paragraph 2?
2. Since this is one of the "future agreements" which are to be covered by the DSM Protocol, is it likely that the whole series of DSM methods may be used, beginning with consultations under Article 2 of the 1996 Protocol?
3. The differences concern not only one or two or a few members, but indeed most if not all Member States, three methods are available under Article 3: good offices, conciliation or mediation. Which of these methods should be used first:?

4. When can the matter be raised at the Senior Economic Officials Meeting (SEOM) for consideration if the choice under question 3 above fails?
5. Is it always advisable to appoint a panel for hearing the differences? If so appointed by the SEOM, will the panel submit its report to the SEOM?
6. Does the SEOM deliberate on the Report and make a ruling on the differences within a time limit? Can representatives of the parties to the dispute attend the deliberation process of the SEOM without participating in the ruling?
7. Is the ruling by the SEOM final, or is there a possibility of further appeal to the ASEAN Economic Ministers (AEM) for making a decision within a given time frame? Can the Economic Ministers of the parties to the dispute participate in the decision-making of the AEM or merely be present during the deliberation process?
8. Are the rulings of the SEOM and decisions of the AEM binding on the parties to the dispute? Is there an obligation on the part of the parties to report on the status of progress in implementation of the ruling or decision?
9. In case of failure to achieve prompt compliance with the ruling or decision, what further procedure is available? Would there be further negotiations on mutually acceptable compensation?
10. In the absence of a mutually satisfactory compensation, is it possible to request authorization to suspend the application of concessions or other obligations under the agreement?

8. FURTHER READING

Books

- **Colletta NJ, Teck TG, Kelles-Viitanen A**, eds. (2001). *Social Cohesion and Conflict Prevention in Asia: Managing Diversity Through Development*. Washington, DC, World Bank.
- **Caballero-Anthony M** (1998). *Mechanisms of Dispute Settlement: The ASEAN Experience*. Singapore.

Articles

- **Amazou AA and Raghavan V** (2000). The legal framework for arbitration in Sri Lanka: past and present. *Journal of International Arbitration* 17(6): 111-135, Dec.
- **Anh Tuan H** (1996). ASEAN dispute management: Implications for Vietnam and an expanded ASEAN. *Contemporary Southeast Asia*, 18: 61-80, June.
- **Sucharitkul S** (1991). ASEAN partnership and cooperation with non ASEAN partners. *Singapore Journal of Legal Studies*: 562.
- **Sucharitkul S** (1991). ASEAN society: a dynamic experiment of Southeast Asian regional co-operation. *Asian Yearbook of International Law*, Vol. 1: 113. Dordrecht/Boston, Kluwer Academic Publishers, Martinis Nijhoff.

Documents

- The ASEAN Declaration (Bangkok Declaration), Thailand, 8 August 1967.
<http://www.itcilo.it/english/actrav/telearn/global/ilo/blokit/aseandec.htm>
- The Treaty of Amity and Cooperation in Southeast Asia, Denpasar, Bali, Indonesia, 24 February 1976.
<http://www.itcilo.it/english/actrav/telearn/global/ilo/blokit/aseantre.htm>
- The ASEAN Agreement for the Promotion and Protection of Investments, Manila, Philippines, 15 December 1987
<http://www.aseansec.org/8007.htm>
- Protocol to amend the 1987 Agreement for the Promotion and Protection of Investment, Jakarta, 12 September 1996.
<http://www.aseansec.org/6465.htm>
- The Framework Agreement on Enhancing ASEAN Economic Cooperation, Singapore, 25 January 1992.
<http://www.aseansec.org/12474.htm>
- Protocol to amend the Framework Agreement on Enhancing ASEAN Economic Cooperation, Bangkok, 15 December 1995.
<http://www.aseansec.org/12464.htm>

- Protocol on Dispute Settlement Mechanism, Manila, 20 November 1996.
<http://www.aseansec.org/4924.htm>
- Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakech, 15 April 1994.
http://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm

