

**DECISION ON THE APPLICATION FOR ANNULMENT
16 MAY 1986**

Table of Contents

- I. THE ARBITRAL AWARD OF NOVEMBER 20, 1984 AND THE APPLICATION FOR ITS ANNULMENT
- II. THE LAW GOVERNING THE ANNULMENT PROCEEDINGS
 - 1. The law to be applied by the *ad hoc* Committee
 - 2. Annulment proceedings and proceedings for completion or correction of an award
 - 3. Failure of an award to state the reasons on which it is based
- III. TIME-BAR TO INDONESIA'S ANNULMENT CLAIMS
 - 1. The plea of time-bar; general considerations
 - 2. The specific time-bar pleas of Amco
- IV. ALLEGED WAIVER BY INDONESIA OF CERTAIN ANNULMENT CLAIMS
- V. THE SUBSTANCE OF THE ANNULMENT CLAIMS
 - A. Claims of Nullity Relating to Indonesia's Responsibility for the Acts of Army and Police Personnel on March 31/April 1, 1980
 - 1. Legality of the acts of army and police personnel under Indonesian and international law
 - 2. Exhaustion and municipal remedies against the acts of army and police personnel
 - 3. The claim that the acts of the army and police personnel constitute a tort: jurisdiction
 - B. Claims of Nullity Relating to the Procedure of Revocation of the PT Amco Licence
 - 1. Claims concerning the absence of warning from BKPM
 - 2. Claim concerning the inadequacy of the hearing given to PT Amco
 - 3. Consequences of illegalities in the revocation procedure
 - C. Claims of Nullity Relating to the Substantive Grounds of the Revocation Order of BKPM
 - 1. Assignment of management functions to Aeropacific
 - 2. Shortfall in the investment required from PT Amco
 - a) the calculation of the shortfall
 - b) the standard of materiality

VI. CONSEQUENCES OF THE ANNULMENT OF THE PART OF THE AWARD
RELATING TO THE ILLEGALITY OF THE REVOCATION ORDER

1. On the grant of damages for illegal revocation of the licence
2. On PT Amco's right to manage the hotel
3. On the grant of damages resulting from the action by army and police personnel
4. On the denial of Indonesia's counter-claim
5. On the annulment of further submissions

VII. MODALITIES OF THE PAYMENT OF COMPENSATION

VIII. CONSIDERATION OF "OTHER GROUNDS" NOT MENTIONED IN THE
REVOCATION ORDER

IX. COSTS

X. AWARD

I. THE ARBITRAL AWARD OF NOVEMBER 20, 1984 AND THE APPLICATION FOR ITS
ANNULMENT

1. On March 18, 1985, the Republic of Indonesia (hereinafter referred to as "Indonesia" filed with the Secretariat of the International Centre for the Settlement of Investment Disputes between States and Nationals of Other States (hereinafter referred to as "ICSID") an application for the annulment, under Article 52 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of March 18, 1965 (hereinafter referred to as the "Convention") of an arbitral Award rendered on November 20, 1984 in ICSID Case No. ARB/81/1 (hereinafter referred to as the "Award"). The Arbitral Tribunal (hereinafter referred to as "Tribunal") which handed down the Award was formed in 1981 as a result of the filing by Amco Asia Corporation, a company incorporated in the State of Delaware, Pan American Development Limited, a limited liability company incorporated under the laws of Hong Kong (hereinafter referred to as "Pan American") and PT Amco Indonesia, a company incorporated under the laws of Indonesia (hereinafter referred to as "PT Amco") (the three companies being hereinafter collectively referred to as "Amco") of a request for arbitration entered by ICSID on January 15, 1981.

2. The Tribunal was composed of Mr Edward W. Rubin, of Canadian nationality, as arbitrator appointed by Amco; Prof. Isi Foighel, of Danish nationality, as arbitrator appointed by Indonesia and Prof. Berthold Goldman, of French nationality, as President appointed by the Chairman of the Administrative Council of ICSID.

3. The Tribunal awarded damages to Amco in the amount of US \$3,200,000 plus interest on the following grounds:

- (a) Indonesia had failed to protect PT Amco's right to manage the Kartika Plaza Hotel under a contract with PT Wisma, a private corporation organized under Indonesian law and controlled by Inkopad, a body connected with the Indonesian Army. PT Wisma had resorted to illegal self-help in its dispute with PT Amco and had taken over the management of the hotel with the help of army and police personnel on March 31/April 1, 1980. Indonesia's failure to protect PT Amco's rights in this regard was violative of a host State's duty under international law to protect foreign investors' rights and interests.
- (b) BKPM, Indonesia's Capital Investment Coordination Board, had on July 9, 1980 revoked PT Amco's licence to do business in Indonesia, without the prior warning required by BKPM Decree 01/1977. The failure of BKPM to give prior warning to PT Amco, and the grant of no more than one hour's hearing to PT Amco's representatives in the revocation proceedings, amounted in the view of the Tribunal to a violation of the fundamental principle of due process.
- (c) In its revocation order, BKPM found that:
 - (i) PT Aeropacific rather than PT Amco had carried out PT Amco's obligation to manage the hotel under the investment licence; and
 - (ii) PT Amco had contributed only US \$1,399,000 of foreign capital of which US \$1,000,000 was in the form of loan and US \$399,000 in the form of equity capital, instead of the US \$3,000,000 of foreign equity capital plus US \$1,000,000 of loan capital promised by, and required from, PT Amco in its application for the investment licence and in the Lease and Management contract (Award, para. 129).

The Tribunal held that the above two grounds did not justify BKPM's revocation of PT Amco's investment licence, considering that:

- (i) Indonesia must have known and had tolerated management of the Kartika Plaza Hotel by PT Aeropacific, which management had in any case ceased two years before the revocation order;
 - (ii) PT Amco had invested US \$2,472,490 in equity capital rather than a total of US \$1,399,000, of which US \$1,000,000 was in loan funds and US \$399,000 in equity funds, as stated by BKPM;
 - (iii) The shortfall of 1/6 of the required investment was not material under the circumstances of the case.
- (d) The Tribunal awarded PT Amco damages for the illegal deprivation of its rights to manage the Kartika Plaza Hotel from April 1, 1980 until the stipulated date of expiry of the contract in 1999. The decisions reached by the Indonesian courts before whom PT Wisma had on April 24, 1980 commenced proceedings against PT Amco for rescission of the management contract on grounds of breach thereof by PT Amco, which decisions granted by PT Wisma's demand for rescission, were based on the fact that the management contract had become inoperative by reason of BKPM having revoked PT Amco's licence to do business in Indonesia. The Tribunal did not feel bound by the decision of the Indonesian courts and so awarded damages to

PT Amco. The Tribunal, referring to the right to repatriate capital imported into Indonesia under Indonesia's Foreign Investment Law, held Amco entitled to receive the damages awarded to it in United States dollars and outside Indonesia.

4. Indonesia seeks the annulment of the Award for the following reasons:

(a) That the Arbitral Tribunal manifestly exceeded its powers, seriously departed from a fundamental rule of procedure, and failed to state the reasons upon which it based the Award deciding that claimant's investment shortfall was not material and did not justify the revocation of PT Amco's licence, and that the amount of foreign equity capital invested by claimants was approximately US \$2,5 million;

(b) That the Arbitral Tribunal seriously departed from a fundamental rule of procedure in deciding not to consider the merits of all the grounds justifying the revocation of PT Amco's licence;

(c) That the Arbitral Tribunal manifestly exceeded its powers, seriously departed from a fundamental rule of procedure, and failed to state the reasons upon which it based the Award in deciding that Indonesia violated due process in revoking the investment licence and therefore must compensate claimants;

(d) That the Arbitral Tribunal failed to state the reasons upon which it based the Award in deciding that Indonesia incurred State responsibility for failure to afford adequate protection to a foreign investor;

(e) That the Arbitral Tribunal failed to state the reasons upon which it based the Award in deciding that Indonesia shall compensate claimants in US dollars outside Indonesia, converted from rupiahs at the exchange rate prevailing as of April 1, 1980.

5. Indonesia's Application for annulment was accompanied by a request for stay of enforcement of the Award. The Application having been registered by the Secretary-General of ICSID on March 27, 1985, [sic] appointed Dr Florentino P. Feliciano, of Philippine nationality, Prof. Andrea Giardina, of Italian nationality, and Prof. Ignaz Seidl-Hohenveldern, of Austrian nationality, as members of the *ad hoc* Committee, pursuant to Article 52(3) of the Convention. The *ad hoc* Committee elected Prof. Ignaz Seidl-Hohenveldern as Chairman.

6. Pursuant to Article 52(5) of the Convention and to Article 54(2) of the ICSID Arbitration Rules, the Secretary-General, together with the notice of registration, informed both parties of the provisional stay of enforcement of the Award. On May 3, 1985, Amco submitted a memorandum in opposition to Indonesia's request to stay enforcement of the Award. On May 10, 1985, Indonesia filed a memorandum in support of continuing the stay of enforcement.

7. In the presence of Dr George R. Delaume, representative of ICSID and Secretary-General of the *ad hoc* Committee and of the attorneys for the parties (Ms Carolyn B. Lamm, Dr Gillis Wetter and Mr Tupman of White & Case, Washington for Indonesia; Mr William Rand, Mr Robert M. N. Hornick and Mr Paul de Friedland of Coudert Brothers, New York for Amco), the *ad hoc* Committee held an initial meeting on May 17, 1985 in Frankfurt in order to discuss various procedural questions. This meeting gave rise to a procedural order of the same day establishing the date for the

exchange of memorials and the dates for the oral proceedings, and dealing with various questions of detail.

8. By a further order also dated May 17, 1985, the *ad hoc* Committee granted to Indonesia a provisional stay of enforcement of the Award, provided Indonesia furnished an irrevocable and unconditional bank guarantee for payment of the Award or parts thereof in accordance with such final decision as the *ad hoc* Committee might reach. The bank guarantee, with terms of provisions approved by the Chairman of the *ad hoc* Committee, was issued on July 3, 1985.

9. The *ad hoc* Committee met in Rome on September 7 and 8, 1985. By an order of September 7, 1985, the *ad hoc* Committee confirmed its understanding of the terms of the bank guarantee and confirmed the stay of enforcement until the issuance of its decision on the Application for annulment.

10. In accordance with the *ad hoc* Committee's order of May 17, 1985, and the ICSID Arbitration Rules, the Memorial of Indonesia was filed on October 15, 1985; the Reply of Indonesia was filed November 1, 1985; the Reply of Indonesia was filed on November 1, 1985; and the Rejoinder of Amco on November 15, 1985. In its Memorial of August 30, 1985, Indonesia, while maintaining that the Tribunal's decision on jurisdiction constituted an excess of power, withdrew that ground for annulment initially submitted in its Application for annulment "so that the Committee might focus on other issues bearing directly on Indonesia's liability for payment" (Memorial, p. 32).

