-Date of dispatch to the parties: June 5, 1990

May 31, 1990

INTERNATIONAL CENTRE FOR THE SETTLEMENT
OF INVESTMENT DISPUTES

(I.C.S.I.D.)

In the Matter of the Arbitration between

Amco Asia Corporation, Pan American Development Limited and P.T. Amco Indonesia

v.

The Republic of Indonesia

The Arbitral Tribunal composed of:

Professor Rosalyn Higgins, Q.C., Chairman
Appointed by agreement of the parties

The Hon. Marc Lalonde, P.C., Q.C. Member
Appointed by Amco

Per Magid Member
Appointed by Republic of Indonesia

made the following award

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AMCO ASIA CORP. ET AL

V.

REPUBLIC OF INDONESIA

ICSID/ARB./81/1

A W A R D

I. BACKGROUND

1. On January 15, 1981, Amco Asia Corporation ("Amco Asia"), Pan American Development Limited ("Pan American") and P.T. Amco Indonesia ("PT Amco") filed with the Secretary General of the International Centre for the Settlement of Investment Disputes ("ICSID") a Request for Arbitration against the Republic of Indonesia. When referred to collectively, the claimant companies will hereafter be designated as "Amco". The Tribunal established for purposes of that arbitration ("the First Tribunal") rendered an Award on Jurisdiction on September 25, 1983 (23 ILM (1984) 351). On November 20, 1984 it gave an Award on the Merits (1

Int.Arb.Rep. (1986) 601, "the First Award").

2. The First Award may be referred to for the full facts of the case. For convenience of reference, the following salient facts are here summarized:

An enterprise known as P.T. Bluntas was established in 1964 by the Bank of Indonesia and an Indonesian private investor to develop an apartment/hotel complex on a specified site in Jakarta. The structural framework of the basement and the first two floors was erected but construction stopped in 1965 due to lack of funds. In 1967, at the order of the new Indonesian government, all the shares in P.T. Bluntas were sold to a cooperative established under Indonesian law for the welfare of Indonesian army personnel, known as Inkopad. Inkopad caused the name of PT Bluntas to be changed to PT Wisma "Kartika" (hereafter referred to as "PT Wisma").

3. On 22 April 1968 a Lease and Management Agreement was entered into by Amco Asia, a company incorporated in Delaware, U.S.A., and PT Wisma, under which Amco Asia was to complete, at its own cost, the original construction (referred to in the

Agreement as "the Annex") and another six storey building. The Agreement provided that Amco Asia would invest "up to the sum of US$4,000,000" overall, with "up to the sum of US$3,000,000" being used for the six storey building. PT Wisma was to grant Amco Asia a nineteen year lease for both structures. Any disagreements would be settled by negotiation, failing which there would be arbitration. The key terms of the 1968 Lease and Management Agreement are summarised in paragraph 11 of the First Award. The full text is to be found in the written pleadings submitted for this arbitration. (Exhibits to the Counter-Memorial,* Volume 1, Tab.1.) An addendum to the 1968 Lease and Management Agreement was signed on May 18, 1968 by PT Amco and PT Wisma, specifying how the profits were to be shared. The enterprise was known as the Hotel Kartika Plaza project. (Ibid, Tab.2).

4. On May 6, 1968 Amco Asia submitted to the Government of Indonesia an application (Previously Filed Claimants' Documents Cited in Amco's Memorial, Vol.I, Tab.5; Indonesia Exh., Vol.I, Tab.4) to establish PT Amco under the aegis of the 1967

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* Hereafter referred to as "Indonesia Exh.".

Foreign Investment Law (Previously Filed Claimants' Documents, Vol.I, Tab.1). The application underwent various amendments (Indonesia Exh., Vol.I, Tab.5). The authorised share capital of PT Amco was to be $3,000,000, divided into 30,000 shares with a nominal value of $100 per share, all of which "represented foreign capital". In the amended application it was proposed that there be an exemption from corporate taxes for three years; and for dividend tax for three years. PT Amco was to be exempt from import duties with respect to capital goods, including spares and parts, if PT Amco used "its own foreign exchange or supplemental foreign exchange in the limits set in the Government regulations in force". (Indonesia Exh., Volume I, Tabs. 4 and 5). The application also included an arbitration clause which referred any dispute between PT Amco and the Government of Indonesia to ICSID. On July 29, 1968, Amco Asia was granted permission by the Minister of Public Works to establish PT Amco within the framework of the 1967 Foreign Investment Law and in accordance with the amended application.

5. As described in the Award of the First Tribunal, (paras.37-39), PT Amco's Articles of Incorporation

set a final date for capitalisation. The Articles of Incorporation were set out in a Notarial Document No. 106 dated September 27, 1968, upon request of the Minister of Justice amended by Notarial Document No.49 dated December 13, 1968. At the time of the incorporation, 20 per cent of the authorised capital was declared issued with 10 per cent having been paid up, half of which was issued to and paid for by Amco Asia and the other half issued to and paid for by a non-resident Dutch business man, Mr. T.K. Tan (First Award, para.37). In the Notarial Document No.49 a new provision was added to the Articles of Incorporation, viz. that "the entire unissued portion of shares must be issued within a period of 10 years beginning today, unless this time should be extended by those responsible, or if required at the request of the Board of Directors". No evidence of any decision to extend the time period of 10 years was put before the First Tribunal (First Award, para.39). Under the Articles of Incorporation, the issue of the US$3m. shares should have taken place before the end of 1978.

6. The Articles of Incorporation of PT Amco were then prepared and presented to the Ministry of Justice

for approval. To meet the position of the Ministry, various notarial documents were executed to effect changes to the Articles of Incorporation (First Award, paras.33-40). On January 25, 1969 the Minister of Justice approved the Articles of Incorporation, which were then registered with the Central Jakarta District Court on January 29, 1969. On April 4, 1969, the Articles of Association were published in Supplement No.27 to the State Gazette of Indonesia No.41 of 1969 (Ibid., para.40).

7. On January 24, 1969 PT Wisma agreed to extend the term of the 1968 Lease and Management Agreement to thirty years.* On August 22 1969 PT Amco entered into a Sub-Lease Agreement whereby certain other persons and airlines would manage and operate the Kartika Plaza hotel, and would guarantee credit facilities to PT Amco to enable it to complete the construction of the hotel. On October 13 1970 a second sub-lease was entered between PT Amco and the

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* The lease was originally granted for 19 years. In the letter of January 24, 1969 (Previously Filed Claimants' Documents, Vol.I, Tab.4; Indonesia Exh., Vol.I, Tab.3) it gets extended to 30 years, which is said to be 10 years more than that originally granted. See also the reference in para.52 of the First Tribunal's Award to 20 years. In any event, the subsequent 1978 Profit-Sharing Agreement (Indonesia Exh. Vol.II, Tab.47) was to terminate September 30, 1999.

Aeropacific Hotel Association ("Aeropacific"), a partnership consisting of the same sub-lessees as in the sub-lease of August 22, 1969 (ibid., Tab.42). Aeropacific was to complete construction of the hotel and also assumed responsibility for a loan of US$1,000,000 from Algemene Bank Nederland N.V. ("ABN") that PT Amco had undertaken to obtain under the first sub-lease agreement. PT Wisma and Amco Asia agreed in writing to respect the terms of this second sub-lease, which was to supersede the first. The second sub-lease continued in operation until June 1, 1978. Relations between PT Amco and Aeropacific gave rise to problems and led to arbitration and then to resolution by agreement on March 29, 1980. (First Award, para.77).

8. In 1971 PT Amco sought recognition from the Ministry of Public Works of Pan American Development Limited ("Pan American"), a Hong Kong company, as a capital investor in the Hotel Kartika Plaza project, stating that Amco Asia had in fact entered into the 1968 Lease and Management Agreement with PT Wisma as agent and nominee for and on behalf of Pan American. The Ministry of Public Works in turn notified the Foreign Investment Board that permission was required to transfer a portion of Amco Asia's shares

to Pan American. This transfer was approved on May 1, 1972. (Ibid., paras.41-45).

9. Faced with legal skirmishing between PT Amco and Aeropacific during the first few months of 1978, Inkopad undertook the management of the hotel, from June, 1978. However, after a few months, in light of its difficulties in administering the property without the assistance of a professional manager and following representations by Amco, Inkopad authorised PT Wisma to enter with PT Amco into a "Profit-Sharing Agreement for the Management of the Kartika Plaza Land and Building with all its contents" (ibid., paras.77-78). That Agreement was signed on October 6, 1978 and PT Amco resumed management of the hotel. On July 4, 1979, with the Agreement of PT Wisma, PT Amco entered into a Licence Agreement and an International Management Agreement with Ramada Inns Inc. and Ramada International Inc., respectively. From November 1979 to March 31, 1980 PT Wisma and PT Amco were in disagreement on a number of matters (listed at paragraph 87 of the First Award). Particularly important was the disagreement concerning the amounts which the respective parties thought were due from PT Amco to PT Wisma under the Profit

Sharing Agreement of 1978. PT Amco stated that it was not in a position to finalise all figures but denied that US$54,609 was still due to PT Wisma (Ibid., para.88). PT Wisma indicated that if it was not paid by specified dates (first set at March 15, and then at March 30, 1980),* then the management of the Kartika Plaza building would be conducted by PT Wisma as the owner (Ibid, para.89).

10. A small advance was made by PT Amco but it did not pay the full US$54,609 claimed. In the last few days of March various meetings were held by senior executives of PT Wisma at which plans were made for the taking of sole control of the Kartika Plaza property (Ibid., paras.90-92). On March 31, 1980 PT Wisma notified all Managers and Department Heads that henceforth the responsibility for the management of the Kartika Plaza and Hotel was to lie with a Management Council established by PT Wisma (Ibid., para.93). After reviewing the conflicting evidence about the presence of military personnel at the hotel during March 31st and April 1st and thereafter (Ibid., paras.97-109), the First Tribunal declared that it was "satisfied that on or about the

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* The First Award speaks of March 15, 1978, which is surely a misprint.

critical period there was a taking of the claimants' rights to the control and management of the land and all the Kartika Plaza building" (Ibid., para.155). Further, the First Tribunal was "satisfied that a number of army and police personnel were present at the hotel premises on the 1st April, 1980 and by their very presence assisted in the successful seizure from PT Amco of the exercise of its lease and management rights" (Ibid., para.155).

11. After intervention by the army and police on March 31/April 1 1980, Colonel Soejupto, Chief Executive of PT Wisma, issued a "Decree or Letter of Decision" whereby a Management Council, to be chaired by Lt. General R. Soerjo, was given the authority to manage the property, and PT Amco was relieved of its management role. (Ibid., para.92). The First Tribunal found that "[o]n the basis of the proven actions and omissions of the army/police personnel in connection with the takeover the Tribunal cannot but draw the conclusion that an internationally wrongful act was committed and that this act is attributable to the Government of Indonesia which therefore is internationally responsible". (Ibid., para.172).