Annex 1

Covered Agreements

1. Multilateral Agreement on Commercial Rights of Non-Scheduled Services among ASEAN, Manila, 13 March 1971.
2. Agreement on ASEAN Preferential Trading Arrangements, Manila, 24 February 1977.
3. Memorandum of Understanding on the ASEAN Swap Arrangements, Kuala Lumpur, 5 August 1977.
4. Supplementary Agreement to the Memorandum of Understanding on the ASEAN Swap Arrangement, Washington D.C., 26 September 1978.
5. Second Supplementary Agreement to the Memorandum of Understanding on the ASEAN Swap Arrangement, Denpasar, Bali, 9 September 1979.
6. Agreement on the ASEAN Food Security Reserve, New York, 4 October 1979.
7. Basic Agreement on ASEAN Industrial Projects, Kuala Lumpur, 6 March 1980.
8. Supplementary Agreement of the Basic Agreement on ASEAN Industrial Projects ASEAN Urea Project (Indonesia), Kuala Lumpur, 6 March 1980.
9. Supplementary Agreement of the Basic Agreement on ASEAN Industrial Projects ASEAN Urea Project (Malaysia), Kuala Lumpur, 6 March 1980.
10. Amendments to the Memorandum of Understanding on the ASEAN Swap Arrangement Colombo, Sri Lanka, 16 January 1981.
11. Basic Agreement on ASEAN Industrial Complementation, Manila, 18 June 1981.
12. Third Supplementary Agreement to the Memorandum of Understanding on the ASEAN Swap Arrangement, Bangkok, 4 February 1982.
13. ASEAN Ministerial Understanding on Plant Quarantine, Kuala Lumpur, 8-9 October 1982.
14. ASEAN Ministerial Understanding on the Standardization of Import and Quarantine Regulation on Animal and Animal Products, Kuala Lumpur, 8-9 October 1982.
15. Protocol to Amend the Agreement on the ASEAN Food Security Reserve, Bangkok, 22 October 1982.
16. ASEAN Customs Code of Conduct, Jakarta, 18 March 1983.
17. ASEAN Ministerial Understanding on Fisheries Cooperation, Singapore, 20-22 October 1983.
18. Basic Agreement on ASEAN Industrial Joint Ventures, Jakarta, 7 November 1983.
19. ASEAN Ministerial Understanding on ASEAN Cooperation in Agricultural Cooperatives, Manila, 4-5 October 1984.

20. ASEAN Ministerial Understanding on Plant Pest Free Zone, Manila, 4 5 October 1984.
21. Agreement on ASEAN Energy Cooperation, Manila, 24 June 1986.
22. ASEAN Petroleum Security Agreement, Manila, 24 June 1986.
23. Agreement on the Preferential Shortlisting of ASEAN Contractors, Jakarta, 20 October 1986.
24. Supplementary Agreement to the Basic Agreement on ASEAN Industrial Joint Ventures, Singapore, 16 June 1987.
25. Fourth Supplementary Agreement to the Memorandum of Understanding on the ASEAN Swap Arrangement, Kathmandu, Nepal, 21 January 1987.
26. Protocol on Improvements on Extensions of Tariff Preferences under the ASEAN Preferential Trading Arrangement, Manila, 15 December 1987.
27. Memorandum of Understanding on Standstill and Rollback on Non Tariff Barriers among ASEAN Countries, Manila, 15 December 1987.
28. Revised Basic Agreement on ASEAN Industrial Joint Ventures, Manila, 15 December 1987.
29. Agreement Among the Government 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.
30. Protocol on Improvements on Extension of Tariff Preferences under the ASEAN Preferential Trading Arrangement, Manila, 15 December 1987.
31. Agreement on the Establishment of the ASEAN Tourism Information Centre, Kuala Lumpur, 26 September 1988.
32. Financial Regulations of the ASEAN Tourism Information Centre, Kuala Lumpur, 26 September 1988.
33. Memorandum of Understanding Brand-to-Brand Complementation on the Automotive Industry Under the Basic Agreement on ASEAN Industrial Complementation (BAAIC), Pattaya, Thailand, 18 October 1988.
34. Protocol to Amend the Revised Basic Agreement on ASEAN Industrial Joint Ventures, 1 January 1991.
35. Supplementary Agreement to the Basic Agreement on ASEAN Industrial Projects – ASEAN Potash Mining Projects (Thailand), Kuala Lumpur, 20 July 1991.
36. Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area, Singapore, 28 January 1992.
37. Second Protocol to Amend the Revised Basic Agreement on ASEAN Industrial Joint Ventures, Manila, 23 October 1992.
38. Ministerial Understanding on ASEAN Cooperation in Food, Agriculture and Forestry, Bandar Seri Begawan, 28-30 October 1993.
39. Memorandum of Understanding on ASEAN Cooperation and Joint

- Approaches in Agriculture and Forest Products Promotion Scheme, Langkawi, Malaysia, 1994.
40. Third Protocol to Amend the Revised Basic Agreement on ASEAN Industrial Joint Ventures, 2 March 1995.
 41. Protocol to Amend the Agreement on the Common Effective Preferential Tariff (CEPT) Scheme for the ASEAN Free Trade Area (AFTA), Bangkok, 15 December 1995.
 42. Protocol to Amend the Agreement on ASEAN Preferential Trading Arrangements, Bangkok, 15 December 1995.
 43. ASEAN Framework Agreement on Services, Bangkok, 15 December 1995.
 44. ASEAN Framework Agreement on Intellectual Property Cooperation, Bangkok, 15 December 1995.
 45. Protocol Amending the Agreement on ASEAN Energy Cooperation, Bangkok, 15 December 1995.
 46. Basic Agreement on ASEAN Industrial Cooperation, Singapore, 26 April 1996.
 47. Protocol to Amend the Agreement Among the Government 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, Jakarta, 12 September 1996.

Note

In addition to the 46 covered agreements in force at the time of the adoption of the DSM in 1996, a number of other economic agreements have been signed in recent years.