11. Hearings on oral argument were held in Vienna on January 8, 9 and 10, 1986, in the presence of Prof. Gautama for Indonesia and Mr Tan for Amco. The members of the *ad hoc* Committee continued their deliberations on January 11-13, 1986. The complete files and transcripts of the proceedings before the Tribunal were at the disposal of the *ad hoc* Committee during the Vienna hearings. The *ad hoc* Committee requested the parties on January 13, 1986 to indicate where in these records and transcripts appear documents and statements bearing on certain arguments pleaded before the *ad hoc* Committee. The parties complied with this request.

12. After the Vienna hearings, the Chairman asked ICSID to furnish to the members of the *ad hoc* Committee copies of certain documents from the files of the Tribunal. ICSID complied with these requests.

13. The transcripts of the Vienna hearings were completed on February 19, 1986, and circulated to the members of the *ad hoc* Committee and to the respective counsel for the parties.

14. The *ad hoc* Committee met for a working session in Paris on April 1-5, 1986, having at its disposal the complete files and transcripts of the proceedings before the Tribunal. The *ad hoc* Committee met for a final working session in Vienna on May 12-15, 1986.

15. On May 12, 1986, the Chairman of the Committee asked ICSID to advise the parties that the proceedings were closed.

II. THE LAW GOVERNING THE ANNULMENT PROCEEDINGS

16. The *ad hoc* Committee has been instituted to determine whether the Award, or any part thereof, should be annulled on one or more of the grounds for annulment established in Article 52(1) of the Convention. In its Application for annulment, Indonesia invokes one or more of three grounds — “that the Tribunal manifestly exceeded its powers” (Art. 52(1)(b)); “that there has been a serious departure from a fundamental rule of procedure” (Art. 52(1)(d)); and “that the award has failed to state the reasons on which it is based” (Art. 52(1)(e)) — in respect of several findings and conclusions of the Tribunal. The *ad hoc* Committee will deal with the various claims of nullity raised by Indonesia following the general sequence of the findings and conclusions adopted by the Tribunal in its Award, instead of grouping the specific claim under each of the three grounds for annulment set forth in the Convention. In carrying out its task, the *ad hoc* Committee will seek to “deal with every question submitted” to it by the parties (Art. 48(3), Convention; “répondre à tous les chefs de conclusion” (in the French text); “todas las pretensiones” (in the Spanish text), (*cf. infra* para. 34)) every question, that is, which reasonably relates to the principal issues before it. In view of the provisions of Article 52(4) of the Convention the *ad hoc* Committee believes that Article 48(3) of the Convention is as applicable to the annulment proceedings before it as to the original proceedings before the Tribunal.

17. As a preliminary matter, the *ad hoc* Committee has to consider certain general questions raised by the parties which bear directly upon the main features of annulment proceedings and the evaluation of asserted grounds of nullity under the Convention.

1. *The law to be applied by the ad hoc Committee*

18. The first general question which the *ad hoc* Committee must deal with preliminarily, refers to the law governing the annulment proceedings and to the law governing the resolution of the dispute among the parties.

The *ad hoc* Committee, having been established under the provisions of an international instrument — i.e., the Convention — believes that the proceedings before it are governed by the relevant Articles of the Convention and by the Rules of Procedure for Arbitration Proceedings (Arbitration Rules) adopted by the Administrative Council of ICSID. Problems of interpretation or lacunae which emerge have to be solved or filled in accordance with the principles and rules of treaty interpretation generally recognized in international law.

19. As to the law applicable in respect of the substance of the dispute before it, the *ad hoc* Committee considers Article 42 of the Convention controlling, in exactly the same way that the Tribunal regarded the same Article decisive of the law governing the substantive dispute before it. Since the parties had not agreed on some other law governing their relations, the Tribunal (Award, para. 148) declared that it would apply to the dispute

the law of Indonesia and such rules of international law as may be applicable.

20. It seems to the *ad hoc* Committee worth noting that Article 42(1) of the Convention authorizes an ICSID tribunal to apply rules of international law only to fill up lacunae in the applicable domestic law and to ensure precedence to international law norms where the rules of the applicable domestic law are in collision with such norms.

21. The above view of the role or relationship of international law norms vis-à-vis the law of the host State, in the context of Article 42(1) of the Convention, is suggested by an overall evaluation of the system established by the Convention. The law of the host State is, in principle, the law to be applied in resolving the dispute. At the same time, applicable norms of international law must be complied with since every ICSID award has to be recognized, and pecuniary obligations imposed by such award enforced, by every Contracting State of the Convention (Art. 54(1), Convention). Moreover, the national State of the investor is precluded from exercising its normal right of diplomatic protection during the pendency of the ICSID proceedings and even after such proceedings, in respect of a Contracting State which complies with the ICSID award (Art. 27, Convention). The thrust of Article 54(1) and of Article 27 of the Convention makes sense only under the supposition that the award involved is not violative of applicable principles and rules of international law.

22. The above view on the supplemental and corrective role of international law in relation to the law of the host State as substantive applicable law, is shared in ICSID case law (Decision of May 3, 1985 of an ICSID *ad hoc* Committee 1 Foreign Investment Law Journal p. 89 (1986), annulling the Award of October 21, 1983, in *Klöckner v. Republic of Cameroon*^[1], (ICSID Case No. ARB/81/2, Clunet 1984 p. 409), hereinafter referred to as "*Klöckner ad hoc* Committee Decision", para. 69) and in literature (e.g. Broches, "The Convention for the Settlement of Investment Disputes between States and Nationals of Other States", *Recueil des Cours* vol. 136 (1972, II) p. 392), and finds support as well in the drafting history of the Convention (see *ICSID Convention, Analysis of Documents Concerning the Origin and the Formulation of the Convention*, vol. II/1, p. 804 (Washington, D.C. 1970); hereinafter referred to as "*History*").

23. The law applied by the Tribunal will be examined by the *ad hoc* Committee, not for the purpose of scrutinizing whether the Tribunal committed errors in the interpretation of the requirements of applicable law or in the ascertainment or evaluation of the relevant facts to which such law has been applied. Such scrutiny is properly the task of a court of appeals, which the *ad hoc* Committee is not. The *ad hoc* Committee will limit itself to determining whether the Tribunal did in fact apply the law it was bound to apply to the dispute. Failure to apply such law, as distinguished from mere misconstruction of that law, would constitute a manifest excess of powers on the part of the Tribunal and a ground for nullity under Article 52(1)(b) of the Convention. The *ad hoc* Committee has approached this task with caution,

[¹ See 2 ICSID Reports.]

distinguishing failure to apply the applicable law as a ground for annulment and misinterpretation of the applicable law as a ground for appeal.

24. The Tribunal recognized (Award, para. 147) that the parties had not authorized it to decide the case *ex aequo et bono* which the parties could have done (Art. 42(3), Convention). Amco (Rejoinder, p. 32) submits that this explicit recognition by the Tribunal created an “overwhelming” presumption, albeit a rebuttable one, that the arbitrators did indeed refrain from deciding *ex aequo et bono* any issue raised by the parties. The *ad hoc* Committee, however, has not been pointed to, and has been unable to discover, any legal principle or rule justifying acceptance of such a general presumption. Accordingly, the *ad hoc* Committee has had to examine closely both what the Tribunal said it was doing and what it was in fact doing, in resolving particular questions.

25. At the same time, the *ad hoc* Committee does not believe that the Tribunal had necessarily to preface each finding or conclusion with a specification of the Indonesian or international law rule on which such finding or conclusion rests. The Tribunal’s conclusions or findings must of course be read in their context (*cf. infra* para. 40).

26. Neither does the *ad hoc* Committee consider that any mention of “equitable consideration” in the Award necessarily amounts to a decision *ex aequo et bono* and a manifest excess of power on the part of the Tribunal. Equitable considerations may indeed form part of the law to be applied by the Tribunal, whether that be the law of Indonesia or international law. The parties discussed this issue before the *ad hoc* Committee in respect of both Indonesian law and international law. Postponing discussion of this item in relation to Indonesian law until examination of the issue of lawfulness of the revocation of PT Amco’s investment licence (*infra* para. 104), the *ad hoc* Committee will consider it here in relation to international law.

27. Indonesia asserts that the International Court of Justice has applied equitable considerations, or rather “equitable principles” (*cf.* ICJ Reports, 1969, p. 48), only in the context of delimitation of maritime boundaries and that application of such considerations should remain restricted to such context (Reply, p. 18). It appears to the *ad hoc* Committee, however, that when the International Court of Justice looked into whether a claim for compensation was “reasonable” in the *Corfu Channel* case (ICJ Cases, 1949, p. 249^[2]), the Court was in effect taking account of equitable considerations in a context not involving maritime boundaries delimitation. The Court did much the same thing in its Judgment on the Merits in the *Barcelona Traction* Case (ICJ Cases, 1970, p. 48, para. 92^[3]) and dealt directly with this problem in its Advisory Opinion of October 23, 1956 on *Judgments of the Administrative Tribunal of the ILO upon complaints made against the UNESCO*, (ICJ Reports, 1956, p. 100^[4]). The view that a tribunal applying international law may take account of equitable considerations in non-maritime boundaries cases, is fairly widely shared among scholars in international law (See, e.g., Verdross-Simma, *Universelles Völkerrecht*,

[² 16 *Ann Dig* 341.]

[³ 46 *ILR* 178 at 222.]

[⁴ 23 *ILR* 517.]

p. 422 (3rd ed., 1984); Rosenne, "Equitable Principles and the Compulsory Jurisdiction of International Tribunals", in *Festschrift für Rudolf Bindschedler*, p. 410 (1980); Pirotte, "*La Notion d'Équité dans la Jurisprudence Récente de la CIJ*", 77 RGDIP p. 131 (1973); and W. Friedmann, "The North Sea Continental Shelf Case: a Critique", 64 AJIL 234-235 (1970)).

28. The *ad hoc* Committee thus believes that invocation of equitable considerations is not properly regarded as automatically equivalent to a decision *ex aequo et bono* which, in view of the determination of the law applicable to the present case (*supra* para. 24), would constitute a decision annulable for manifest excess of powers. Nullity would be a proper result only where the Tribunal decided an issue *ex aequo et bono* in lieu of applying the applicable law.

2. *Annulment proceedings and proceedings for completion or correction of an award*

29. The second preliminary general question which the *ad hoc* Committee needs to address refers to the relationship between the annulment proceedings provided for in Article 52 of the Convention and the proceedings contemplated in Article 52 of the Convention and the proceedings contemplated in Article 49(2) concerning the completion and correction of an award by the same ICSID arbitral tribunal which pronounced it.

30. The *ad hoc* Committee has before it an Indonesian claim of nullity relating to an alleged failure on the part of the Tribunal to answer all the questions submitted to it, in disregard of the requirement of Article 48(3) of the Convention that "the award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based". The specific claim of Indonesia here is that the Tribunal had wrongfully refused to consider some grounds which could have led it to conclude that the revocation by BKPM of the PT Amco licence to do business in Indonesia was lawful, which grounds, however, had not been set forth in the BKPM order of revocation. In the view of Indonesia, this refusal by the Tribunal constituted a denial of equal treatment to the parties and hence a serious procedural defect and a ground for annulment of the Award (Art. 52(1)(e), Convention).