12. After PT Wisma took over control and management of the Kartika Plaza on March 31/April 1, 1980, it reported certain information to the Capital Investment Coordinating Board (Bodas Koordinasi Penannanam Modal, hereafter "BKPM"). This body is responsible for examining applications by foreign investors, making recommendations to the Indonesian government and supervising the implementation of approved investments. After holding meetings with, and receiving further information from, representatives of PT Wisma, a report made by Mr. Usman of BKPM recommended that PT Amco's Foreign Capital Investment Licence be reviewed. Pursuant to a request by the Chairman of BKPM on May 12, 1980 for guidance, the termination of the licence was approved by the President of Indonesia and on July 9, 1980 BKPM revoked PT Amco's licence. (For details see First Award, paras.110-130).

13. On April 24, 1980 PT Wisma filed a suit claiming that PT Amco had failed to perform its investment and reporting obligations required by BKPM and the Bank of Indonesia and asked the Central Jakarta District Court to rescind the 1968 Management and Lease Agreement, as amended, and the 1978 Profit

Sharing Agreement. On May 28, 1980, two days before PT Amco was notified of the suit, the Court granted ex parte PT Wisma's request for an interlocutory decree giving PT Wisma the right to manage the Kartika Plaza pending the final outcome of the suit. PT Wisma was ordered to make a monthly accounting of its management. On July 8, 1980 the Greater Jakarta Court granted PT Amco's request to postpone application of the interlocutory decree. On July 28, 1980 PT Wisma appealed this judgment, notifying the Indonesian Supreme Court that BKPM had revoked PT Amco's licence. On August 4, 1980, the Supreme Court reversed the judgment of the Greater Jakarta Court.

14. The case now returned to the courts for hearings on the merits. By November 1983 it had reached the Jakarta Appellate Court, which found in favour of PT Wisma. (For details, see First Award, paras.134-141).

15. In bringing a case before the First Tribunal, PT Amco claimed that Indonesia had seized its investment in the building and management of the Kartika Plaza complex and then unjustifiably

cancelled its investment licence. Indonesia contended that any military or public assistance was only directed to supporting the legal right of PT Wisma to control the hotel and was not a seizure of the hotel by the government. It denied PT Amco's claim that the cancellation of the investment licence was unlawful, both procedurally and substantively, and that the courts had acted in an unlawful manner in rescinding the Lease and Management Agreement. In its counterclaim Indonesia asserted that, as the cancellation of the investment licence was justified, PT Amco was obliged to return tax and other concessions granted by Indonesia. A full description of the claims, defences and counterclaim are to be found at paragraphs 142-146 of the First Award.

16. The First Tribunal found in favour of the claimants, ordering the sum of US$3,200,000 with interest to be paid, outside of Indonesia. 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 ICSID.

17. 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 First Award which had been made on November 20, 1984. An Ad Hoc Committee was established pursuant to Article 52(3) of the ICSID Convention. The Ad Hoc Committee ordered, and later confirmed, a stay of enforcement upon the furnishing by Indonesia of an irrevocable and unconditional bank guarantee.

18. Written pleadings and oral hearings ensued in 1985 and 1986. On May 16, 1986 the Ad Hoc Committee rendered its Decision (1 Int.Arb.Rep. (1986) 649; 25 ILM (1986) 1439). It decided to annul the First Award "as a whole for the reasons and with the qualifications set out above." (Decision of the Ad Hoc Committee, final para.). The annulment did not extend to the First Tribunal's findings that the action of the army and police personnel on March 31/April 1, 1980 was illegal. The annulment did however extend to the findings on the duration of such illegality and on the amount of the indemnity due on this account. (Decision of the Ad Hoc Committee, p.47).

19. On May 12, 1987, pursuant to Article 52(6)* of the ICSID Convention and Rule 55 of the Arbitration Rules, Amco submitted to the Secretary General of ICSID a Request for Resubmission of a Dispute. On June 12, 1987, Indonesia submitted to the Secretary General of ICSID a Request for Resubmission of a Dispute. On October 20, 1987 the present Tribunal ("the Tribunal") was constituted. On December 21, 1987 the Tribunal issued a Provisional Indication as to what determinations of the First Tribunal had been annulled by virtue of the Decision of the Ad Hoc Committee and what remained as res judicata. On January 13, 1988 Amco submitted written observations and exhibits on the res judicata effect of the First Award in view of the Decision of the Ad Hoc Committee on May 16, 1986. On January 14, 1988 Indonesia submitted its written observations, exhibits and an expert Legal Opinion on these matters. Various other jurisdictional matters were contested. On January 30 and February 1, 1988 oral hearings were held in London on jurisdiction, including on questions of res judicata.

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* In fact, Amco referred to Article 53 of the Convention.

20. The Tribunal considered the representations of the parties in deciding on the scope and effect of the Decision of the Ad Hoc Committee to annul the First Award, with certain qualifications. On May 10, 1988, the Tribunal gave its Decision on Jurisdiction (3 ICSID Review - Foreign Investment Law Journal 166 (1988); 27 ILM (1988) 1281).

21. The parties filed the following briefs on the merits, along with extensive legal and factual exhibits:*

Claimants' Memorial, July 11, 1988.

Respondent's Counter-Memorial, September 12, 1988.

Claimants' Reply, October 17, 1988.

Respondent's Rejoinder, November 14, 1988.

A variety of correspondence on different issues has occurred between the parties and the Tribunal; and action (including certain interlocutory decisions) has been taken upon this correspondence as necessary.

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* Several of the factual exhibits had not been produced before the First Tribunal.

22. Hearings on the merits were held in Washington, D.C. from September 18 to 29, 1989. The following witnesses testified:

Ms. S. Pellaupessy

Mr. W.S. Djohari

Dr. A. Noer

Mr. N. Hanafi

Mr. E. Abdurrachman

Mr. D. Mathias

Professor D. Dapice

called by Indonesia.

Mr. J. Fox

called by Amco.

During these hearings oral argument was presented for the Claimants by

Mr. William Rand

Mr. Robert Hornick

Mr. Paul Friedland.

Oral argument was presented for the Respondents by

Ms. Carolyn Lamm

Mr. Charles Brower

Professor Sudargo Gautama

Mr. Aldo Badini.

II. THE CLAIMS, DEFENCES AND COUNTERCLAIM

23. In its Request for Resubmission Amco advanced five essential claims: namely, that by reason of wrongful acts of the Indonesian army and police, it had suffered damage; that in revoking its licence, BKPM gave Amco no proper warning and denied it a fair hearing, a chance to rebut charges or to make good any deficiencies; that BKPM was not substantively justified in revoking the licence on either of the two grounds given in its revocation order; that the rescission by the Indonesian courts of Amco's Lease and Management Agreement was wrongful because it had no proper jurisdiction of the action and no evidence was presented of breach of contract; and that Indonesia was unjustly enriched as a consequence of these unlawful acts. Damages of "not less than US$15,000,000" were claimed.

24. The Republic of Indonesia, in its own Request for Resubmission, claimed that as Amco had breached its licence, it must make restitution of tax and other concessions granted only by virtue of the licence. These were itemized as a US$77,955 exemption from capital stamp duties; a Rp. 29,691,965 exemption

from company tax in 1972, together with penalties and interest; and a Rp. 424,348,207.08 exemption from customs duties (US$1,022,525.70 at the prevailing exchange rate). Indonesia further claimed tax allegedly evaded by Amco since 1973, estimated to be in excess of US$150,000. In addition, Indonesia claimed that, as a provisional measure pursuant to Rule 39 of the ICSID Arbitration Rules, Amco should pay to Indonesia one half of the cost of the annulment proceeding, which amounted to US$103,313.75, with accrued interest until the date of effective payment.

25. In its Decision on Jurisdiction of May 10, 1988, the Tribunal found that the tax fraud claim was beyond its jurisdiction. The Tribunal further ruled that the pleadings on the merits should proceed with the parties being in the respective positions they were before the First Tribunal. Indonesia's remaining claim in its Request for Resubmission thus became, in the proceedings on the merits, a counterclaim.

26. In its Memorial, Amco characterised its first cause of action variously as assistance by Indonesia in "the unlawful taking of the hotel from Amco on or

about April 1, 1980" (p.21) and as "an unlawful taking of an interest in a hotel" (ibid). Indonesia, in its Counter-Memorial, asserted that the only loss from the activities of the army and police was a temporary loss of Amco's right of control over the hotel; and that that loss ended either on the date of the licence revocation (July 9, 1980) or when the army and police left the hotel in October 1980.

27. Amco did not break down its quantification of loss claimed for the "taking of the hotel" or of the "interest in a hotel" into periods related to claims against the army and police, BKPM and the courts. It advanced a global claim for this loss. By contrast, Indonesia claimed that the temporary loss of control by Amco caused by the army and police action (the illegality of which was res judicata pursuant to this Tribunal's Decision on Jurisdiction) had no intrinsic value. In oral argument it was thus said there was either no quantifiable damage or the damage was de minimis.

28. Amco contended in its Memorial that damages due "for the taking" (p.27) were not "cut off by" (i.e. did

not terminate upon) the licence revocation (the second cause of action), which was procedurally unlawful (which finding this Tribunal had in its Decision on Jurisdiction held to be res judicata). In its Memorial Amco affirmed that violation of due process gave rise of itself to compensation. This was denied by Indonesia, which took the position in its Counter-Memorial and Rejoinder that procedural irregularities must be shown to be the cause of any injury before damages are due; and that the damage was caused by PT Amco's own failures, which led to a lawful revocation of the licence by BKPM.

29. Amco also contended that its entitlement to compensation was not "cut off by" the Indonesian Supreme Court decision of April 30, 1985, which affirmed lower court judgments terminating the Lease and Management Agreement. Although it was res judicata that these lower court judgments did not terminate any rights to compensation held by Amco, Indonesia claimed in its Counter-Memorial that the Supreme Court decision, being the final judicial recourse, had this effect.

30. In its Memorial Amco's second cause of action concerned the unlawfulness of the licence revocation. Amco contended that compensation was due for the procedural violations by BKPM, regardless of any substantive grounds. Amco further contended that BKPM's substantive decision to revoke the licence was unlawful. Two arguments were advanced in support of this claim. First, there had been two stated grounds of revocation, but one of these had been found by the first Tribunal to be unlawful (a finding that was res judicata). The remaining single ground by itself was not sufficient to sustain the substantive finding. Second, the remaining ground of under-investment and under-registration of foreign equity capital was said to be invalid.