The covered agreement No. 47 was not in force at that time for lack of ratification by one of its signatories. Nevertheless, it has served to clarify and distinguish between two different types of disputes, under the 1987 ASEAN Agreement to Promote and Protect Investment: Article IX relating to “disputes between States or contracting parties” which are covered by the 1996 Protocol on Dispute Settlement Mechanism, and disputes between a State or contracting party and a national or company investor of another State or contracting party under Article X.

The agreements normally contain a provision according to which, if a settlement cannot be reached through consultation and negotiation, the dispute shall be dealt with in accordance with the Dispute Settlement Mechanism.

The agreements include:

- Protocol to amend the Framework Agreement on Enhancing ASEAN Economic Cooperation, Bangkok, 15 December 1995;
- Framework Agreement on the ASEAN Investment Area (AIA), signed at Manila the 7 October 1998;
- ASEAN Market Area Agreement, signed in Makati, Philippines, 7 October 1998;
- Protocol on Temporary Tariff Exclusion List, signed in Singapore the 23 November 2000;
- E-ASEAN Framework Agreement, signed in Singapore 28 November 2000;
- ASEAN Tourism Agreement, signed at Phnom Penh, Cambodia, 4 November 2002.

Annex 2

Working Procedures of the Panel

I. Composition of Panels

1. Panels shall be composed of well-qualified governmental and/or non-governmental individuals, including persons who have served on or presented a case to a panel, served in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member State. In the nomination to the panels, preference shall be given to individuals who are nationals of ASEAN Member States.
2. Panel members should be selected with a view to ensuring the independence of the members, a sufficiently diverse background and a wide spectrum of experience.
3. Nationals of Member States whose governments are parties to the dispute shall not serve on a panel concerned with that dispute, unless the parties to the dispute agree otherwise.
4. To assist in the selection of panellists, the Secretariat shall maintain an indicative list of governmental and non-governmental individuals possessing the qualifications outlined in paragraph 1, from which panellists may be drawn as appropriate. Members may periodically suggest names of governmental and non-governmental individuals for inclusion on the indicative list, providing relevant information on their knowledge of international trade and of the sectors or subject matter of the covered agreements, and those names shall be added to the list upon approval by the SEOM. For each of the individuals on the list, the list shall indicate specific areas of experience or expertise of the individuals in the sectors or subject matter of the covered agreements.
5. Panels shall be composed of three panellists unless the parties to the dispute agree, within 10 days from the establishment of the panel, to a panel composed of five panellists. Members shall be informed promptly of the composition of the panel.
6. The Secretariat shall propose nominations for the panel to the parties to the dispute. The parties to the dispute shall not oppose nominations except for compelling reasons.
7. If there is no agreement on the panellists within 20 days after the date of the establishment of a panel, at the request of either party, the Secretary-General, in consultation with the SEOM Chairman, shall determine the composition of the panel by appointing the panellists whom the Secretary-General considers most appropriate in accordance with any relevant special or additional rules or procedures of the covered agreement or covered agreements which are at issue in the dispute, after consulting with the parties to the dispute. The SEOM Chairman shall inform the Members of the composition of the panel thus formed no later than 10 days after the date the Chairman receives such a request.

8. Member States shall undertake, as a general rule, to permit their officials to serve as panellists.
9. Panellists shall serve in their individual capacities and not as government representatives, nor as representatives of any organization. Member States shall therefore not give them instructions nor seek to influence them as individuals with regard to matters before a panel.

II. Panel Proceedings

1. In its proceedings the panel shall follow the relevant provisions of this Protocol. In addition, the following working procedures shall apply.
2. The panel shall meet in closed session. The parties to the dispute, and interested parties, shall be present at the meetings only when invited by the panel to appear before it.
3. The deliberations of the panel and the documents submitted to it shall be kept confidential. Nothing in this Protocol shall preclude a party to a dispute from disclosing statements of its own positions to the public. Member States shall treat as confidential information submitted by another Member State to the panel that that Member State has designated as confidential. Where a party to a dispute submits a confidential version of its written submissions to the panel, it shall also, upon request of a Member State, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.
4. Before the first substantive meeting of the panel with the parties, the parties to the dispute shall transmit to the panel written submissions in which they present the facts of the case and their arguments.
5. At its first substantive meeting with the parties, the panel shall ask the party that has brought the complaint to present its case. Subsequently, and still at the same meeting, the party against which the complaint has been brought shall be asked to present its point of view.
6. Formal rebuttals shall be made at a second substantive meeting of the panel. The party complained against shall have the right to take the floor first to be followed by the complaining party. The parties shall submit, prior to that meeting, written rebuttals to the panel.
7. The panel may at any time put questions to the parties and ask them for explanations either in the course of a meeting with the parties or in writing.
8. The parties to the dispute shall make available to the panel a written version of their oral statements.
9. In the interest of full transparency, the presentations, rebuttals and statements referred to in paragraphs 5 to 9 shall be made in the presence of the parties. Moreover, each party's written submissions, including any comments on the descriptive part of the report and responses to questions put by the panel, shall be made available to the other party or parties.
10. Any additional procedures specific to the panel.