31. Upon the other hand, Amco (Counter-Memorial, p. 35) states that failure of the Tribunal to decide some of the questions submitted to it, is not, in itself, a ground for annulment but rather simply entitles a party to request from the Tribunal the completion or correction of the Award under Article 49(2) of the Convention. Article 49(2) provides that a Tribunal may, upon the request of a party made within 45 days from the date of rendition of the award, render its supplementary decision which becomes part of the original award.

32. The *ad hoc* Committee believes that the obligation set out in Article 48(3) of the Convention to "deal with every question submitted to the

Tribunal and [to] state the reasons upon which [the award] is based”, can find its sanction in Article 52(1)(e) of the Convention. Failure to deal with one or more questions raised by the parties would entail annulment of the award where such omission amounts to “failure to state reasons upon which [the award] is based” (Art. 52(1)(e), Convention). Such an omission could, moreover, amount in particular situations to “a serious departure from a fundamental rule of procedure” (Art. 52(1)(d)) and to a manifest excess of power (Art. 52(1)(b)).

33. To support its above view, Amco (Counter-Memorial, p. 35) draws on the drafting history of the Convention and points in particular to the fact that a motion for insertion of a clause providing that failure to comply with the duty to state reasons could be a ground for annulment was rejected by a majority vote (*History*, II/1, p. 849; Amco Exh. 4). It seems worth noting, however, that, at the time such vote was cast, the present Article 52(1)(e) had already been approved and adopted (*History*, I, p. 210 and 230). Votes against the above motion cannot therefore necessarily be regarded as importing an objection to the content of the clause proposed, since the delegates voting against the motion may simply have found it redundant in view of the prior adoption of Article 52(1)(e).

34. Moreover, Article 49(2) of the Convention must be considered in its entirety. After authorizing a Tribunal to “decide any question which it had omitted to decide in the award”, Article 49(2) goes on immediately to direct the Tribunal to “rectify any clerical, arithmetical or similar error in the award”. Article 49(2) thus appears to offer a remedy merely for unintentional omissions to decide “any question” (“*question*” in the French text and not “*chef de conclusion*”, “*puntos*” in the Spanish text and not “*pretensiones*”, cf. *supra* para. 16). It may be sagely assumed that arbitrators will strive in their award to express clearly at least the main reasons on which the award rests. Any omissions of relatively minor points may be repaired pursuant to Article 49(2) by simply inserting the Tribunal’s conclusions thereof in the award, the main reasoning of the award remaining unaffected by such insertion. This evaluation of Article 49(2) as being limited in scope is approved by Pirrung, *Die Schiedsgerichtsbarkeit nach dem Weltbankübereinkommen für Investitionsstreitigkeiten*, p. 176 (Berlin, 1972).

35. In the present case, however, Indonesia alleges that the Tribunal had disregarded facts and arguments which, had they been considered, could have obliged the Tribunal to abandon the very bases of its Award. If the Tribunal had accepted as valid any of the arguments invoked in the Application for annulment, their insertion in the Award would have contradicted what had hitherto been the main lines of reasoning of the Award. Thus, the Tribunal would have been obliged to modify the rationale of the Award. However, the full or partial annihilation of the reasoning and conclusion of an award is the very task which the Convention allots to an *ad hoc* Committee created pursuant to Article 52(3) of the Convention, and not to the Tribunal which had rendered the Award.

36. It follows that the remedy provided by Article 49(2) would be inadequate to cope with the allegations set out in the Application before the

present *ad hoc* Committee. Further, in line with the international law rule that a claimant does not need to exhaust inadequate remedies before resorting to remedies believed to be more efficient, (Finland/Great Britain, *Finnish Shipowners claim* (1924) RIAA III, 1499, at 1503-4^[5]; cf. Brownlie, *Principles of Public International Law* (1979), p. 498 and Jiménez de Aréchaga, "International Law in the Past Third of a Century", *Recueil des Cours* 159 (1978 I) p. 294) Indonesia can have recourse to Article 52(1) without having previously requested the Tribunal, under Article 49(2), to decide the questions which, according to Indonesia, it had omitted to decide in the Award. This conclusion of the *ad hoc* Committee finds support in Note B to Arbitration Rule 50 prepared by the ICSID Secretariat, and according to which an application for annulment under Arbitration Rule 50 must be made separately from a request for supplementary decisions and rectifications under Arbitration Rule 49.

37. For the above reasons, the *ad hoc* Committee affirms its jurisdiction to decide the claim of Indonesia that the Tribunal seriously departed from a fundamental rule of procedure when it refused to consider other grounds for revocation of PT Amco's investment licence, different from those adopted in the BKPM order. (On the substance of this claim cf. *infra* paras 121-124).

3. Failure of an award to state the reasons on which it is based

38. The third preliminary issue upon which the parties present opposing positions and implications to the *ad hoc* Committee relates to the duty of an ICSID tribunal to state in its award the reasons upon which it is based (Art. 48(3)) and consequently to the meaning of failure to state the reasons on which the award is based as a ground for annulment (Art. 52(1)(e)). Indonesia urges that the mere presence or inclusion in the Award of a statement of reasons would be insufficient to avoid annulment if that statement is not reasonably capable of justifying the result reached by the Tribunal (Memorial, p. 24). The view taken by Amco, on the other hand, is that failure to state reasons as a ground for nullity requires no more than references to a simple test of whether or not a statement of reasons is in fact set forth in the Award and does not refer to the quality of the reasoning adduced. To annul an award for inadequate reasoning would, in Amco's view, amount to reviewing the award on appeal, which is not the task given to an *ad hoc* Committee by Article 52 of the Convention. (Counter-Memorial, pp. 37-8).

39. It has been claimed that the reasoning of an award would be incomplete if a reader of the award would not be able to find there all the reasons which prompted the arbitrators to reach their conclusions and which led to the findings in the operative part of the award (Broches, in *History II*/1 p. 515). The *ad hoc* Committee would, however, note that the International Court of Justice in its Advisory Opinion in the *Fasla* case (ICJ Reports 1973, p. 210, para. 95)^[6] rejected as too rigorous the claim that a tribunal should

[⁵ 7 ILR 231 at 239.]

[⁶ 54 ILR 373 at 430.]

enter meticulously into every claim and contention by each side, or else see its award annulled.

40. An arbitral award addresses itself first and foremost to the parties before a tribunal. The parties thus are the readers to which the statements by an arbitral tribunal are presented in the first place. In the ICSID system, by refusing their consent to the publication of the award (*cf.* Art. 48, para. 5) the parties may even prevent the emergence of other readers. The parties moreover, may be expected to understand the award in its context. Uncontradicted pleadings and uncontested references to cases and authorities will enable them to fill what outside readers might deem to constitute lacunae in the reasoning of the award.

41. Prior to the decision of the *Klöckner ad hoc* Committee (*supra* para. 22), the most useful discussion of the problem of lack or insufficiency of the supporting reasoning of an international arbitral award was to be found in the judgment of the International Court of Justice, and in the pleadings submitted to it, in the case of the Arbitral Award made by the King of Spain on December 23, 1906 (*Honduras v. Nicaragua*, ICJ Reports 1960, p. 192; Pleadings vol. II, p. 71, 346 and 469)^[7].

42. The *ad hoc* Committee in the *Klöckner*^[8] case read the duty of a tribunal to state reasons imposed by Article 48(3) and Article 52(1)(e) of the Convention as a duty to give “sufficiently pertinent reasons” for its award. The *Klöckner ad hoc* Committee referred expressly to the solution offered by the International Court of Justice in its judgment concerning the Award by the King of Spain (ICJ Reports 1960, p. 216) in refusing to annul that Award on the ground of lack or inadequacy of supporting reasons. The Court had found that that Award dealt “in logical order and in some detail with all relevant consideration” and contained “ample reasoning and explanations in support of the conclusions arrived at by the arbitrator”. The *Klöckner ad hoc* Committee read this conclusion of the International Court of Justice in the context of the debate between Professor Guggenheim denying that insufficiency of motives should be a cause for annulment (Pleadings, vol. II, p. 71) and Professor Rolin urging that any award must contain a “motivation suffisante” (*ibid.*, p. 469) and “pertinente” (*ibid.*, p. 346). The *Klöckner ad hoc* Committee understood the conclusion of the International Court of Justice as an acceptance of Professor Rolin’s plea (*Klöckner ad hoc* Committee Decision, paras. 61 and 120).

43. This *ad hoc* Committee finds the above reading of the *Klöckner ad hoc* Committee convincing. If it be true that a full control and review of the reasoning followed by an ICSID tribunal would transform an annulment proceeding into an ordinary appeal, it is also true that supporting reasons must be more than a matter of nomenclature and must constitute an appropriate foundation for the conclusions reached through such reasons. Stated a little differently, there must be a reasonable connection between the bases invoked by a tribunal and the conclusions reached by it. The phrase “sufficiently pertinent reasons” appears to this *ad hoc* Committee to

[⁷ 30 ILR 457.]

[⁸ See 2 ICSID Reports.]

be a simple and useful clarification of the term “reasons” used in the Convention.

44. Neither the decision of the International Court of Justice in the case of the Award of the King of Spain nor the Decision of the *Klöckner ad hoc* Committee are binding on this *ad hoc* Committee. The absence, however, of a rule of *stare decisis* in the ICSID arbitration system does not prevent this *ad hoc* Committee from sharing the interpretation given to Article 52(1)(e) by the *Klöckner ad hoc* Committee. This interpretation is well founded in the context of the Convention and in harmony with applicable international jurisprudence. Therefore this *ad hoc* Committee does not feel compelled to distinguish strictly between the *ratio decidendi* and *obiter dicta* in the *Klöckner ad hoc* Committee decision.

III. TIME-BAR TO INDONESIA'S ANNULMENT CLAIMS

1. *The plea of time-bar: general considerations*

45. Amco contends that the five pleas advanced by Indonesia for the annulment of the Award or parts thereof are time-barred (Counter-Memorial, pp. 48-9). Amco invokes Arbitration Rule 50(1)(c) which provides that an Application for annulment shall “state in detail ...the grounds on which [it] is founded”. The application for annulment must be made within 120 days after the date of rendition of the Award (Art. 52(2), Convention). Amco claims that the pleas involved were raised by Indonesia only in the latter's memorial of August 30, 1985, more than 120 days after rendition by the Tribunal of its Award on November 20, 1984, and consequently are time-barred.

46. It appears to the *ad hoc* Committee that Arbitration Rule 50(1)(c) is not adequately complied with by an Application for annulment which merely recites *verbatim* the specific subparagraph(s) of Article 52(1) of the Convention being invoked by the applicant. The thrust of Arbitration Rule 50 is not successfully avoided by coupling a recital of the subparagraphs invoked with a general reservation of a “right to supplement (a) presentation [of Indonesia's claims] with further written submissions” (Indonesia's Application for Annulment, p. 8).