31. Indonesia rejected each of these arguments and further found that the licence revocation was valid on other grounds also, even if these were not explicitly relied on in the revocation decision.

32. Amco's third cause of action was that Indonesia would be unjustly enriched if permitted both to retain the benefits of Amco's investment and the

earnings which Amco could have made from its investment. Indonesia, denying that Indonesian law knew the concept of unjust enrichment or that international law regarded it as a distinct rather than merely ancillary right, said that it was not Indonesia but rather PT Wisma that had benefitted from hotel revenues. Any benefit to Indonesia from PT Amco's investment was too indirect, speculative and unquantifiable.

33. PT Amco had in its Request for Resubmission quantified globally the damage claimed to be due, setting it at US$15,000,000, plus interest compounded annually at a rate per annum equal to the Singapore Interbank Offered Rate plus 1% from April 1, 1980, the date of effective payment. However, in the Memorial the sum claimed was US$10,171,000. The First Tribunal had found interest to be owed at the Indonesian statutory rate of 6% per annum from January 15, 1981 to the date of effective payment. Amco claimed in its Memorial that, although this finding was res judicata, it was inapplicable in the present arbitration because Indonesian law makes market rate interest applicable to monetary awards for wrongful acts and for unjust enrichment claims. Indonesia contended that the res judicata character

of the finding of the first Tribunal did not permit of such arguments.

34. Indonesia also made a counterclaim in its Counter-Memorial for the restitution of all monies which would have been paid by PT Amco, for example as tax and import duties, but for the tax holiday granted by the licence. This was done on the basis that under Indonesian law a failure to comply with foreign investment law resulted in the withdrawal of all the facilities that had been granted from the date of their approval. These sums were quantified at US$1,936,914.92.

35. For the determination of these issues the Tribunal has had the benefit of the oral and written submissions of the parties, and the witnesses who testified. The Tribunal has also had access to the transcript of argument and testimony before the First Tribunal.

III. ISSUES TO BE DETERMINED

36. The Tribunal's Decision on Jurisdiction identified what issues of the First Tribunal are res judicata for purposes of the present Tribunal, and what issues may be reargued. The claims, defences and counterclaims of the parties have been formulated accordingly. The issues have, quite naturally, been approached by the parties in ways that are not identical. In resolving those aspects of the dispute between Amco and Indonesia on which there are no res judicata findings of fact or law, the Tribunal finds that the following issues arise:

- What is the applicable law?

- What was the damage caused to Amco by the unlawful acts of army and police?

- Did Indonesia's responsibility by virtue of the acts of the army and police continue beyond July 9, 1980?

- What is the compensation due for any damage shown to be caused by the acts of the police and army?

- Does the procedurally unfair character of the BKPM decision to revoke Amco's licence (which finding remains res judicata for this arbitration) per se entitle Amco to damages; and if so how are these damages to be assessed?

- Was the BKPM decision unlawful, either by virtue of procedural irregularities, or for substantive reasons?

- If the liability of Indonesia continued beyond the date of revocation by BKPM, was it brought to an end by the judgment of the Supreme Court of Indonesia on April 30, 1985, affirming the findings of the lower courts that the Lease and Management Agreement should be rescinded?

- If BKPM's decision to revoke Amco's licence is unlawful, what compensation is due?

- What are the relevant principles of any due compensation?

- What are the techniques by which any due compensation is to be calculated?

- If BKPM's revocation of Amco's licence is

lawful, is Amco required to repay all tax and other concessions which it received by virtue of the licence?

IV. APPLICABLE LAW

37. The question of applicable law was not specifically addressed in the written pleadings of the parties. Amco simply noted that "where ... the law of the host state contains no express rule on the point, the Tribunal is authorized under Article 42(1) [of the ICSID Convention] to look to international law" and cited the Decision of the Ad Hoc Committee in the case of Klöckner v. Cameroon (Memorial, p.24; XI Yearbook of Commercial Arbitration, (1986) p.162). Indonesia, in both its Counter-Memorial and Rejoinder, advanced legal arguments on each of the issues under first, the heading of Indonesian law and second, the heading of international law. In oral argument, however, Mr. Brower explained that international law was only relevant if there was a lacuna in the law of the host state, or if the law of the host state was incompatible with international law, in which case the latter would prevail. Indonesia provided the Tribunal with many authorities and with travaux préparatoires of the

ICSID Convention, said to sustain its view on the applicable law under Article 42(1).

38. Article 42(1) of the ICSID Convention provides:

> "The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable."

The First Tribunal stated that

> "[t]he parties having not expressed an agreement as to the rules of law according to which the disputes between them should be decided, the Tribunal has to apply Indonesian law, which is the law of the Contracting 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." (First Award, para.148).

The Ad Hoc Committee, in its Annulment Decision, stated that it considered Article 42 "controlling, in exactly the same way that the Tribunal regarded the same article decisive of the law governing the substantive dispute before it." (Decision on Annulment, para.19). The Ad Hoc Committee then went on to state that Article 42(1) of the ICSID Convention "authorises 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 law are in collision with such norms" (ibid, para.20). The role of international law is thus "supplemental and corrective" under Article 42(1) (ibid, para.22).

39. Amco submitted no contrary arguments or authorities on the question of applicable law, and there was no contested issue between the parties on this matter.

40. This Tribunal notes that Article 42(1) refers to the application of host-state law and international law. If there are no relevant host-state laws on a particular matter, a search much be made for the relevant international laws. And, where there are applicable host-state laws, they must be checked against international laws, which will prevail in case of conflict. Thus international law is fully applicable and to classify its role as "only" "supplemental and corrective" seems a distinction without a difference. In any event, the Tribunal believes that its task is to test every claim of law in this case first against Indonesian law, and then against international law.

V. THE CONSEQUENCES OF THE FINDING OF THE FIRST TRIBUNAL THAT THE CONDUCT OF THE ARMY AND POLICE CONSTITUTED AN UNLAWFUL ACT FOR WHICH THE GOVERNMENT OF INDONESIA IS INTERNATIONALLY RESPONSIBLE.

41. In the First Award, certain findings were made relating to the role of the army and police. The First Tribunal found that the events of April 1, 1980 onwards deprived Amco of the right to operate the hotel. Referring also to the revocation of the licence, the First Tribunal described "the prejudice suffered" as consisting of "the loss of incorporeal, patrimonial and potentially profitable rights" (First Award, para.253). Having then established a causal link between the "prejudice suffered" by loss of the right to operate the hotel, and the illegal acts of the army and police (para.257), the First Tribunal then proceeded to determine damages. It did not make a distinction between damages related to prejudice caused by the acts of the army and police, and prejudice caused by the licence revocation.

42. The Ad Hoc Committee, while nullifying the conclusions of the First Tribunal on the calculation and the amount of the investment made by Amco, and on the non-materiality of the shortfall, upheld the findings of illegality of the acts of the army and police (Decision of the Ad Hoc Committee, para.60). Further, in a section entitled "On the grant of damages resulting from the action by Army and Police personnel", the Ad Hoc Committee reiterated that it did not annul "this part of the Award, nor the finding that Amco is entitled to damages from Indonesia". (Ibid., para.108.)

43. After the Decision of the Ad Hoc Committee, and the requests by the parties for the resubmission of the dispute, the present Tribunal noted that there was agreement between the parties that "the responsibility of Indonesia to compensate PT Amco for damages for the events of March 31-April 1, 1980" was res judicata (Decision on Jurisdiction, paras.48-49). It further held that it was also res judicata that compensation would be due for the unlawful acts of the army and police up to July 9, 1980 (para.93). The finding that violation by virtue of the acts of the police and army continued beyond July 9th was however nullified and thus fell

to be considered afresh by the present Tribunal.

44. In its Counter Memorial in the present proceedings, Indonesia claimed that

> "PT Amco's loss as a consequence of the activities of the Army and Police was at most the loss of its non-exclusive right to manage... Its value, if any, was de minimis." (Counter Memorial, pp.109-110).

45. In its Reply Amco contested that this ignored the finding of the First Tribunal that:

> "[w]hile it is right to say that the claimants' deprivation of the rights they had acquired did not result from this de facto dispossession, the fact of the matter is that the actual prejudice they suffered, consisting in the deprivation of the profit they were entitled to expect by exercising said rights, commenced on April 1, 1980, and that at this date, the cause of the prejudice was the dispossession: in other words, during this very first stage, there was effectively a causal link between the dispossession and the prejudice." (First Award, para.257, cited at p.5 Reply).

Amco thus took the view that it was not open to Indonesia, given the findings of this Tribunal on res judicata, to contest that harm had occurred consisting of the deprivation of the profits to which they were entitled; only the amount and its

calculation could be contested before this Tribunal.

46. As indicated above (paras.42-43), it is res judicata that the army and police acted unlawfully in respect of the events of March 31-April 1 1980; that PT Amco suffered prejudice thereby; and that it is the responsibility of Indonesia to compensate for such prejudice. However, the precise nature of the prejudice suffered during this period and its quantification remain issues properly open before this Tribunal.

47. The title to the hotel building and land was held by PT Wisma and the support of the army and police in the actions of March 31-April 30 thus did not expropriate the hotel as such. The rights held by PT Amco in relation to the hotel were rights of management and control on the one hand, and of participation in the profits on the other. Indonesia contended that rights of management and control have no inherent value, but are rights ancillary to the entitlement to a share of the profit. Indonesia claimed that unless it could be shown that the loss of rights of management and control caused a diminution of profits by comparison

to what would have been achieved if Amco had retained management, loss of management rights of itself occasioned no harm to Amco and thus gave rise to no compensation.

48. Indonesia in oral argument elaborated its position that while the action of the army and the police was relevant to the loss of management and control, it did not mean that Amco could not continue to receive the share of profits to which it was entitled under its 1978 Profit Sharing Agreement with PT Wisma. Amco contended that paragraph 257 of the First Award (see above, para.45) made it res judicata that the dispossession effected by the army and police did indeed prevent the receipt by Amco of its share of the profits.

49. The wording of paragraph 257 is not entirely easy. It is not certain whether, in its reference to "deprivation of the profit they were entitled to expect", the First Tribunal was referring to a de facto inability to receive, from April to July 1980, its share of the profits under the 1978 Agreement; or whether it was rather saying that the legal right to secure profits from the Hotel Kartika venture was

ultimately lost by the revocation decree of July 9th, the path to which began with the dispossession of March 31-April 1. It is not sufficiently clear to the present Tribunal which meaning was intended by the First Tribunal; and neither the Ad Hoc Committee's Decision at paragraph 109 nor the present Tribunal's Decision on Jurisdiction, paragraph 93, makes a finding on this particular aspect.

50. The Tribunal believes that paragraph 257 is not to be understood as entailing a res judicata in the sense contended for by Amco (para.42, infra). The Decision of the Ad Hoc Committee was to annul with qualifications, one such being the illegality of the acts of the army and police. But paragraph 257 goes beyond mere affirmation of such illegality and is therefore not to be treated as res judicata. Accordingly, the Tribunal therefore finds that, while it is res judicata that the army and police acted unlawfully up to July 9, 1980, and that some compensation is due therefor, it is necessary to identify exactly what rights were lost; and in respect of any so lost, the damage caused.

51. In a situation where management is not being paid a fee under a management service contract, its remuneration lies in the commercial importance that management will have on profitability. The evidence before the Tribunal indicates that the 1980 results were significantly above those for 1979. This was true of the first quarter of 1980 (under the PT Amco management) as much as for the rest of the year. It also may have been the case that 1979 had been an unusually poor year for hotels in Jakarta. On the other hand, the Tribunal has no way of knowing what the profit levels would have been during 1980 under Amco management.

52. Whatever the level of profitability, Amco take the view that as of April 1, 1980, de facto they were unable to secure their entitlement to their share of profits; and read paragraph 257 of the First Award as affirming this. Put differently, Amco contends that the loss of their rights under the Profit-Sharing contract of 1978 occurred on April 1, 1980. In Amco's view April 1 marked the date of taking their profit-sharing rights and was thus the date at which those rights were to be valued for compensation purposes.

53. Indonesia insists that, notwithstanding unlawful action by the military and police, there was no taking of PT Amco's profit share rights on April 1, for two reasons. First, the events of March 31-April 1 dispossessed PT Amco of its right to manage, but did not at all touch upon its right to a share of profits under the Profit-Sharing Agreement. Second, any difficulty PT Amco might have experienced in securing these profits was a matter between PT Wisma and PT Amco. Even if PT Wisma had refused to allow PT Amco its share of the profits, such act should not be attributed to the Government of Indonesia, PT Wisma being a legally distinct body.

54. On this last point the Tribunal notes that PT Amco's current management rights were held under the 1978 Profit Sharing Agreement with PT Wisma and notice of their termination was issued by PT Wisma, and not the Government of Indonesia. Nonetheless, the First Tribunal found Indonesia responsible for acts which led to the dispossession of PT Amco from its rights. By the same token, if PT Amco's entitlement to participation in the profits was taken from it at the same moment, it cannot be precluded that in

principle Indonesia could be held responsible.

55. However, it still remains to be determined whether PT Amco did at that juncture lose, de facto or otherwise, its right to a share of the profits.

56. There has been no evidence before the Tribunal to indicate that PT Amco made a demand for its share of the profits during the period April-July 1980. However, the Tribunal was informed by Indonesia (and it was not contested by Amco) that settling of the profit share would normally have occurred only on an annual basis. (See Previously Filed Documents, Vol.I, Tab.41.) It is the case that the Central Jakarta District Court, when ruling on May 28, 1980 on PT Wisma's claim for an interlocutory decree entitling it to manage the Hotel Kartika pending further legal proceedings, ordered that PT Wisma render a monthly account and justification of the management. (Indonesia Factual Appendix B, Tab.2). This order, while a normal protection in an interlocutory order where the final issues remain to be determined, necessarily envisaged the possibility that the Profit Sharing Agreement was still operational at that point.

57. The present controversy as to whether the events of April 1, 1980 impinged upon PT Amco's entitlement to participation in the profits occurred against a background described in the First Award as "a kind of Cold War" (para.104). Each side had taken certain actions and issued certain orders to try to secure its position. PT Amco kept its offices in the building until October 1980 (for details of these various actions and events, see First Award, paras.102-109). It was suggested to the Tribunal that meetings were in fact continuing throughout this period between PT Amco and PT Wisma, though there is no evidence that anything was discussed at such meetings save PT Wisma's demands for the full implementation of the transfer of management.

58. The Tribunal finds that although PT Amco was prevented from exercising its right to management and control due to the events of March 31-April 1 1980, it has not been shown that at this time it also lost its entitlement to its share of profits.

59. Management rights are generally considered in the hotel industry to be a valuable and sought-after commodity. No quantification for this loss per se has been offered by PT Amco. Two issues have arisen, however, in relation to loss of management rights. First, the Tribunal must consider whether the taking of PT Amco's management rights caused a level of profits to be reached under PT Wisma that was less than it would otherwise have been. It was suggested by Indonesia in oral argument that the profit levels secured under PT Wisma management were in fact higher than those secured in the period under PT Amco management. Be that as it may, it cannot be shown what PT Amco might have achieved, had it continued to manage, compared with the profit levels that were actually achieved under PT Amco's management. This comparison is necessarily hypothetical. No figures were directed by PT Amco to the Tribunal on this point, nor was any specific portion of the US$15,000,000 claimed said to be attributable to this element of loss.

60. Amco further claimed that the undoubted loss of its rights of management and control also entailed loss of access to the daily cash flow of the hotel. This loss too was not quantified by Amco, but the access

to the cash flow was said to be commercially valuable in the property investment business. For its part, Indonesia noted that nothing in the 1978 Profit Sharing Agreement (Indonesia Exh., Vol.II, Tab.4) gave any specific contract right to PT Amco for access to the cash flow. Indonesia further contended that, whereas Amco might have lost control over the daily cash flow, such right was in any event fiduciary in nature, with Amco being accountable for any surplus over hotel needs, and any interest thereon. This surplus and interest would be part of the profits to be shared under the 1978 Agreement, being part of the Net Income referred to in paragraph 3 thereof.

61. It is res judicata that access to the cash flow was lost to Amco by virtue of the actions of the army and police (First Award, para.257, first sentence). The First Tribunal did not, however, attempt to address the character of this loss. Even though Amco's entitlement to the cash flow appears to have been as a matter of practice, rather than as any express contract right, such access would be a normal incidence of management. No evidence was put before this Tribunal as to practice between the parties in relation to the exercise of this access

to the cash flow. Amco's access to the cash flow appears, however, to have been accepted by both parties. The Tribunal believes that control of the daily cash flow was fiduciary in nature. Amco's entitlement was to make disbursements from the cash flow for the necessary expenditures of the hotel. Insofar as any balance was interest bearing, that interest was for the benefit of both parties. No damages can therefore be awarded for the loss of access to the cash flow.

62. None of the above is to be taken as condoning by the Tribunal of military intervention as a method unilaterally to resolve disputes concerning foreign investment. If it was desired to remove Amco from management, appropriate Indonesian legal procedures existed to examine this possibility. It is not sufficient to have had recourse to these procedures for related, but different, legal purposes after the physical loss of management control by reason of the army and police action. The Tribunal's task, however, has been to identify the precise prejudice caused by these undoubtedly unlawful acts.

63. While its analysis does not lead to the award of damages for the aspects of military intervention thus far examined, a further matter remains. The loss of the right to manage entailed a general disturbance caused to Amco. Some details of this disturbance are recalled at paras.101-108 of the First Award; and this consequence of the de facto loss of the right to manage on April 1 was also referred to in oral argument. The Tribunal finds that such harm was caused as a result of the illegal police and army intervention, and continued at least until Amco's licence was revoked on July 9, 1990. A sum of damages will be awarded.

VI. THE BKPM REVOCATION OF PT AMCO'S LICENCE

(a) The so-called "single limb" argument

64. Amco claimed that the revocation was not substantively justified because one of the grounds on which it was said to be based has been held invalid by the First Tribunal. It argued that a decision unable to rely on that struck-down ground was necessarily invalid.

65. The BKPM revocation decision (Indonesia Exh., Vol.II, Tab.63) contains several recitals of fact, and two clauses that may properly be said to be recitals of law which state reasons for the decision to revoke. One such reason was the clause rehearsing Amco's failure to invest the required sum of foreign capital. The other was

> "2. that based on the Sub Lease Agreement dated October 15 1969 jo [sic] October 13, 1970, P.T. Amco Indonesia (Lessor) delivered the management of Hotel Kartika Plaza to P.T. Aeropacific Hotel Corp. (Lessee), therefore it is not P.T. Amco Indonesia which fulfilled the obligations as stipulated in the said Lease and Management contract..."

The First Tribunal held (First Award, paras.206-219) that the assigning of the sublease was not a sufficient ground for revocation; and the present Tribunal has determined that finding to be res judicata (Decision on Jurisdiction, para.57).

66. Amco contends that as these are not stated to be grounds in the alternative, the striking down of the validity of the one (the assignment of the sublease) leaves the other (insufficiency of investment) as inadequate to sustain, alone, the decision to revoke.

67. The matter is one of construction. The parties cited no authorities, whether of Indonesian or international law, to support their positions. Although the revocation decision does not, it is true, say that the two grounds are grounds in the alternative, it is equally true that it does not state that they are cumulative. Looked at as a whole, there is nothing in the wording or structure of the decision that leads one to suppose that the one ground is dependent on the other or insufficient without the other. More particularly, there is nothing in the wording or structure of the revocation decision that would entitle this Tribunal to conclude that BKPM would have been unable to revoke by reference to insufficiency of investment without also relying on the assignment of the lease.

68. This finding of construction is sustained by an examination of the relevant Indonesian legislation. Law No.1 of 1967 (Factual Appendix A to Counter-Memorial, Tab.1) contains provisions on foreign capital investment that stand separately from other matters. The situation is not changed by the Announcement of the Foreign Exchange Bureau (BLLD) on July 25, 1967, elucidating Law No.1 of 1967

(Ibid., Tab.2). Paragraph 1 of this Announcement emphasises that in foreign capital investment the investor bears the risk. Decree No.63/1969 "Regulations and Procedures for Exercising Control over Capital Investments" (Ibid., Tab.3) simply provides for withdrawal of the licence "if the capital investment plan is not implemented in accordance with the approval that has been granted"; there is no suggestion that an alleged insufficiency of investment would be an insufficient ground to cause such sanction, if it was not also coupled with, e.g., a failure by the investor to bear all the risk.

69. Whether looked at from the perspective of the specific BKPM revocation order, or the underlying applicable Indonesian legislation, the BKPM decision could in principle be valid notwithstanding the striking down of the validity of the "second limb" of the decision.

(b) Procedural Irregularities and the BKPM Decision

70. Amco's second cause of action lay in its claim that its licence had been wrongfully revoked, entitling

it to full compensation therefor. There were many interrelated threads to this cause of action. The starting point was the finding of the first Tribunal that, as a matter of Indonesian law and of international law, the procedures leading to the deprivation of PT Amco's licence had violated due process. (First Award, paras.198, 201, 203.) The first Tribunal's finding that the procedure of the licence revocation was unlawful is res judicata. (Decision on Jurisdiction, para.48). This starting point was necessarily common to both parties. However, they made different arguments and drew different conclusions. Amco contended that the due process violation of itself entitled it to compensation and that this would be so even if - which PT Amco denied - the revocation decision of BKPM were substantively valid. Amco had contended in its first cause of action that damages lay for the army and police intervention on March 31-April 1, and that these damages should reflect a taking of the right to management and control, access to cash flow and PT Amco's inability to secure participation in the profits. Amco contended that the procedurally unlawful revocation of the licence was not only incapable of operating to "cut off" such damages running from April 1st, but was itself a further ground for the award of damages.