47. The letter of the Secretary-General of ICSID dated March 18, 1985 registering the Application for annulment does not, by itself, resolve the time-bar argument of Amco. In this letter, relied on by Indonesia (Reply p. 13), the Secretary-General stated that he had “ascertained that the conditions for considering the request, as set forth in Article 52 of the ICSID Convention and in Rule 50 of the ICSID Arbitration Rules were satisfied”. The registration of an Application by the Secretary-General cannot, however, be considered as conclusive in this regard upon an Arbitral Tribunal (*Holiday Inns v. Government of Morocco*, ICSID Case No. ARB/72/1; Pierre Lalive, “The First World Bank Arbitration [*Holiday Inns*

v. *Morocco*], Some Legal Problems”,^[9] BYIL, 1980, p. 144, Note 2; and Parra, “The Screening Power of the ICSID Secretary General”. News from ICSID [1985] No. 2, p. 12) nor upon an *ad hoc* Committee.

48. Indonesia (Reply, p. 14) contends that Amco’s time-bar argument is absurd as in effect requiring a party to file not just an application to annul but the complete memorial as well within 120 days from rendition of the Award. While the *ad hoc* Committee believes that to require a memorial within 120 days after rendition of an award need not be absurd, it does not consider Arbitration Rule 50 to have established such a requirement.

49. In the Vienna hearings (Transcript, p. 561), counsel for Indonesia opposed Amco’s reading of Arbitration Rule 50(1)(c) by additionally pointing out that in its procedure and practice the International Court of Justice admits changes and additions to the submission of the parties right up to the close of the written proceedings (See Rosenne, *Procedure in the International Court*, p. 112 [1983]).

50. The *ad hoc* Committee does not believe there is any lacuna in the ICSID Arbitration Rules justifying recourse to the practice before the International Court as a model. It is useful to refer in this connection to Note B to Arbitration Rule 50 which states that the procedure there set out “is roughly analogous to that for the filing and registration of an original request for arbitration in accordance with the Institution Rules”. Note K to ICSID Institution Rule 2(1)(e) states that this Institution Rule requires that the request for arbitration contain “information concerning the issues in dispute. No evidence on this subject need be submitted at this stage; the information given can be developed by the requesting party in subsequent phases of the proceeding”. If applications for annulment are reasonably analogous to original requests for arbitration, and the *ad hoc* Committee believes they are, then the statements made in Indonesia’s Application for annulment may be taken together with the development or amplification of such statements in Indonesia’s Memorial.

51. The above general considerations would seem sufficient by themselves to lead to a denial of the time-bar plea of Amco. The *ad hoc* Committee, however, believes it useful to proceed to a detailed examination of the time-bar pleas of Amco, in order to verify whether the claims for annulment made by Indonesia can reasonably be considered as covered by the statements made in Indonesia’s Application for annulment, which Application had been lodged in a timely manner.

2. *The specific time-bar pleas of Amco*

52. According to Amco, (Counter-Memorial, pp. 48-9), Indonesia has raised out of time the following new grounds in its Memorial:

- (i) that the decision holding Indonesia liable for the participation of its Armed Forces in wrongfully seizing the hotel was insufficiently reasoned;

[⁹ This decision has not been made available to the public. For an account of the case see Annex 1 p. 645.]

- (ii) that the decision regarding Indonesia's due process violations seriously departed from a fundamental rule of procedure;
- (iii) that the calculation of the amount of foreign capital invested in the hotel was a manifest excess of power, seriously departed from a fundamental rule of procedure, and was insufficiently reasoned;
- (iv) that the decision not to consider the merits of the alleged non-filing of investment implementation reports was a serious breach of fundamental rules of procedure and was insufficiently reasoned; and
- (v) that the order directing Indonesia to pay compensation outside Indonesia was insufficiently reasoned.

53. The *ad hoc* Committee believes that the grounds above pointed to by Amco are not really new grounds raised for the first time by Indonesia in its Memorial but were either in fact referred to in the Application or reasonably implicit in the Application. The statements in Indonesia's Memorial thus constitute developments or specifications of statements already made in the Application: (i) the action of army and police personnel is referred to in page 19 note 50 of the Application; (ii) the due process violations attributed to Indonesia are referred to in pages 14-15 of the Application; (iii) the calculation of the amount of foreign capital invested in the hotel is dealt with in pages 13-14 of the Application; (iv) although the alleged failure to file investment implementation reports is not mentioned *expressis verbis* on page 16 of the Application, it may be deemed covered by the reference to "unauthorized" transfers in page 16 of the Application; (v) the Application contains no reference to Indonesia's objection to the Award's requiring payment of compensation to Amco outside Indonesia. The *ad hoc* Committee accepts, however, Indonesia's statement that the order to pay compensation outside Indonesia is a "logical corollary" of the Award's requirement that compensation be paid in United States dollars (Factual Appendix B to Indonesia's Reply, at pp. 4-5). Indonesia did object in its Application (p. 22) to the order to pay in United States dollars. The *ad hoc* Committee accordingly denies Amco's time-bar pleas.

IV. ALLEGED WAIVER BY INDONESIA OF CERTAIN ANNULMENT CLAIMS

54. Amco alleges (Counter-Memorial, p. 48) that Indonesia abandoned and therefore effectively withdrew two grounds for annulment set out in the Application (grounds E and F, pp. 18 and 21) since these grounds were not repeated in Indonesia's Memorial.

55. Ground E of the Application for annulment relating to an alleged two month limitation on lost profits is in fact mentioned in pages 91-2 of the Memorial, while in page 96 the Memorial objects to the order to pay compensation in United States dollars (ground F) alleging failure of the Tribunal to state reasons for such order. Although the Memorial did not reiterate the further claim raised in page 23 of the Application that the Tribunal had also thereby manifestly exceeded its powers, the *ad hoc* Committee does not believe that such non-reiteration is adequate basis

for finding waiver or withdrawal by Indonesia of this particular claim of nullity.

56. It will be noted that when Indonesia decided to withdraw its annulment claim relating to the jurisdiction of the Tribunal, Indonesia did so explicitly, leaving nothing to inference (*cf. supra*, para. 10). Waiver and withdrawal of grounds for annulment appears to the *ad hoc* Committee to be so serious a matter that an intent to waive or withdraw cannot lightly be inferred from the mere non-repetition in the Memorial of particular grounds already set out in the Application.

V. THE SUBSTANCE OF THE ANNULMENT CLAIMS

A. *Claims of Nullity Relating to Indonesia's Responsibility for the Acts of Army and Police Personnel on March 31/April 1, 1980*

1. *Legality of the acts of army and police personnel under Indonesian and international law*

57. Indonesia claims that the Tribunal manifestly exceeded its powers (Application, p. 19) and failed to state any reasons (Memorial, p. 96) in holding Indonesia responsible for the acts of army and police personnel in the Kartika Plaza Hotel from March 31/April 1, 1980. Indonesia challenges (Memorial, p. 79) the finding of the Tribunal that those acts of army and police personnel were violative of a special duty imposed by international law on States to protect foreign investors and their property (Award, paras. 171-172). In the view of Indonesia, the Tribunal should have applied Indonesian law and determined whether that law had established such a special duty, before undertaking to apply international law and any duties prescribed by such law.

58. The Tribunal found that the acts of PT Wisma involving the takeover of the management of the hotel from PT Amco amounted to illegal self-help and that army and police personnel assisted in carrying out such illegal unilateral acts (Award, para. 169). The *ad hoc* Committee reads this portion of the Award to mean that the Tribunal found the acts of PT Wisma, and therefore also the acts of the army and police personnel involved, to be illegal under Indonesian law. It is true that the Tribunal did not refer to any specific Indonesian statutory or regulatory provision nor to any Indonesian case-law, but this omission is no more decisive of non-application of Indonesian law than it is indicative of an intent on the part of the Tribunal, at that point in the Award, to apply international law. Indonesia claims (Application, p. 19) that the army and police personnel concerned, as of May 18, 1980, the date when the Central Jakarta District Court granted to PT Wisma the provisional right of management of the hotel pending final resolution of the suit brought by PT Wisma against PT Amco, "had a duty [under Indonesia law] to assist PT Wisma as the lawful possessor of the hotel". By making this statement Indonesia must be taken to be simultaneously conceding that the same army and police personnel had also

a duty under Indonesian law to protect on March 31/April 1, 1980 PT Amco which was up to then in actual, peaceful and uncontested possession of the hotel. From this position of Indonesia's counsel (Application, p. 19), the *ad hoc* Committee feels entitled to conclude that there existed, at all times material for present purposes, under general Indonesian law, a duty to protect a person, whether national or foreigner, in actual, peaceful possession of property. In the case of Amco, this duty is reinforced by the undertaking of Indonesia in Article 21 of the Foreign Investment Law (Law No. 1 of 1967; Factual Appendix C to the Counter-Memorial before the Tribunal, Attachment 1) "not to restrict the right of control and/or management of the enterprises concerned" (*cf.* Award, para. 188, p. 78).

59. The *ad hoc* Committee is consequently unable to sustain Indonesia's contention that the Tribunal failed to evaluate the acts of the army and police personnel concerned under Indonesian law.

60. The Tribunal did find that, on the basis of the evidence submitted before it, the acts of the army and police personnel were not taken on the private initiative of the individuals concerned (Award, para. 91) and these individuals had acted as organs of the State of Indonesia (Award, para. 101; *cf.* Jiménez de Aréchaga, *op. cit.* at 277; Report of the International Law Commission, Yearbook of the ILC (1975, vol. II) p. 69). It has become unnecessary, however, for the *ad hoc* Committee, having reached the conclusion it has in the next preceding paragraph, to determine whether or not the Tribunal failed to state reasons in holding (Award, para. 171) that a special duty of States to protect foreign-owned property exists in public international law and that the acts of the army and police personnel involved constituted a violation of that duty and hence an "internationally wrongful act ... attributable to the Government of Indonesia". The *ad hoc* Committee would nonetheless note that the existence or content of such a "special duty" is at best a controversial matter. A very considerable number of States reject that notion. United Nations General Assembly Resolution No. 3281 (XXXIX) Article 2(2)(a), for instance, emphasizes that: "No State shall be compelled to grant preferential treatment to foreign investment". The *ad hoc* Committee would also note that the propriety of attributing the acts of the army and police personnel involved to the Republic of Indonesia was asserted or assumed in the Award (para. 172, p. 67) rather than demonstrated. Be that as it may, the *ad hoc* Committee finds it unnecessary to pass upon Indonesia's claim of nullity in this specific respect, having upheld the Tribunal's conclusion on the illegality of the acts of the army and police personnel concerned as a matter of Indonesian law.

2. Exhaustion of municipal remedies against the acts of army and police personnel

61. Indonesia denies (Memorial, p. 79) that the acts on March 31/April 1, 1980 of the army and police personnel concerned amounted to an international wrong for which Indonesia is responsible. Indonesia's international responsibility would be engaged, in its view, only if Indonesian

law does offer such remedies in both nationals and foreigners and if PT Amco chose not to avail itself of those remedies, such abstention should not work prejudice upon Indonesia.

62. Indonesia further argues (Memorial, pp. 80 and 82) that the Tribunal manifestly exceeded its powers by holding that Amco could bring its claim for compensation of damages based on the acts of the army and police personnel involved directly to an ICSID Tribunal without previously seeking redress before the Indonesian courts in conformity with the general international law rule on exhaustion of local remedies. In the allegation of Indonesia, the Tribunal failed to state any reasons for its disregard of this rule.