71. Indonesia claimed that procedural violations did not per se give rise to damages, unless it could be shown that it was the very lack of due process that led to an unlawful substantive decision. Further, rather as Indonesia had contended that the events of March 31-April 1, while illegal, had caused no significant damage, so it was contended that the unlawful BKPM procedures occasioned no damage - partly because the revocation would in any event have occurred for proper substantive reasons, and partly because PT Amco was in fact afforded later opportunities to have the initial revocation decision revised.

72. This last argument comes close, as Amco pointed out, to a reopening of res judicata findings of procedural illegality. However, the Tribunal was prepared to countenance Indonesia's argument that there was new evidence which could be properly put before the Tribunal which, while it could not overturn a res judicata finding of procedural illegality, could still go to showing lack of damage arising therefrom. It was on that basis that the Tribunal was reminded that the Revocation Order

itself (Indonesia Exh, Vol.II, Tab.63) contained the possibility of rectification in the face of error; and it was suggested that evidence showed that PT Amco sought to have the Revocation Order reviewed (Ibid., Vol.II, Tab.65 and Vol.VII, Tab.124). The Tribunal's attention was also drawn to certain documentation which was not before the first Tribunal, including representations made by Washington lawyers acting on behalf of Amco Asia to the Indonesian Embassy in Washington (Ibid., Vol.VII, Tab.112); representations made by Indonesian lawyers to the Chairman of BKPM (Ibid., Vol.VII, Tab.113); and to PT Wisma (Ibid, Vol.VII, Tab.124). It was put to the Tribunal that it was the inability of PT Amco to satisfy the licence criteria, rather than an inability to have BKPM reconsider matters, that caused any harm suffered by PT Amco.

73. Amco contended that damages due as a result of the unlawful acts of the army and police of March 31/April 1, could not be "cut off" by a BKPM decision that was procedurally unlawful. Further, the fact that the BKPM decision was procedurally unlawful, itself gave rise to damages. As has been indicated, this Tribunal finds that the events of

March 31-April 1, while unlawful, occasioned damages only in respect of disturbance to PT Amco. The significance of the question of whether a procedurally unlawful revocation of the licence by BKPM could operate to "cut off" the flow of damages thus in large part falls away. The other facet of the second Amco cause of action - namely, whether the violations of due process in the revocation of the licence per se entitle Amco to recover damages - remains for consideration. Amco contended that even were BKPM's decision substantively valid, damages would be due for the procedural violations.

74. However, this last question, on which the Tribunal heard much interesting argument on Indonesian and on international law from both parties, is of practical importance only (given that Amco has offered no separate quantification for such head of damage) if BKPM's revocation is found to be substantively lawful. That issue will therefore be addressed next.

75. The Tribunal believes that the relevant issue is not whether (as Amco contends) procedural irregularities generate compensation, even if the substantive

decision might be lawful; nor whether (as Indonesia contends) compensation is only due for procedural violations if these are themselves the cause of an unlawful substantive decision. Rather, the issue that must be determined is whether there exists a generally tainted background that necessarily renders a decision unlawful, even if substantive grounds may exist for such a decision. This background includes, but is not limited to, the question of procedural irregularities.

76. In early 1980 there existed serious disagreements between PT Amco and PT Wisma on a variety of matters, including the sums due to each party under the 1978 Profit-Sharing Agreement. By late March Colonel Soetjipto, the Chief Executive Officer of PT Wisma, Major Malonda, the Security Coordinator of the hotel, General Soerjo, a Director of PT Wisma, and others, were preparing for the takeover of control on March 31. (See First Award, para.91). The letter by which PT Wisma informed PT Amco that it was taking back control of the Wisma Kartika property dated March 31, 1980 (Indonesia Exh., Vol.II, Tab.55), was in fact signed by General Soerjo on March 28, 1980 (First Award, para.91). On March 31-April 1 1980 the army and police

intervened and PT Amco, in spite of attempts to re-secure its position (Ibid, paras.98-108), effectively lost control of the management of Hotel Kartika. Some members of the armed forces remained in the hotel until October 1980 (Ibid, para.109). The intervention of the army and police and their presence are elements that cannot be ignored in the ensuing events.

77. On April 12 1980, General Soerjo, a director of PT Wisma and now Chairman of the PT Wisma-appointed Management Council of the Kartika Hotel, accompanied by Mr. Zoelkarnain Ali, a former employee of PT Amco who was now employed by PT Wisma, visited the offices of BKPM. The PT Wisma representatives alleged certain irregularities with Amco's investment in Indonesia (First Award, para.112). A second meeting was held later that day between PT Wisma (represented on this occasion by Mr. Zoelkarnain Ali and Mr. Azwar Karim) and Mr. Ridho Harun and Mr. Usman Mahmud for BKPM (Ibid, para.113). The meeting was followed by a letter of April 14, 1980, from PT Wisma to BKPM (Indonesia Exh., Vol.II, Tab.57). Apparently there had been an earlier letter of April 11, but this was not placed before the First Tribunal (First Award,

para.114) or before this Tribunal. The allegations in the April 14 letter were summarised by the First Tribunal thus (ibid, para.117):-

> "... (a) PT Amco had failed to meet its investment obligations under the Investment Licence and the 1968 Lease and Management Agreement; (b) the accounting treatment in PT Amco's financial statements of the US$1,000,000 1969 ABN Loan was misleading insofar as it purported to represent 'fresh capital abroad'; (c) payments for imported goods came from Indonesian operations and not from overseas funds; (d) significant sums were transferred abroad and 'never reported and without the knowledge' of Bank Indonesia, BKPM and PT Wisma; (e) PT Amco was 'unwilling to submit to PT Wisma its periodical reports concerning the proceeds of lease of rooms and shops'; (f) goods imported by PT Amco from Hong Kong were inflated; (g) PT Amco in 1973 participated in a fictitious loan from Pan American, and treated same in PT Amco's books in such a way as 'to deceive the Government'; (h) certain payments by PT Amco to Yee On Hong, a Hong Kong company, were really payments of debts due by Pan American to Yee On Hong, and other allegations of a similar nature ..."

78. PT Wisma identified PT Amco's investment obligation by reference to the 1968 Lease and Management Agreement. That Agreement required "up to" $US4m to be invested, with US$3m as equity and US$1m in loans. PT Wisma's letter of April 14, 1980 states the obligation as $4m, omitting "up to". In any event, the correct sum to be invested by PT Amco is to be found in the official Investment Application and approval (infra, paras.4). The capital of PT

Amco, as there set out, was to be US$3m, all of which "represents foreign capital and was to be deposited stage by stage and may take the form of cash, capital goods or both." At the conclusion of the PT Wisma letter of April 14, 1980, there is a passing reference to capital investment relating to "the capital structure which they had agreed with PT Wisma Kartika or what have been stated in PT Amco Indonesia's application to the Government" (Indonesia Exh., Vol.II, Tab.57, XII(1)). But no mention is made, here or elsewhere in the letter, of the different sum of US $3m set out in the Investment Application.

79. A one hour meeting took place on April 13 1980 between representatives of BKPM and of PT Amco. (First Award, para.116; Washington Hearings, p.1230, December 22, 1983).

80. Three days after the allegations were presented by PT Wisma to BKPM for the first time, and one day after receiving the detailed allegations in the April 14, 1980 letter and enclosures* from PT Wisma,

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* The totality of which have not been produced before this Tribunal.

Mr. Usman of BKPM prepared a Summary for Mr. Ridho Harun on the matter (First Award, paras.118 and 123; Indonesia Exh., Vol.II, Tab.58). The summary was sent to the Chairman of BKPM on April 26,1980 (Ibid, Vol.II, Tab.59).

81. There are many disturbing aspects about the preparation of this summary, all of which have been pointed out by the First Tribunal and not alleviated by any evidence that was put to this Tribunal. It is the PT Wisma position on the Lease and Management Contract and the Profit-Sharing Agreement that is taken as the starting point. The First Tribunal put it thus (First Award, paras.120-121):-

> "120. Mr Usman then stated the 'problem' as he saw it: 'The management of Hotel Kartika Plaza Building was taken over by PT Wisma Kartika because PT AMCO INDONESIA did not meet the provisions in the Lease and Management Contract of the year 1968, and the Agreement of 1979 (sic) (although by this, Mr Usman was obviously referring to the 1978 Profit Sharing Agreement), and also violations of Public Law'. Which 'Public Laws' were violated, Mr Usman at this point, did not say. He then went on to give a clarification of what took place in regard to the AMCO group's investment in Indonesia, basing himself entirely on 'the meeting with representatives of P.T. Wisma Kartika on the 12th day of April, 1980 at the office of BKPM' at which 'the occurrence of the above problem was explained ...'. In his Summary Mr Usman did not say whether he spoke with/or visited Bank of Indonesia and/or the Indonesian tax authorities. His assessment of the facts, according to his report, was based

> solely on the April 12th, 1980 'meetings' with PT Wisma representatives. Furthermore, nothing was said about PT AMCO's side of the story or about his meeting with the PT AMCO representatives on April 13, 1980.
>
> "121. Mr Usman concluded: 'Based on the above facts it can be concluded that PT AMCO INDONESIA has committed violations towards the administrative provisions of the capital investment (law) in the form of: 1° - did not fulfil the invest(ment) as had been agreed upon by the Government; 2° - it has acknowledged a loan as equity; 3° - it did not send report(s) to Bank Indonesia concerning the transfer(s) abroad; 4° - within 5 years, it did not forward report(s) to BKPM on the realization of (its) capital investment; 5° - it did not report on the execution of the Sub-Lease Agreement by PT AMCO INDONESIA to BKPM, and (in) this case it also means that PT AMCO INDONESIA did not manage the project by itself. Besides that, PT AMCO INDONESIA has also committed violations which have criminal characteristics in the form of: 1°- committing tax manipulation in the sense it did not pay tax as it should as had been assessed; 2° - giving as guarantee the assets owned by the Hotel, for obtaining (a) loan, without the approval of the owner (PT Wisma Kartika)."

82. Mr. Usman's Summary did not refer to the amount or schedule of payment with regard to the foreign capital obligations of Amco Asia (First Award, para.118). Rather than correctly summarising the amount that Amco Asia was required to invest, Mr. Usman, like PT Wisma, referred to the 1968 Lease and Management Agreement and repeated the (incorrect) sums specified in the letter of April 14, 1980 (Ibid., para.119; Indonesia Exh., Vol.II, Tab.57).

Further, Mr. Usman, in reporting on PT Wisma's allegations, not only reached his conclusions at great speed but failed to visit the Bank of Indonesia for talks and thorough examination of relevant files (First Award, para.115; not refuted in evidence before this Tribunal). And although Mr. Usman testified to the First Tribunal that he visited the tax office (Ibid., para.115), no evidence placed before this Tribunal indicates that any meeting was held with customs officials regarding charges relevant to their responsibilities.

83. The manner in which Mr Usman prepared his Summary must be described as rushed, over-reliant on PT Wisma's characterisations, factually careless, and insufficiently based on detailed and independent verification with the authorities concerned. This is so whether or not any of the charges were in fact sustainable.

84. These shortcomings were not rectified by BKPM's handling of Mr Usman's Summary. Mr. Ridho, for whom Mr Usman prepared his summary, repeated Mr. Usman's statements in the brief memorandum that he sent to

the Deputy Chairman of BKPM on May 10, 1980. He added, however, additional information on the US$1m. amount which BKPM regarded as a loan. (Indonesia Exh., Vol.II, Tab.60). On May 12, 1980 the Chairman of BKPM wrote to the President of the Republic of Indonesia, requesting guidance as to whether approval would be given to a decision to terminate the licence. The First Tribunal has noted that this communication repeats inaccurate references to the 1968 Lease and Management Agreement, omits mention of Amco's investment obligations according to its investment licence, reiterates the findings of violations without any detailed evidence being presented, rather repeating "allegations [that] were a combination of those contained in the Usman and Ridho Reports" (First Award, para.126; and see Indonesia Exh., Vol.II, Tab.61).

85. The President of the Republic approved the revocation of PT Amco's investment licence on May 30, 1980. (Indonesia Exh., Vol.II, Tab.63, para.6). A further meeting took place between BKPM and PT Amco on June 16, 1980 and correspondence ensued (Indonesia Exh., Vol.II, Tabs.62 and 65). Representations were also made on July 3, 1980 by Washington lawyers to the Indonesian Embassy in

Washington (Indonesia Exh., Vol.VII, Tab.112). On July 8, 1980, the Greater Jakarta Court granted PT Amco's application for the postponement of the implementation of the interlocutory decree ordered by the Central Jakarta District Court on May 28, 1980. On July 9, 1980 BKPM issued Decision No. 07/VII/PMA/1980 revoking the said licence (ibid, Tab.63). This Decision referred to failures of PT Amco under both the 1968 Lease and Management Contract and the Investment Licence, though BKPM had no authority to revoke by reason of alleged shortcomings under a private contract. The Revocation Decision also refers to the Lease and Management Contract and the Investment Licence in terms which suggest that the investment sums in each were identical. The reference to the Lease and Management Contract was not only inapposite, but incorrect. The Decision stated that PT Amco was required "according to the Lease and Management Contract and its Foreign Capital Application" to invest $4m, $3m as its own equity.

86. Mr. Usman's Summary states that "based on the letter from Bank Indonesia dated 1st of October 1971, permanent registration of the entry of new capital was only amounted to $US983,992.65". It was

explained to the Tribunal (Counter-Memorial, p.76) that in April 1980 BKPM received PT Amco's balance sheet as of December 31, 1978, which had not previously been available; and that BKPM was now in a position to calculate that PT Amco had invested even less in equity capital, namely, $399,000.

87. Indonesia contended in its Counter-Memorial, and during oral argument, that "Under Indonesian law, the calculation of a foreign investment must be made by reference to Bank Indonesia regulations regarding registration, and the kinds of evidence the Bank requires" and that if a foreign investor were to challenge the registration in an Indonesian Court, "[t]he registration of capital by Bank Indonesia, therefore, is dispositive, absent a showing that the Bank did not respect its own regulations." (Counter-Memorial, pp.70-71; supported by Opinion of Dr. Komar Kantaatmadja ("the Komar Opinion"), Legal App. Vol.I, Tab.B, pp.64-65. This was challenged in the Opinion of Mrs Winita Kusnander, ("the Kusnander Opinion"), New Legal Exhibits to Claimants' Reply, Tab.140, pp.19-21.)

88. The Tribunal is at this juncture not addressing the substantive correctness or otherwise of BKPM's decision, but rather the background to its decision and the climate in which it was made. In that context, the Tribunal observes that it is well established that registration of investment and its recognition as foreign capital is a matter for Bank Indonesia. Prior to 1971, this task was given to the Foreign Exchange Bureau (BLLD) (Fact. App. A to the Counter-Memorial, Tab.2) and then to the Bank of Indonesia for purposes of the administration of foreign capital in the framework of Law No.1 of 1967 (Ibid, Tab.4). The Bank of Indonesia issued detailed directives for administering and reporting foreign capital investment (Ibid, Tab.7). It also issued interpretative provisions on the implementation of foreign capital investment within the framework of the Law of 1967 (Ibid, Tab.9). It is clear, especially from this last, that companies operating under the Law of 1967 are required to notify the Bank of Indonesia about the capital they have invested. The Bank grants temporary registration based on the quarterly report from the company concerned, and permanent registration after examination:

> "The said examination among others is concerning the proper prices of goods/services,

> either in regard to payment of share capital or as implementation of foreign loan in the framework of fulfilling the intended investment concerned, and to conform with the Financial Statement and Summary on Foreign Capital examined/verified by registered a Accountant Office (sic).
>
> "This registration is performed with the obligation to submit the financial report with the realisation of the capital investment within the framework of PMA [Foreign Capital Investment] to Bank Indonesia ..." (Ibid., Tab.9, para.2B).

89. This central role of Bank Indonesia, clearly envisaged in the relevant decrees and instruments, was confirmed in oral evidence. Ms. S. Pellaupessy of Bank Indonesia told the Tribunal that it was for the Bank of Indonesia to see that a licence obligation is met, and that it was a duty against the background of the terms of the licence. An account had to be opened with Bank Indonesia, precisely so that the Bank could monitor compliance. Dr. Noer of BKPM affirmed that, where compliance with the licence was under scrutiny, there would be reliance on the Bank of Indonesia. He further confirmed that in the only other case where a licence had been revoked for a failure to make the specified investment of foreign capital (Indonesia Exh., Vol.VI, Tab.99, No.10), the figures produced by Bank Indonesia were relied upon. Mrs. Kusnander suggests in her Opinion that in the legal

proceedings the Court was prepared to rely on BKPM's figures rather than the Bank of Indonesia's. In the interlocutory judgment (Previously Filed Claimants' Documents, Volume I, Tab.22) no reference was made to the BKPM figure. In the judgment of the Jakarta Court (Ibid, Tab.27), referred to by Mrs. Kusnander, the issue before the Court was, however, whether PT Amco had defaulted on its contract with PT Wisma, and not whether PT Amco had made the necessary foreign capital investments. PT Wisma thus claimed that PT Amco was obligated to pay "capital amounting to US$4,000,000" and had only "paid-in an amount of US$1,399,000". The Court agreed, rejecting PT Amco's figures. However, as the case was not concerned with foreign capital investment, the Court was never put in the position of having to choose between the Bank's figure of US$983,992.65 and BKPM's figure of US$399,000.

90. It is clear to the Tribunal, in any event, that the disparity between the Bank's figures and those of BKPM was due to the fact that the former represented capital of foreign origin; while the latter represented equity capital shown in the 1978 audited accounts (received by BKPM in 1980), less US$1m which BKPM regarded as a loan improperly disguised

as equity. While BKPM was surely entitled to make use of audited figures, these figures could not of themselves reveal what was capital of foreign origin. It would have been expected that the figures be passed to Bank Indonesia whose central role in the verification of foreign capital is clear. BKPM could perhaps have taken the view that the evidence in the 1978 accounts of shortfall of equity investment was so clear that there was no need to refer to the Bank for guidance as to the foreign capital element. But the fact remains that BKPM relied on 1978 figures, rather than ask the Bank for any further information it might have in 1980.

(c) <u>The Information Known to BKPM at the Time of its Decision</u>

91. In its written complaint of April 14, 1980 to BKPM, PT Wisma made various allegations about matters other than PT Amco's stated failure to meet its investment obligations. These included allegations of failure to make investment reports; of misleading accounting treatment of the US$1,000,000 1965 ABN loan; unreported transfer of sums abroad; inflation of prices indicated for goods imported by PT Amco from Hong Kong; and participation by PT Amco

in 1973 in a fictitious loan from Pan American, which was then misleadingly presented in PT Amco's books. (See below, para.111).

92. These matters were repeated, in the form of findings adverse to PT Amco, by Mr Usman in the report that he prepared for BKPM. (See above, para.81); and were repeated in further memoranda of BKPM, including the request to the President of the Republic for approval of a decision to terminate the investment licence. (See above, para.84). The violations of legal obligation said to entitle revocation (other than shortfall of investment) are elaborated in the Counter-Memorial, pp.87-92. Indonesia contended before the Tribunal that even if there had not been sufficient grounds for revocation by virtue of the investment shortfall, these other grounds would have entitled BKPM to terminate the licence.

93. The Tribunal heard testimony from Mr. N. Hanafi that the tax authorities became aware that the loan from Pan American was fictitious only when they discovered that there was, despite PT Amco's previous denials, a set of audited accounts for

1973. Mr. Hanafi told the Tribunal that neither he nor any other responsible officer of BKPM saw the 1973 audited accounts "before it became a case". He also informed the Tribunal that he did not know of any required second 'deficiency letter' being sent for 1973, or for any year, and that he did not check the records of payments kept in the collection section.

94. The Tribunal notes that the evidence placed before it at oral hearings in Washington (which appeared to have been processed after 1980) tended to indicate that sums in tax were still due for the period 1974 to 1977. This fact was characterised by Mr. Usman, and by the BKPM letter to the President, as "tax manipulation" (Indonesia Exh., Vol.II, Tab.58, para.5; and ibid, Tab.60), notwithstanding that no case for recovery of tax under Indonesian law had been brought against PT Amco by the date of the revocation of the licence.

95. So far as the allegations concerning inflating of import prices were concerned, the Tribunal heard from Mr. E. Abdurrachman about documents entitled "Acknowledgement of Clearance for Use", which, when

presented by the importer or his agent, and finally signed by the Chief of the Customs Section at the port, becomes authority for the release of the goods ("PPUD"). Mr. Abdurrachman informed the Tribunal that he had been unable to find PT Amco's documents, to review them, among the general filing held at the port of entry.