63. The Tribunal did not in fact set out in the Award any reasons for not requiring Amco to exhaust local remedies. The *ad hoc* Committee, however, does not believe that this portion of the Award may be annulled on this account. The Tribunal being a creature of the Convention was bound to apply the Convention, including Article 26 thereof. By acceptance of ICSID jurisdiction without reserving under Article 26 of the Convention a right to require prior exhaustion of local remedies as a condition for obtaining access to an ICSID tribunal, Indonesia must be deemed to have waived such right (*cf.* Shihata, "Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA", 1 Foreign Investment Law Journal, p. 10 (1986)). This view seems to be shared by Professor Hartono in her book (in Indonesian) on *Some Transnational Problems of Foreign Investment in Indonesia* (1972), pp. 200-1 (an excerpt submitted to the Tribunal as Claimant's Legal Document NN on March 1, 1984). The *ad hoc* Committee cannot disregard this circumstance (*cf. supra* para. 40) in evaluating this portion of the Award which embodies a conclusion compelled by the fundamental law of all ICSID tribunals.

64. Thus Amco could seek redress directly from the Tribunal for the action of the army and police personnel without need of exhausting Indonesian local remedies. The Tribunal did not exceed its powers nor fail to state reasons when, applying international law, it characterized the intervention of army and police personnel on March 31/April 1, 1980 as an international wrong although Amco had not exhausted local remedies in Indonesia.

65. It is also claimed by Indonesia (Memorial, p. 92) that the Tribunal did not apply Indonesian law and gave no reasons for its finding that there existed an uninterrupted causal link between the illegality of the acts of army and police personnel concerned and the revocation of the licence by BKPM (Award, para. 258). The Indonesian view is that such illegality, assuming it had initially existed, was effectively ended by the interlocutory decree of the Central Jakarta District Court dated May 28, 1980 in the action brought by PT Wisma against PT Amco authorizing PT Wisma to manage the hotel during the pendency of the proceedings (Attachment 3 to Indonesia's Factual Annex B in the Proceedings before the Tribunal).

66. While that interlocutory order may have been sufficient for the time being to cure the illegality of the acts of the army and police personnel, the Tribunal cannot be regarded as having failed to apply Indonesian law when

it found (Award, para. 258) that the illegality persisted even after issuance of the interlocutory decree. The Tribunal noted (Award, para. 135) that on July 8, 1980, the Greater Jakarta Court as Appellate Court had granted PT Amco's request for postponement of implementation of the interlocutory decree. On August 4, 1980, the Supreme Court of Indonesia reversed the ruling of the Appellate Court and reinstated the interlocutory decree of the District Court (Award, para. 135). On July 9, 1980 – i.e., one day after the Appellate Court had restrained enforcement of the interlocutory decree and almost a month before the Supreme Court reinstated the same decree – the BKPM issued its order revoking Amco's investment licence (Award, para. 128). In other words, shortly before issuance of the BKPM revocation order which the Tribunal eventually held unlawful (on this matter, see below, para. 105), acts of the army and police personnel which had enabled PT Wisma to wrest *de facto* control of the hotel from PT Amco had in effect been regarded by the Appellate Court as once again illegal. The *ad hoc* Committee believes that the portion of the Award reaching the above conclusion cannot be annulled for manifest excess of power or for failure to state reasons.

3. *The claim that the acts of the army and police personnel constitute a tort: jurisdiction*

67. In the Vienna hearings (Transcript, p. 56), counsel for Indonesia argued that the acts of the army and police personnel on March 31/April 1, 1980, if illegal under international law, constituted an international tort. A dispute over state responsibility for an international tort is, it was submitted, quite different from an investment dispute. The jurisdiction of the Tribunal conferred by Indonesia's acceptance (Exhibit 18 before the Tribunal) of ICSID arbitration in Article 9 of PT Amco's investment application of May 6, 1968 (Exh. 4 before the Tribunal) was limited to jurisdiction over foreign investment disputes. Counsel for Indonesia urged that the Tribunal had manifestly exceeded its powers by assuming jurisdiction over the matter of legality of the acts of the army and police personnel.

68. The *ad hoc* Committee is unable to accept the above submission of Indonesia's counsel for it does not think of "international tort" and "investment dispute" as comprising mutually exclusive categories. The Tribunal (para. 188, at p. 78) considered the acts of the army and police personnel involved as a disregard of Indonesia's commitments to foreign investors under Article 21 of Law No. 1 of 1967, Indonesia's Foreign Investment Law. In effect, the Tribunal did not manifestly exceed its powers when it considered the question of the legality of the acts of the army and police personnel as an integral part of the investment dispute between Amco and Indonesia. The jurisdiction of the Tribunal is not successfully avoided by applying a different formal characterization to the operative facts of the dispute.

69. The *ad hoc* Committee believes, moreover, that Indonesia is precluded from thus challenging the jurisdiction of the Tribunal. Indonesia

has expressly waived (Memorial, pp. 31-2) the claims of nullity relating to the jurisdiction of the Tribunal which had been raised in the Application for annulment. If the present claim for nullity is correctly regarded as embraced in the Application, it has been effectively waived. If, upon the other hand, this claim of nullity is not covered by the Application, Indonesia is time-barred from presenting it for the first time at the January 1986 Vienna hearings.

B. Claims of Nullity Relating to the Procedure of Revocation of the PT Amco Licence

70. The Tribunal gave two bases for its ruling that BKPM had disregarded the requirements of due process in revoking the investment licence issued to PT Amco. Firstly, the Tribunal found (Award, paras 193-8) that PT Amco's licence was revoked without BKPM giving PT Amco prior "warning" as required by Article 13(3) of BKPM decree 01/1977. Article 13(3) provides that revocation of a licence "shall be preceded by the warning by the Capital Investment Coordinating Board (BKPM) to the investors concerned maximally 3 (three) times with the 1 (one) month interim period respectively". Secondly, the Tribunal found (Award, paras 199-200) that in the administrative process leading to revocation of its licence, PT Amco was given only one hour's hearing.

1. Claims concerning the absence of warning from BKPM

71. Indonesia argued before the Tribunal that a series of letters from the Bank of Indonesia (the Indonesian government agency charged with the registration of foreign investments) to PT Amco over the years repeatedly reminding the latter of the registration, or lack thereof, of the investment made or claimed to have been made by PT Amco (Exhs No. 76, 79, 80, 83 to 86 to Indonesia's Counter-Memorial before the Tribunal) should be regarded as substantially equivalent to the warnings contemplated in BKPM decree 01/1977. The Tribunal (Award, paras 196-7), considering the authorship, dates and language of those letters refused to regard the letters by the Bank of Indonesia as substantial compliance with Article 13(3) of BKPM decree 01/1977 requiring a warning by BKPM. Whatever one may think as to the necessity or propriety of the literalness with which the Tribunal interpreted Article 13(3) of the BKPM decree 01/1977, the *ad hoc* Committee does not believe itself justified in annulling this portion of the Award for failure to apply the applicable law.

72. Counsel for Indonesia (Vienna transcript, p. 111) challenges the Tribunal for having thus applied an administrative regulation issued by BKPM, without the Tribunal having first measured the legality of this regulation in terms of the requirements of the applicable Indonesian law. However, the decree 01/1977 of November 3, 1977, was issued by BKPM, an administrative agency of the Republic of Indonesia by virtue of the authority granted to it by the laws of Indonesia, i.e. by Article 6 of Presidential Decree

No. 54/1977 of October 3, 1977. (Factual Appendix C to the Counter-Memorial before the Tribunal of December 30, 1982, Att. 1, p. 64). For this reason, the *ad hoc* Committee believes that the Tribunal did not fail to apply the applicable law when it took into consideration also this Indonesian administrative regulation.

73. It is further argued by Indonesia (Memorial, p. 74) that the Tribunal failed to apply the applicable Indonesian law when it annulled or set aside the BKPM order of revocation of PT Amco's licence for failure of BKPM to observe the three warnings rule.

74. Actually, the Tribunal did not purport to set aside the BKPM revocation order and did not seek to order *restitutio in integrum*. The Tribunal felt that it lacked the power to suspend or cancel the effects of the BKPM revocation order (Award, para. 202). An Indonesian court could repair procedural defects in a revocation order of an administrative agency for new or further proceedings. The Tribunal believed that it had no authority to act in like manner and that it had to accept the BKPM order as a definitive and closed administrative act. The Tribunal, not forming part of the Indonesian judicial system, could only award compensation to PT Amco for damages, if any, sustained by it from the definite revocation order. The amount of such compensation was of course dependent on whether or not the revocation was justified on substantive grounds (Award, paras 191, 194 and 213; *cf. infra* para. 105).

2. Claims concerning the inadequacy of the hearing given to PT Amco

75. In its Award (paras 199-201), the Tribunal, "quite apart from the issue of the absence of any warning", held in effect that PT Amco was denied a fair and adequate hearing in the course of BKPM's revocation procedure, a denial which the Tribunal held to be contrary "to the general and fundamental principle of due process".

76. It is not clear from the Award whether this second basis for the Tribunal's ruling on the illegality of the BKPM revocation order is *obiter* (*cf.* Award, beginning on para. 199) or not (*cf.* Award, second subpara. of para. 201). The *ad hoc* Committee therefore deems it necessary to examine the claims of Indonesia relating to this issue.

77. Indonesia alleges (Memorial, p. 76) that "the general and fundamental principle of due process" relied upon in the Award (para. 201) has every appearance of being based on equity and not on the law prescribed to be applied by Article 42(1) of the Convention. It is maintained by counsel for Indonesia (Vienna Transcript, pp. 382-4) that Indonesian administrative law does not include any general principles or standards of due process. It may well be that the words "due process" do not figure in the Constitution of Indonesia. It is, however, affirmed by counsel for Indonesia that a person who regards himself aggrieved by an act of the Government or administration may seek redress in the civil courts of Indonesia under Article 1365 of the Indonesian Civil Code. Such redress will be granted, it is further affirmed, if the decision of the administrative agency involved, on a

case to case basis, is found to be arbitrary or *ultra vires* or not in conformity with the concepts of substantial justice prevailing in the community.

78. Moreover, according to counsel for Indonesia (Memorial, p. 75) under Indonesian law, and in the light of all the circumstances of the present case, the procedural defects, if any, in the BKPM process which culminated in the order revoking PT Amco's investment licence, were not of such a nature or gravity as to compel an Indonesian court to set aside the BKPM revocation order. The general standards which Indonesian counsel affirms are part of Indonesian administrative law and which an Indonesian court would apply in resolving a challenge to the validity of an act of an administrative agency by a private person aggrieved thereby, involve the purpose and tenor of the relevant statute[s] as well as the concepts of reasonableness, proportionality, lack of arbitrariness and conformity with community notions of substantial justice. It appears to the *ad hoc* Committee that these general standards of Indonesian law are not qualitatively different from, and seem equivalent in a functional sense to, what the Tribunal appears to have had in mind in referring to "the general and fundamental principle of due process". It is true that the Tribunal did not seek to define the conditions for the application of this "general and fundamental principle". Indonesia, in relying on certain statements contained in the decision of the *Klöckner ad hoc* Committee (Memorial, p. 77), claims that this portion of the Award is therefore vitiated by insufficient motivation. Since counsel for Indonesia have conceded that the general principles or standards here involved are applied, in the context of the Indonesian judicial system, on a case-by-case basis (Vienna transcript, p. 382), the Award can scarcely be challenged for having relied on a general principle without discussing specific rules defining the scope of application of such principle.