96. Neither tax manipulation nor import irregularities were in the event relied on when BKPM drew up its formal revocation decision. (Ibid, Tab.63)

97. Finally, the Tribunal cannot but note that in a letter of September 22, 1980, BKPM wrote to the Ambassador of the Republic of Indonesia to the Kingdom of the Netherlands, to inform him about events concerning PT Amco and PT Wisma, and told him "the take over of the management of Hotel Kartika Plaza by PT Wisma Kartika was performed without the involvement or assistance of the Indonesian Army". (Indonesia Exh., Vol.VII, Tab.120, at para.9).

98. The Tribunal finds that the whole approach to the issue of revocation of the licence was tainted by

bad faith, reflected in events and procedures.

99. At this juncture the Tribunal wishes to observe that while it has for the First Tribunal been relatively straightforward to perceive Indonesia as the wrongdoer, and Amco as the aggrieved party, to the present Tribunal matters in 1990 are less black and white. That Indonesia acted unlawfully through the police and army action is undeniable. But the evidence also reflects discreditably on Amco. Amco submitted apparently false statements concerning the availability of audited accounts for certain years. Accounts submitted to the tax authorities contained deductions for interest on a loan never entered into.

100. Amco's obligation to invest foreign capital was established by the Minister of Public Works' final approval of Amco's investment application given on July 29, 1969 (Indonesia Exh. 8, Vol., Tab.8). In the approval the Minister gave "permission to Amco Asia Corp. to establish P.T. Amco Indonesia in Jakarta, in accordance with its letter of request to the Foreign Capital Investment Technical Team". The letter of request referred to in the Minister's

decision is Amco Asia's application of May 6, 1968 to establish PT Amco Indonesia (Amco Exh., Previously Filed Claimants Documents, Vol.I, Tab.5 and Indonesia Exh., Vol.I, Tab.4) as amended by Amco Asia's letter of May 13, 1969 to the Foreign Capital Investment Technical Team (Ibid., Tab.5).

101. In the application Amco Asia undertook to invest its own assets in PT Amco Indonesia so that PT Amco Indonesia's share capital would amount to US$3m, divided into 30,000 shares with a nominal value of US$100 per share. All of the company equity was to be foreign equity. The application also provided that capital would be deposited in stages and could be in the form of cash, capital goods, or both. The application indicated that a deposit schedule and deposit form was attached. These documents have not been produced by the parties.

102. The investment application shows that the equity investment was not to be made at one time, but could be made over a period of time. Due to lack of evidence, it is not possible firmly to establish within what time period the equity investment was to be made. Indonesia's position has not been

consistent in the matter (Indonesia's Counter-Memorial, at footnote 253 states "It continues to be Indonesia's position that the investment had to be satisfied at the latest by 1972 to coincide with the scheduled completion of the hotel". But footnote 295 says that it is res judicata that the Amco Group had ten years until the end of 1978 to complete their investment. And Mr. Noer of BKPM told the Tribunal that it was still open to Amco to meet any shortfall even up to June 1980).

103. PT Wisma's letter of April 14, 1980 to BKPM (Indonesia Exh., Vol.II, Tab.57) contains a reference to the now missing document schedule annexed to Amco's investment application. According to PT Wisma the deposit schedule states that the entire capital shall be remitted to Indonesia at the latest within four years. PT Wisma does not state from what time the period starts to run. The time period stipulated in the Lease and Managment Agreement of 1968 was approximately five years from the authorities' approval of Amco's investment application.

104. The construction of the hotel was completed in late 1971/early 1972 (First Award, para.74).

105. During the period from 1968 to 1971 Amco applied to Bank Indonesia for the registration of a total of US$2,156,559.13 in foreign investment. As of October 1, 1971 Bank Indonesia had permanently registered only an amount of US$983,992.65. Bank Indonesia's refusal to make permanent registration was in part due to lack of sufficient documentation for the actual value of imported goods. Amco's request in 1971 for registration of certain assets as reinvested profits was denied by Bank Indonesia because the amounts did not constitute reinvested profits under the Foreign Investment Law. In a letter dated November 23, 1972 Bank Indonesia requested Amco to report on the realisation of the capital investment (Indonesia Exh., Vol.I, Tab.29). It would seem that Amco did not reply to this letter from Bank Indonesia and apparently Bank Indonesia let nearly three years pass without taking any action. With reference to the November 23, 1972 letter, Bank Indonesia requested in a letter of October 29, 1975 that Amco submit the reports as soon as possible. A copy of the letter was sent to BKPM (Indonesia Exh., ibid.,Tab.30).

106. On January 10, 1976, BKPM wrote to Amco requesting it to submit various reports to Bank Indonesia and to file an investment report with BKPM (Indonesia Exh. Ibid., Tab.31). In a letter dated August 10, 1977 Bank Indonesia requested PT Amco to forward financial statements verified by a certified public accountant to enable Bank Indonesia to consider permanent registration of the foreign investment. Additional requests from Bank Indonesia to PT Amco for documents were made on February 27, 1978 (Indonesia Exh., ibid., Tab.35), May 31, 1978 (Ibid., Tab. 36) and September 3, 1979 (Ibid., Tab.37).

107. Bank Indonesia's request to PT Amco to forward its audited financial statements was apparently never met by the company. (The Tribunal notes that PT Amco claims that certain of its documents had been seized during the army and police action (First Award, para.104). In a statement dated December 5, 1979, signed by Mr. E.M. Tomodok, Vice-Chairman of PT Amco, PT Amco represented that its financial reports for the years 1974 until 1977 had never been audited (Indonesia Exh., Vol.I, Tab.39). This

statement by Amco appears to be false. Before this Tribunal the Republic of Indonesia produced 1977 audited accounts for PT Amco. The 1977 audited accounts had been sent on March 27, 1978 by the public accountants firm of Machjud Modofore to the Board of Directors of Amco (Indonesia Exh., Vol.III, Tab.125).

108. The Tribunal has no evidence that certified accounts of PT Amco for the 1974 financial year and subsequent years were given by PT Amco either to Bank Indonesia or to BKPM.

109. On January 1, 1973 Pan American and PT Amco Indonesia executed a document purporting to be a loan from Pan American to PT Amco Indonesia in the amount of Rp. 360m. The interest on the loan to be paid by PT Amco to Pan American was 8.8 per cent per year (Indonesia Exh., Vol.III, Tab.80).

110. PT Amco's unaudited accounts for 1973 (Indonesia Exh., Vol.III, Tab.75) used for its tax assessment, contain an expense item named "service rate etc." amounting to Rp. 32,4000,000.00, a sum close to 8.8

per cent of the purported loan from Pan American to Amco. The unaudited 1973 accounts also contain an amount of Rp. 362,194,889.00 named long range debt. The 1973 audited accounts do not contain similar amounts (Indonesia Exh., Vol.III, Tab.77). The 1973 audited accounts were apparently not submitted to the tax authorities.

111. On September 20, 1989 in the afternoon session Mr. Nono Hanafi being questioned by Mr. Badini testified that he had learned from the transcripts from the hearings of the First Tribunal that Mr. Tan had "denied" the existence of said loan. Mr. Rand intervened to state that "we are quite willing to stipulate that such loan was never made".

112. While PT Amco's behaviour contained discreditable features, that fact could not justify BKPM's approach to the question of revocation.

(d) <u>The Application of the Law to These Findings</u>

113. The Tribunal must now consider the legal consequences of its findings. To do this it is necessary to turn first to Indonesian law, and then

to international law.

114. The Indonesian law adduced by Amco was in support of the proposition that "Under Indonesian Law, a procedurally unlawful administrative act is void". (Memorial, p.28). It was also claimed that "Under Indonesian law, due process violations are compensable per se" (Reply, p.14). The position was claimed to be the same under international law. Both these related claims were advanced in oral argument. Indonesia argued that under both Indonesian and international law, an unlawful procedure "cannot alone support an award of compensation in this case. This is because of the inseparability of the procedural aspects and the substantive basis for the revocation." (Counter-Memorial, p.123). The issue of "compensability per se" was treated interchangeably with the question of validity of procedurally unlawful acts (see, e.g., Counter-Memorial, p.124). In Indonesia's view, a procedurally unlawful act would be valid, and would give rise to no compensation, unless the "procedural defect is integrally related with the substantive right such that compliance with the procedure is a necessary condition to the exercise of the substantive right". (Komar First Opinion,

Legal App. to Counter-Memorial, Tab.B, p.52).

115. Dr. Komar, in his First Legal Opinion, opined that BKPM's right to revoke, being based on presidential decree, existed independently of required procedural formalities. He further contended that the revocation was caused by PT Amco's repeated failure to fulfil its obligations, and was not a necessary consequence of the procedural defects. Dr. Komar also wrote that under Indonesian law the validity of an administrative act is tested by reference to "substantial justice" (Ibid, p.42). In both the written pleadings and oral argument, Indonesia introduced evidence directed to show that, while it was res judicata that Amco had not been afforded due process, it had not, in the overall picture, been denied "substantial justice".

116. Mrs. Kusnander offered a Legal Opinion which rejected as incorrect Dr. Komar's analysis of Indonesian law (Claimant's New Legal Documents, Tab.140). A second Opinion was provided by Dr. Komar (Legal App. to the Counter-Memorial, Vol.VIII, Tab.RRR). These Opinions provide helpful analyses of Indonesian law generally, going beyond the

immediate point in issue, and have been carefully studied by the Tribunal, along with the cases and authorities to which it has been referred, and on which it was addressed by counsel for both sides in oral argument.

117. The Tribunal finds that most of the Indonesian cases cited by Amco are irrelevant as to its claim (that procedurally unlawful administrative acts are void, and give rise to compensation); and to the issue that the Tribunal believes must here be determined (whether a generally tainted background necessarily renders a decision unlawful, even if substantive grounds may exist for such a decision). Thus the case of Yayasan Tjie On Jie Jan (64/Perd. 1971/PT/-Mdn., of 1973, New Legal Exhibits to Claimants' Memorial, Tab.103), concerned wrongful procedure in the sense of absence of jurisdiction, which want of jurisdiction necessarily led to a revocation of the decision and to compensation. Although there is some reference at the outset to it having been proved that "the form of cancellation is illegal because it did not follow legal procedure", nothing in the facts shows this as constituting a separate head. Rather, it was because of the absence of jurisdiction that the form of cancellation was

illegal. The case of Soekartin v. Indonesia, (No.772/1970-G. herregistrasei No.530/1961-G of 1972, (Ibid., Tab.107), concerns unlawful arrest, detention and the sale of property, with the appropriate legal consequences being drawn. It is neither authority for the claim as formulated by Amco nor of assistance in resolving the issue as formulated by the Tribunal. In the case of John Kong Seng v. Head of Kabupaten et al. (Ibid, Tab.108), the administrative acts of the defendants were declared void as they were taken under the wrong section of the relevant Decree. The case provides no guidance on the legal effects of lack of due process, still less on the legal consequences of a generally tainted environment in which the administrative decision operates. And the extract with which the Tribunal was provided from R.M. Suryodinigrat, S.H., Perikatan-Perikatan Bersumber Undang-Undang (1980) (Ibid, Tab.118) is unilluminating.