79. For these reasons, the *ad hoc* Committee holds that this portion of the Award is not vitiated by a failure to apply the applicable law amounting to a manifest excess of power on the part of the Tribunal, nor by failure to state reasons.

3. *Consequences of illegalities in the revocation procedure*

80. In this respect Indonesia claims, moreover, (Memorial, p. 74) that the Tribunal manifestly misinterpreted and misapplied Indonesian law in establishing the legal consequences to be drawn from the procedural irregularities ascertained in the revocation proceedings. In this regard, the Tribunal held (Award, para. 201) that those procedural irregularities were sufficient grounds for concluding that the BKPM revocation order was illegal according to Indonesian law, entailing the further consequence of responsibility of Indonesia for damages towards Amco.

81. The fundamental character of Indonesian administrative law seems, to the *ad hoc* Committee, to be such that a conclusion on the legality of an act of an Indonesian public authority, and on its implications for responsibility for damages, can be reached only after an overall evaluation of the act including consideration of its substantive bases.

82. The *ad hoc* Committee believes that the Tribunal in its finding (Award, para. 201 *in fine*) concerning the illegality of the order because of procedural defects merely intended to state that the order did not fully comply with Indonesian administrative law. This intent is clearly suggested by the fact that the Tribunal immediately found it “necessary” (Award, para. 202 first line) to deal with the substantive reasons of the revocation, for the assessment of the amount of damages, if any, due because of the revocation.

83. The *ad hoc* Committee, therefore, rejects Indonesia’s claim for annulment and holds that the Tribunal, by affirming the illegality of the revocation procedure while, at the same time, conditioning the award of damages upon the existence of substantive reasons for the revocation, did not manifestly exceed its powers in interpreting and applying Indonesian law in this regard.

C. *Claims of Nullity Relating to the Substantive Grounds of the Revocation Order of BKPM*

84. Indonesia claims (Memorial, p. 35) that the Tribunal seriously departed from a fundamental rule of procedure, manifestly exceeded its powers and failed to state reasons in finding the BKPM revocation illegal on substantive grounds as well.

85. The Tribunal held that the grounds set out in the BKPM order did not justify the revocation of PT Amco’s investment licence. These grounds were:

- (i) that PT Amco had not itself managed the hotel as required in the licence but had assigned the management to other persons during the period from October 15, 1969 to June 1, 1978 without obtaining the required approval of BKPM (Award, paras 207 and 217); and
- (ii) that PT Amco had invested in the hotel only US \$1,399,000, of which US \$1 million was in the form of a loan and US \$399,000 in the form of “own capital (equity)”, while PT was obliged to invest a total of US \$4 million, of which US \$3 million was to consist of its own capital and US \$1 million in loan funds (Award, para. 220).

The *ad hoc* Committee will examine the Tribunal’s rulings on those two grounds *seriatim*.

1. *Assignment of management functions to Aeropacific*

86. In respect of the assignment of management functions by Amco the Tribunal concluded that, “in principle”, the “total transfer by the investor of the actual performance of his obligations towards the host State, without the latter’s consent, amounts to a material failure of the investor’s obligations, which might justify the revocation of the licence” (Award, para. 216). The Tribunal also found, however (Award, para. 217), that PT Amco had entered into two “sub-lease” agreements by which, with the consent of PT Wisma, the management of the hotel had been transferred (first to

Pulitzer-KLM-Garuda and later to PT Aeropacific) for nine years (from 1969 to 1978). To the Tribunal, it was “hardly credible that the Government was not informed about the two sublease agreements”. The Government, having failed to impose sanctions from 1969 to 1978 and also from 1978 until the dispute broke out in 1980, could not in 1980 base its revocation order on those agreements. In the view of the Tribunal, the failure of PT Amco to carry out personally its obligation of management ceased to be material, and indeed had ceased altogether (PT Amco having resumed the management) at the time of the revocation (Award, paras 218 and 219). The *ad hoc* Committee is aware, just as the Tribunal was aware (Award, paras 214 and 215) that the identity of the foreign investor is not a casual or incidental detail but rather an essential consideration of the host State’s approving the investment application. Yet, the *ad hoc* Committee does not believe that by the above ruling, the Tribunal manifestly exceeded its powers by failing to apply the applicable law (e.g. Presidential Decree No. 63/1969, Article 4, Factual Appendix C to the Counter-Memorial before the Tribunal, attachment 3; Presidential Decree No. 54/1977, Article 6, *ibid* attachment 1, p. 64). Neither did the Tribunal fail to state sufficiently pertinent reasons for its ruling here.

87. Indonesia has also maintained (Memorial, p. 77) that the Tribunal seriously departed from a fundamental rule of procedure by treating the parties unequally in certain respects. One of these, it is alleged (Legal Opinion by Prof. W. Michael Reisman, p. 56, Att. 2 of Opinions of Legal Experts submitted with the Memorial), relates to the above ruling by which the Tribunal effectively attributed to Indonesia the knowledge of PT Wisma of the two sublease agreements even though the Tribunal had earlier rejected Amco’s argument that PT Wisma was an “*alter ego*” of the Republic of Indonesia and had refused to attribute to the latter the former’s take over of the hotel management (Award, paras 161-3). In contrast, the Tribunal refused to hold PT Amco as duly warned because the series of letters on PT Amco’s continued failure to register its claimed investment emanated from Bank Indonesia rather than the BKPM directly.

88. The *ad hoc* Committee acknowledges that differing results were reached by the Tribunal in the two above situations. But the *ad hoc* Committee, after according due regard to the fundamental rule of equality of the parties, is unable to conclude that the Tribunal in evaluating the surrounding facts in the two situations clearly exceeded the scope of discretionary authority granted to it by Arbitration Rule 34 and must consequently refuse Indonesia’s claim of nullity in this regard.

2. Shortfall in the investment required from PT Amco

89. Indonesia claims that the Tribunal manifestly exceeded its powers, seriously departed from a fundamental rule of procedure and failed to state sufficiently pertinent reasons for its findings that: (i) PT Amco had invested US \$2,472,490, and that (ii) in the circumstances of this case, the shortfall of

1/6 of the required equity investment was not sufficiently material to justify the revocation by BKPM of PT Amco's licence (Award, paras 240-1).

(a) The calculation of the shortfall

90. The Tribunal undertook the task of determining the amount invested by PT Amco in the construction, outfitting and furnishing of the hotel. This task was rendered difficult by the incompleteness of the evidence submitted by Amco as well as that submitted by Indonesia. The Tribunal did not find that PT Amco's records and accounts were stolen as PT Amco had claimed (Award, para. 104) but the fact remains that PT Amco was expelled from its business premises under circumstances imposing at least the risk of loss of records. Thus, documents which in the ordinary course of business should have been in the possession of PT Amco and presented by it to the Tribunal, were submitted by Indonesia instead. At the same time, however, important documents such as those relating to the registration or the registerability of foreign exchange supposedly infused into the project were not submitted to the Tribunal by PT Amco; a reasonably prudent foreign non-resident investor may be expected in the ordinary course of business to keep copies of such documents outside the host State. The incomplete character of the evidence submitted by Indonesia – e.g., the lack of copies of complete tax returns and financial statements by PT Wisma (a company wholly owned by Inkopad, itself controlled by the Government) and of investment reports of PT Amco – may also be noted. The relatively low capability of an administrative agency efficiently to store and monitor and enforce the submission of formally required documentation is commonly a reflection of the realities of developing countries, and not an indication of bad faith towards investors, domestic or foreign. It seems to the *ad hoc* Committee that the Tribunal was aware of all these difficulties and took them into account in distributing the burden of proof between the parties (Award, para. 236).

91. Thus, the *ad hoc* Committee does not consider the claim of Indonesia (Reply, p. 31) of unequal treatment of the parties in the allocation of the burden of proof as successfully established and therefore does not regard annulment as justified in this respect. The assertion that the Tribunal systematically favoured PT Amco in the evaluation of the evidence (Memorial, p. 90) is negated by, among other things, the fact that the Tribunal did exclude significant sums (Award, paras 221-30) which, according to PT Amco, should have been considered as part of its investment and which, if so counted by the Tribunal, would have brought PT Amco's total figure above the critical level of US \$3 million of equity capital.

92. In this regard, Indonesia argues (Memorial, p. 49-53) that important amounts included in the aggregate sum of US \$2,472,490 found by the Tribunal to have been invested by PT Amco should have been excluded from the calculation of such investment, if the Tribunal had indeed applied Indonesian law.

93. By the end of the Vienna hearings (Transcript pp. 82, 301 *et seq.*, 330

et seq.) it was firmly established, in the view of the *ad hoc* Committee, firstly that according to relevant provisions of Indonesian law, only investments recognized and definitely registered as such by the competent Indonesian authority (Bank Indonesia) are investments within the meaning of the Foreign Investment Law (Law No. 1/1967). Soon after promulgation of the Foreign Investment Law, a Circular or Announcement of the Foreign Exchange Bureau of Bank Indonesia required foreign investors to submit evidence that the required amounts of foreign capital originating from outside Indonesia had in fact been invested in conformity with the provisions of the Foreign Investment Law (Announcement of the BLLD [Foreign Exchange Bureau, Bank Indonesia] of July 25, 1967, No. 7/Inv./BUD/67 reproduced in Government of the Republic of Indonesia (ed.): *Investment in Indonesia Today* [1968], p. 60, Attachment 2 of Factual Appendix C to the Counter-Memorial before the Tribunal). The Announcement went on to state that Bank Indonesia “shall determine by a written statement to the enterprise whether the [imported] goods/foreign exchange will be recognized as invested capital” (Article III[4] *ibid.* also: a) “Directives for Administering and Reporting Capital Entry in the Framework of Foreign Capital Investment, Bank Indonesia, of January 12, 1973”, Att. 6 of Factual Appendix C to the Counter-Memorial before the Tribunal; and b) “Report on the Administration of Foreign Capital in the Framework of Law No. 1 year 1967”, of July 10, 1975, Circular Letter No. 03/PTpm/VI/ED/1971 from the Capital Investment Technical Committee, Att. 4 of Factual Appendix C to the Counter-Memorial before the Tribunal). This approval and registration requirement is a principal mechanism for implementation of Article 1 of the Foreign Investment Law which limits foreign investment eligible for the incentives provided in that law to direct investment of foreign capital “made in accordance with or based on the provisions of this law”, dispositive of the amount of approved or qualified foreign investment made by a foreign investor in Indonesia, such as PT Amco (*cf.* Legal Opinion of Prof. Komar, in Opinions of Legal Experts submitted by Indonesia with the Memorial, pp. 11-12, 18-19).

94. It was also clearly established at the Vienna hearings that PT Amco failed to obtain definitive registration with Bank Indonesia of all the amounts claimed to have been invested by it in the hotel project. It was noted by counsel for Amco (Vienna Transcript, p. 300) that Amco in the beginning tried to validate the amounts for which it had claimed provisional registration but that Amco soon ceased its efforts in this regard. Amco suggested that Bank Indonesia had been unwilling to register the amounts provisionally claimed by Amco to have been invested. Indonesia’s counsel countered (Vienna Transcript, p. 505), however, that Article 1365 of the Indonesian Civil Code provided a remedy against any arbitrary refusal of Bank Indonesia to register investment actually made by Amco in conformity with the requirements of the Foreign Investment Law and that Amco through the years never invoked that remedy but had on the contrary disregarded the series of written reminders from Bank Indonesia on registration.

95. The evidence before the Tribunal showed that as late as 1977, Amco’s

investment of foreign capital duly and definitely registered with Bank Indonesia in accordance with the Foreign Investment Law, amounted to only US \$983,992 (Exh. No. 83 to Indonesia's Counter-Memorial before the Tribunal). The Tribunal in determining that the investment of Amco had reached the sum of US \$2,472,490 clearly failed to apply the relevant provisions of Indonesian law. The *ad hoc* Committee holds that the Tribunal manifestly exceeded its powers in this regard and is compelled to annul this finding.

96. The failure of the Tribunal to seize the critical importance of PT Amco's duty to register its claimed inward investment of foreign exchange was, in the impression of the *ad hoc* Committee, the result of the basic rule on the matter (*cf. supra* para. 93) having been obscured by the lengthy arguments and counterarguments on accounting principles and problems on, e.g., deductible taxes, undistributed profits and depreciation. Not that such discussions were redundant; they would have been important, for instance, had the Tribunal reached a different conclusion on the issue of the investment shortfall of Amco and come to confront Amco's plea of unjust enrichment on the part of Indonesia (*cf. Award*, para. 149). The basic rule that only approved and registered foreign capital inputs are investments within the contemplation of the Foreign Investment Law was in fact presented in the briefs and hearings before the Tribunal (e.g., Mr Usman, Washington hearing, transcript p. 1231; Indonesia's Counter-Memorial before the Tribunal, p. 53; and Factual Appendix C to the Counter-Memorial before the Tribunal, p. 5). The Tribunal became preoccupied, as it were, with finding its way through the complicated procedures conceived by PT Amco for the financing of the construction of the hotel building and the operation and management of the hotel. In doing so, the Tribunal was assisted by two firms of accountants specially retained by the respective parties. The accountants' reports were reviewed by the Tribunal, but it is not clear to what extent either firm sought to apply general accounting principles or the rules administered by the Indonesian foreign investment regulatory agencies.

97. It is also necessary to note that the Tribunal in its calculation of the investment of PT Amco adopted the total sum set out in the BKPM revocation order as PT Amco's investment – i.e., US \$1,399,000 which is identical with the entry in PT Amco's unaudited balance sheet of March 30, 1978 of "shares placed and deposited" (Amco's Exhibit No. 64 before the Tribunal). The Tribunal apparently, however, overlooked the fact that, according to the BKPM revocation order, "PT Amco Indonesia has only desposit (sic) its capital as much as US \$1,399,000 which consisted of loan for the amount of US \$1,000,000 and own capital (equity) for the sum of US \$399,000" (*Award*, para. 204;). If it be assumed that BKPM's finding that PT Amco's share capitalization figure of US \$1,399,000 had in fact included US \$1,000,000 of loan funds, was correct, then the Tribunal had effectively failed to apply Article 2 of the Foreign Investment Law which limits qualified foreign investment to investment of equity capital. The Tribunal, in any case, failed to state reasons for counting the entire US \$1,399,000 as equity capital and not merely US \$399,000 (assuming the BKPM was correct).

If, upon the other hand, it be assumed that the BKPM finding was *not* correct and the entire US \$1,399,000 had somehow become “equity capital”, then the Tribunal had still failed to apply Article 2 of the Foreign Investment Law and to state reasons for including the following item: “6. Unamortized balance of the US \$1,000,000 ABN loan – [US \$]451,329” (Award, para. 238, p. 110) as part of the (equity) capital investment of PT Amco. Neither PT Amco who had originally incurred the US \$1,000,000 loan from ABN (Award, para. 62), nor PT Aeropacific who later assumed the obligation of repaying the dollar loan to ABN (Award, para. 67), pretended to have obtained authorization from any competent Indonesian public authority to consider such loan funds as equity investment of PT Amco (*cf.* Legal Opinion of Prof. Komar, p. 17 in Opinions of Legal Experts submitted by Indonesia with the Memorial). The *ad hoc* Committee acknowledges that the Tribunal was aware of the rule excluding loan funds from the foreign capital investment contemplated by the Foreign Investment Law (Award, paras 228 and 236, p. 107) and therefore concludes that the Tribunal seems to have contradicted itself. At least, this impression is not fully disproved by the text of the Award itself (para. 236i, at p. 107).

98. For the above reasons, the *ad hoc* Committee feels obliged to consider that the Tribunal manifestly exceeded its powers in failing to apply fundamental provisions of Indonesian law and failed to state reasons for its calculation of PT Amco’s investment.

(b) The standard of materiality

99. Indonesia challenges the Tribunal’s ruling that the shortfall in Amco’s investment – determined by the Tribunal to amount to 1/6 of the required level of investment – was not material and did not therefore justify the revocation of PT Amco’s investment licence. In the view of Indonesia, the Tribunal manifestly exceeded its powers and failed to state reasons for this ruling (Memorial, pp. 41-4; 45-8).

100. Indonesia begins by denying the existence of a materiality rule in Indonesian administrative law while admitting that Indonesian civil or contract law contains such a rule. Indonesia continues by insisting that the Tribunal should have decided the issue of materiality of PT Amco’s shortfall by referring to Indonesian administrative law (Memorial, p. 43). PT Amco, on the other hand, affirms that this issue was properly governed by Indonesian civil law (Counter-Memorial, p. 74).

101. The Tribunal did not state *expressis verbis* on whether its ruling on the non-materiality of a shortfall of 1/6 of the prescribed minimum amount rested on Indonesian administrative or civil law. The Tribunal characterized the “application-approval relation” between PT Amco and Indonesia as “a *sui generis* relationship comparable to a contract” (Award, para. 189), a relationship “not identical to a private law contract” but nonfulfillment of the duties of which gives rise to consequences “substantially identical to the parallel rule concerning contracts” (*ibid*). This characterization apparently enabled the Tribunal to apply the materiality test conceded to form part of

Indonesian civil law to the BKPM revocation order, while qualifying such an order as an administrative act (Award, p. 192).

102. Indonesia resists this conclusion reached by the Tribunal and maintains that the applicable standards are those of Indonesian administrative law (Reply, p. 29). The *ad hoc* Committee is not able to share the view suggested by Indonesia. It appears to the *ad hoc* Committee that the general notion of materiality is not alien to Indonesian administrative law, though that notion may bear different names in different contexts. For instance, Indonesia itself invoked the general notion that a lawful reaction to a wrong must be proportionate to the wrong itself. Thus Indonesia pleaded that BKPM's omitting the three warnings to PT Amco before revocation of the latter's licence was not an error serious enough to render the revocation order automatically illegal (Memorial, p. 74). In the same vein, Indonesia urged that PT Amco's failure to register capital investment allegedly brought in by PT Amco was not merely a failure to comply with a formalistic requirement but a matter of grave national concern to Indonesia (Memorial, pp. 59-60). Since Indonesia may thus be regarded as conceding the relevance of materiality understood as proportionality in its administrative law, whether the Tribunal applied a materiality test under Indonesian administrative or civil law is basically a moot question.

103. Because the *ad hoc* Committee has annulled the conclusions of the Tribunal on the calculation (*supra* para. 98) and on the amount of PT Amco's investment (*supra* para. 95), it follows that the Tribunal's ruling on the non-materiality of the shortfall of PT Amco's investment must also fall. Since the duly registered investment of PT Amco amounted to only US \$983,992, the shortfall was US \$2,016,008 or 67.20% of the requisite equity investment. Upon the hypothesis that the statements made in the BKPM revocation order (US \$1,000,000 in loan funds, US \$399,000 in equity funds) are correct, the shortfall would escalate to US \$2,601,000 or 86.10% of the required equity capital. The *ad hoc* Committee concludes that whatever standard of statutory intent, substantial justice, materiality, reasonableness or proportionality, of civil or administrative law, of Indonesian law or international law, to be employed, the revocation order must be regarded as a reasonable and proportional, and hence lawful, response.

104. With regard to the reasons given by the Tribunal in holding a shortfall of 1/6 of the required investment not material in the circumstances of this case, Indonesia argues (Memorial, p. 47) that whether PT Amco (had it been given due warning by BKPM) would have been able to prove a higher amount of investment, was entirely a matter for conjecture. It is also contended by Indonesia (*ibid.*) that to suppose that BKPM would have been willing to permit PT Amco to make good any remaining shortfall after the time-limit for making the investment had expired, was just as speculative. While one may share Indonesia's view about the hypothetical or speculative nature of the reasons adduced by the Tribunal, the *ad hoc* Committee thinks it unnecessary to deal with those reasons, having already annulled the conclusions of the Tribunal on the amount and calculation of PT Amco's investment. It perhaps remains only to note that hypothetical reasons are

not *per se* insufficient reasons (*Klöckner ad hoc* Committee Decision, para. 125^[10]) and an arbitral tribunal may, in some situations, well be entitled to take account of loss of opportunities suffered by a party. Finally, Indonesia complains that the Tribunal's statement "that the hotel was effectively built and is now a part of the travel and touristic facilities of the City of Jakarta" (Award, para. 242) in effect evidences an excess of power. The statement of the Tribunal is clearly *obiter* and while it would be interesting to examine recourse to equitable considerations as part of the applicable law as distinguished from resort to decision *ex aequo et bono* the *ad hoc* Committee believes there is no need to do so.

VI. CONSEQUENCES OF THE ANNULMENT OF THE PART OF THE AWARD RELATING TO THE ILLEGALITY OF THE REVOCATION ORDER

1. *On the grant of damages for illegal revocation of the licence*

105. For the reasons set out above (paras 95 and 103), the conclusion of the Tribunal (Award para. 241) that BKPM was not justified in revoking Amco's licence on account of the shortfall of the investment, which the Tribunal calculated without regard to the applicable law and held immaterial, has to be annulled.

106. However, if BKPM was not unjustified in revoking the licence on substantive grounds, then, according to the findings of the Award itself (*supra* para. 74), no compensation was due for the lack of three warnings and for other procedural defects of the revocation order. Therefore, the part of the Award granting PT Amco damages on this account was to be annulled.

2. *On PT Amco's right to manage the hotel*

107. As the withdrawal of the investment licence cannot be considered unjustified, the resulting effect of such withdrawal cannot be considered unjustified either, i.e. PT Amco's inability to exercise its right to manage the Kartika Plaza Hotel as of the day of issuance of the revocation order (July 9, 1980), whatever would have been the outcome of the litigation begun by PT Wisma against PT Amco before the Jakarta Courts.

3. *On the grant of damages resulting from the action by army and police personnel*

108. The conclusions of the *ad hoc* Committee relating to the revocation order do not affect the Tribunal's finding as to the illegality of the action by army and police personnel. The *ad hoc* Committee, therefore, does not annul this part of the Award, nor the finding that Amco is entitled to damages from Indonesia.

[¹⁰ See 2 ICSID Reports.]

109. The damage caused to PT Amco by the action of army and police personnel came to an end on the day of the revocation of PT Amco's licence, i.e. on July 9, 1980. Consequently, the *ad hoc* Committee annuls the grant of damages to PT Amco in paras 280-281 of the Award for the period beyond July 9, 1980.

110. The Tribunal calculated the damages due to PT Amco on "present value" terms (Award, para. 271) and on the basis of a "continuous prejudice" (Award, para. 258), arising from the existence of a single causal link between the several heads of damage. The *ad hoc* Committee not being a Court of Appeal, is not entitled to separate those links to determine the amount of damages due for the action by army and police personnel from April 1 to July 9, 1980. For these reasons, the *ad hoc* Committee has to annul the Tribunal's findings on the amount of damages as a whole.

111. This conclusion of the *ad hoc* Committee renders academic Indonesia's claim (Application p. 21) that the Award should be annulled for having manifestly exceeded its powers by failing to apply Indonesian law, as determined by the decisions of Central Jakarta District Court of January 12, 1982 (Factual Appendix B of December 30, 1982, Att. 23 before the Tribunal) and of the Jakarta Appellate Court of November 28, 1983 (Exh. 257, submitted to the Tribunal) cancelling the contract between PT Wisma and PT Amco.

112. The *ad hoc* Committee notes, however, that the Tribunal held these decisions ill-founded, as they were based on the revocation order, held illegal by the Tribunal (Award, para. 261).

113. Counsel for Indonesia claims moreover (Vienna transcript, p. 478) that the Tribunal did not apply Indonesian law when it considered these decisions ill-founded in spite of the fact that they adduced other grounds (*cf. infra* para. 121 ss) as "equivalent causes" for PT Amco being deprived of its right to manage the hotel (Award, para. 261).

114. The *ad hoc* Committee finds that this claim does not constitute an independent basis for annulment in the view of the *obiter* character of these findings in the Award.

115. In view of the fact that the revocation of Amco's licence could not be considered illegal (*cf. supra* para. 105) the *ad hoc* Committee need not evaluate Indonesia's submission (Exh. 1 to Indonesia's Memorial) of the decision of the Indonesian Supreme Court of April 30, 1985, which decision approves the rescission of the management contract exclusively on grounds other than those adduced in the revocation order. The *ad hoc* Committee cannot, in any case, annul the Award on account of an interpretation and application of the governing law offered by a court decision rendered after the date of the Award.

4. *On the denial of Indonesia's counterclaim*

116. The conclusion of the Tribunal (Award, para. 287) rejecting Indonesia's counterclaim for recovery of tax and import facilities granted to PT Amco has to be annulled. As the *ad hoc* Committee has annulled the

findings of the Award that the revocation of the licence was unlawful, the part of the Award dismissing the counterclaim for recovery of the tax and import facilities has to be annulled as well. The Tribunal (Award, para. 287) itself established an inseparable link between its conclusions on the licence revocation and on the counterclaim.

5. *On the annulment of further submissions*

117. In point 4 of the operative part of the Award, the Tribunal rejected all other submissions of the parties. As this rejection was based on the consequences drawn by the Tribunal from its finding that the revocation order was illegal and as the *ad hoc* Committee has annulled this finding, point 4 of the operative part of the Award has likewise to be annulled.

VII. MODALITIES OF THE PAYMENT OF COMPENSATION

118. Indonesia challenges (Memorial, p. 89) the conclusions of the Tribunal on damages to be paid in US dollars outside Indonesia for failure to state reasons and as a manifest excess of powers. The *ad hoc* Committee finds that the Tribunal gave sufficiently pertinent reasons both for payment of damages in US dollars as well as for payment outside Indonesia, having based these conclusions, *inter alia* on its interpretation of the word “repatriation” in Article 20 of Indonesia’s Foreign Investment Law (Award, para. 280). The Tribunal’s amplification concerning international law on this issue appears *obiter* to the *ad hoc* Committee. Moreover, it may be recalled that Indonesia concedes – albeit in the context of the time-bar issue – that the Award’s order to pay damages outside Indonesia is a “logical corollary” to payment in US dollars (*cf. supra* para. 53).

119. For these reasons the *ad hoc* Committee holds that, in this respect, the Tribunal, since it interpreted and applied Indonesian law, did not manifestly exceed its powers.

120. Indonesia challenges (Memorial, p. 89), for failure to state reasons, the conclusion of the Tribunal (Award, para. 280) that the conversion of any amounts due as damages from rupiahs into US dollars should be made as of the date on which the damage occurred. The *ad hoc* Committee finds that the Tribunal reached that result by referring to several provisions of Law No. 1/1967 (which authorizes “the investor to repatriate its capital and earnings”). Moreover, the *ad hoc* Committee recalls the provisions of Article 1365 of the Indonesian Civil Code (cited in Award, para. 247) imposing upon a person causing a loss to another in violation of law a duty to “replace” said loss. The reference to international law made by the Tribunal appears *obiter* to the *ad hoc* Committee in this regard.

VIII. CONSIDERATION OF "OTHER GROUNDS" NOT MENTIONED IN THE REVOCATION ORDER

121. The Tribunal refused to consider some other grounds possibly justifying the revocation of PT Amco's licence which were not mentioned in the internal files prepared by BKPM. The most serious of these grounds related to failure by PT Amco to report to Bank Indonesia concerning the transfers abroad of large amounts of capital, non-submission of reports to BKPM concerning the realization of PT Amco's investment and alleged tax manipulations, in addition to disqualification for tax benefits to which PT Amco would have been entitled only if PT Amco had indeed completed its investment.

122. Indonesia alleges (Memorial, p. 57 ss) that the Tribunal had treated Indonesia and PT Amco unequally and thus had violated a fundamental rule of procedure when it refused to consider these other grounds. According to Indonesia (Application, p. 18), while PT Amco was allowed to submit its case to the Tribunal *de novo*, i.e. adducing arguments not raised by PT Amco in the Jakarta Courts, Indonesia received unequal treatment as it was restricted to arguing its case before the Tribunal only on the grounds adduced in BKPM's revocation order.

123. Here, as in other parts of the Award, the *ad hoc* Committee finds no unequal treatment of the parties. The *de novo* argument raised by Indonesia is unconvincing since the dispute in the Jakarta Courts involved PT Wisma and PT Amco, whereas the revocation order as well as the arbitration proceedings before the Tribunal concerned PT Amco and Indonesia.

124. In so far as Indonesia alleges these other grounds as hypothetical justification for the lawfulness of BKPM's revocation order, the *ad hoc* Committee believes that the Tribunal gave sufficient reasons for holding these grounds irrelevant for this purpose (Award, para. 204). Moreover, these other grounds do not figure in Indonesia's counterclaim as independent claims in addition to the recovery of tax and import facilities granted to PT Amco. In this respect, too, the *ad hoc* Committee believes that the Tribunal did not violate fundamental rules of procedure in considering these grounds irrelevant. However, the *ad hoc* Committee notes that, since the Tribunal did not find it necessary to rule on the possible additional grounds for the revocation order, there was no substantive decision of the Tribunal on these points.

IX. COSTS

125. In view of the fact that both parties showed equal diligence in helping the *ad hoc* Committee to reach its conclusions, the *ad hoc* Committee finds that each of the parties should contribute in equal parts to the costs of the *ad hoc* Committee and that each party should bear its own costs for legal counsel.

X. AWARD

The *ad hoc* Committee by unanimous decision annuls the Award as a whole for the reasons and with the qualifications set out above. The annulment does not extend to the Tribunal's finding that the action of army and police personnel on March 31/April 1, 1980 was illegal. The annulment extends, however, to the findings on the duration of such illegality and on the amount of the indemnity due on this account. The bank guarantee issued by Indonesia on July 3, 1985 (*cf. supra* para. 8) will expire in accordance with its terms.

[*Source*: This decision is published in full in English in 89 *International Law Reports* 514.]

**RESUBMITTED CASE: DECISION ON JURISDICTION
10 MAY 1988**

A. BACKGROUND

On January 15, 1981 Amco Asia Corporation ("Amco Asia"), Pan American Development Limited ("Pan American") and PT Amco Indonesia ("PT Amco") filed with the Secretary-General of ICSID a Request for Arbitration against the Republic of Indonesia. The Tribunal established for purposes of this arbitration gave an Award on Jurisdiction on September 25, 1983. On November 21, 1984 it gave an Award on the Merits.

The Claimants had contended that whereas their investment in the building and management of a hotel complex in 1968 had been authorized by the Republic of Indonesia for a period of thirty years, in 1980 the Republic seized the investment in an armed military action and then unjustifiably cancelled the investment licence. Various decisions of the Jakarta courts later rescinded a Lease and Management Agreement relating to the hotel. The Republic of Indonesia contended that any military or police assistance was only directed to supporting the legal right of an Indonesian national to control the hotel and was not a seizure of the hotel by the Government; that the cancellation of the investment licence was fully justified; and that the Jakarta courts had acted in a binding and lawful manner in rescinding the Lease and Management Agreement. In its counterclaim Indonesia asserted that, as the cancellation of the investment licence was justified due to violations of Indonesian and applicable international law, PT Amco was obliged to return tax and other concessions granted by Indonesia.

A description of the claims, defences and counterclaim are to be found at paragraphs 142-6 of the Award on the Merits. The applicable law, by virtue of Article 42, paragraph 1 of the ICSID Convention was "Indonesian law, which is the law of the State Party to the dispute, and such rules of international law as the Tribunal deems to be applicable, considering the matters and issues in dispute". (Award on the Merits, para. 148).

The Tribunal found in favour of the Claimants, ordering the sum of US \$3,200,000 with interest to be paid, outside of Indonesia. The Republic of Indonesia's counterclaim was rejected. Orders were also made as to fees, expenses, arbitrators' fees and expenses and charges for the use of the facilities of the Centre for the Settlement of Investment Disputes.

These findings on the merits were naturally made in the form of findings on specific contentions advanced by the parties.

On March 18, 1985 the Republic of Indonesia filed with the Secretariat of ICSID an application under Article 52 of the Convention, for the annulment of the Award on the Merits made on November 21, 1984. An *ad hoc* Committee was established pursuant to Article 52(3) of the ICSID Convention, under the Chairmanship of Professor Dr Ignaz Seidl-Hohenveldern. The *ad hoc* Committee ordered, and later confirmed, a stay of enforcement upon the furnishing by Indonesia of an irrevocable and unconditional bank guarantee.