118. One case was more relevant. In P.T. Savoy Homan Hotel, (No.353/1979/C/Bdg. of 1980, Ibid, Tab.116) there was both a decision taken by an improperly constituted Committee and an omission to make the necessary request of the Government (and thus a

failure of jurisdiction) and also a failure of due process due to the absence of the plaintiff. All grounds are equally relied on in annulling the decision and ordering restitution. To the extent that one could speculate that the same decision would have been reached even if the Committee had been properly constituted, and a request to the Government had been made, so long as the plaintiff was not present at the proceedings, this case may show that a failure of due process may lead to annulment. But this is necessarily hypothetical.

119. The attention of the Tribunal was also drawn to the treatise by Prajudi Armosudirajo, Hukum Administrasi Negara (Ibid, Tab.117). The author states that a civil judge can declare an administrative directive wrongful not only if it was taken arbitrarily, or without following the law, or without authority, but if it was taken "by misusing authority". The author cites no specific authority for this view, though reference is made to Article 1365 of the Civil Code (which is in much more general terms).* The author addresses only what may be done by a civil judge and does not state that the act is automatically void.

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* For text, see para.170 infra.

120. Two other cases were drawn to the attention of the Tribunal in the Opinion on Indonesian law prepared by Dr. Komar: the Josopandojo Case, Decision of the Supreme Court, March 3, 1971; and the Eddy Hans Case, Decision of the Supreme Court, November 11, 1976; (Legal Appendices to the Counter-Memorial, Vol.I, Tab.3, pp.43-45). Mrs. Kusnander offered her observations to the Tribunal on these cases. (New Legal Exhibits to Claimants Reply, Tab.140). Dr. Komar provided a second opinion (Legal Appendices to the Counter-Memorial, Vol.VIII, Tab.RRR). It is clear that, on the one hand, in the Josopandojo case it was found that no tort had been committed; while on the other hand the test for ascertaining a tort by a public authority is by reference to "the Laws and Regulations" and also, as a separate head "kepatutan dalam masvarakat". (Text and translation provided to the Tribunal, p.10). This phrase was interpreted by Dr. Komar as 'reasonableness (or 'propriety') in society' and by Mrs. Kusnander as 'standards of fairness within society'. In the view of the Tribunal nothing turns on this different terminology. The Eddy Hans Case does not carry matters forward, as the claim that a decision was taken on the basis of a "one sided report" of a

public authority, made "without hearing, summoning and investigating" (text and translation provided to the Tribunal, p.2) was rejected by the Supreme Court, apparently simply on the grounds that the High Court was competent to affirm the District Court's decision if it thought it correct. It would seem that the Supreme Court did not regard itself as competent to review the argument of "one-sidedness" (ibid, p.8).

121. The Tribunal concludes that Indonesian law does not clearly stipulate whether a procedurally unlawful act per se generates compensation; or whether a decision tainted by bad faith is necessarily unlawful. There is, however, some slight authority for the view that these last two questions might be answered in the affirmative under Indonesian law. (See paras.118 and 119 above).

122. The Tribunal now turns to the international law authorities relied on by the parties. The writings of Dr. F.A. Mann, Professor D. O'Connell, Professor A. Freeman and Professor Borchard, while always profitable to read, are not in the view of the Tribunal directed to the issues in this case. Dr.

Mann ("The Consequences of an International Wrong in International Law", 48 BYIL (1976-7), New Legal Exhibit to Claimants' Memorial, Tab.109), is writing generally on the consequences of illegality, but not on the specific question of whether a procedurally unlawful act, or a tainted background to a decision, necessarily generates damages and/or invalidates the substantive decision. The cases analysed by Dr. Mann, at the pages cited in Amco's Memorial, p.30, are clearly relevant to the question of the consequences of substantive illegality in international law. (New Legal Exhibits to Claimants' Memorial, Tab.109). The extracts from Professor O'Connell (International Law, Vol.II, at ibid., Tab.110) are likewise inapposite. Professor Freeman, (The International Responsibility of States for Denial of Justice, 1970, at Ibid., Tab.111) refers in the passages cited by Amco, Memorial, p.43, to the Martini Case and states that an arbitral tribunal may annul certain obligations imposed on a foreigner by a local decision which violates international law; or more usually monetary reparation will be awarded. This does not address the problem before this Tribunal. Nor does his analysis of the Fabiani Case, in which the procedural delays led to tangible financial losses. The case shows only that if the unjust procedure is

the cause of the loss, damages will follow; but it does not address the converse, namely, whether damages are available for unjust procedure that is not shown to be the cause of loss. The extracts from Borchard, (The Diplomatic Protection of Citizens Abroad, 1915, at ibid., Tab.114) are cited in the Memorial, pp.53-4, 130, for the proposition that acts in violation of international law will not be given effect. Professor Borchard, clearly writing of French administrative law, merely says that to have an illegal administrative act annulled, it is necessary to have recourse to the courts.

123. The Draft Convention on the International Responsibility of States for Injuries to Aliens (ibid., Tab.121) - of doubtful weight as persuasive authority of international law - contains in Article 30 wording which is clearly too broad to be a correct statement of international legal principle. And the Restatement (Third) of the Foreign Relations Law of the United States, s.712 and Comments, (ibid, Tab.122), is equally undirected to the issue before the Tribunal.

124. Some of the case law put before the Tribunal equally lacks focus on the issues in these proceedings. Banco Nacional de Cuba v. Farr, (383 Fed.Rep. 2d Series, ibid., Tab.113) turns on the application of the Hickenlooper Amendment* and is thus doubtful authority for the proposition that "acts in violation of international law will not be given effect" (Memorial, p.30), even were that a correct formulation of the issue before the Tribunal. The case of McCurdy v. The United Mexican States, US-Mexico Claims Commission, 1929 (Legal App. to the Counter-Memorial, Vol.IV, Tab.JJ) indicates only that some irregularities in proceedings will not necessarily constitute a denial of justice.

125. Indonesia, in its written and oral pleadings, and Professor D.W. Bowett QC, who prepared a legal opinion (Legal App. to the Counter-Memorial, Vol.VIII, Tab.TTT), relied on certain cases of the European Court on Human Rights to contend that procedural violations do not generate damages where there remains the possibility that the substantive decision might be the same. In the Sramek Case, 1984, (ibid., Tab.UUU) an application was brought

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* i.e. an amendment to the Foreign Assistance Act of 1965.

against Austria for violation of Article 6(1) of the European Convention on Human Rights, which requires that in the determination of one's civil rights and obligations or of a criminal charge, "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". It was found that in the circumstances of the case, there was a violation of Article 6(1) (the tribunal having included a person "in a subordinate position, in terms of his duties and the organisation of his service, vis-a-vis one of the parties": Judgment, para.42). The Court refused, however, the claim of the applicant for pecuniary loss.

126. It is true that the European Court said that "the evidence in the file does not warrant the conclusion that had it been differently composed [the tribunal] would have arrived at a decision in Mrs. Sramek's favour". It is against that background that Indonesia argues that no compensation was paid for a procedural violation, where there existed the possibility that the same outcome might have occurred even had there been no procedural violation.

127. The present Tribunal makes the following observations. First, cases under the European Convention on Human Rights deal with compensation not as a matter of general international law, but by reference to the specific treaty requirements of Article 50 of the Convention, which requires "just satisfaction" to be given by the Court if the local law allows of only partial reparation. Mrs. Sramek's claim before the Austrian courts had been not for compensation for the procedural wrong (which in any event was a substantive wrong under the terms of the European Convention, i.e. procedural guarantees of fair trial are a substantive treaty right) but rather for consequential pecuniary loss. This she had failed to prove - and the European Court, not being an Austrian Court of Appeal, could not override the Austrian Court and award compensation on this basis. The Tribunal therefore finds that the Sramek Case does not support Indonesia's claim.

128. The same underlying considerations apply to other European Convention cases cited by Professor Bowett in his Opinion (Legal App. to the Counter-Memorial, Vol.VII, Tab.TTT). The Golder Case, ECHR, Ser.A.

1975, is an indication that not every violation (procedural or substantive) entitles an award of "just satisfaction" under Article 50. But that does not bear upon the present problem. Equally, all that one may reasonably deduce from the European Court of Justice (EEC) case of Bayerische HNL Vermehrungsbetriebe GmbH and Co., 1978 E.Ct. Justice 1209, is that not all losses sustained in the face of government economic policy entail compensation. That is a far cry from the present issue. And as Professor Bowett himself notes, in the other European Convention of Human Rights case which he cites, Engel, ECHR Ser.A 1977, no claim was made for compensation for material damage. There is a discrete jurisprudence relating to Article 50 of the European Convention that has no applicability to the issue in this case.

129. The de Sabla Case, US-Panama General Claims Arbitration 1934 (New Legal Exhibits to Claimants' Memorial, Tab.120), relied on by Amco, concerned grants by Panama to third parties over de Sabla's land. The Commission found that inadequate possibility was given to de Sabla for opposition to such grants. Damages were assessed, but these cannot be said to represent compensation for

procedural violations, which the Commission found to have occurred without bad faith or discrimination. Rather, damages were based on the fact that the procedures resulted in the loss of property. This would thus seem to be another case where procedure and substance are inextricably intertwined.

130. Three further cases cited by Amco remain for consideration. The first of these is the Idler Case U.S. v. Venezuela, 1898 (New Legal Exhibits to Claimants' Memorial, Tab.112). Idler was a United States citizen, who contracted with agents acting for Venezuela, for the provision of military equipment. Certain invoices for very large sums remained substantially unpaid. After the Union of Venezuela and New Grenada in 1819-1821, arguments occurred as to whether it was the new Republic of Colombia that was liable for the debt, or the "Department of Venezuela". Without here entering into the very complicated history of Idler's attempts to recover the sums owed, we note that judgment was eventually entered for Idler, but the Treasury refused to pay, contesting the jurisdiction of the court concerned. This question, too, was decided by the Venezuela Supreme Court in favour of

Idler. Still unable to secure payment, Idler returned to the United States where he sought diplomatic support for his claim. In 1836 the Venezuelan Government applied to the Supreme Court for an order to annul the judgment. This followed two years' of written submissions by the Government to the Supreme Court, of which Idler was never notified. Idler was instructed by the Court to appear before it, but learned of this only twelve days before the commencement of proceedings, when it was impossible to get to Venezuela in time. The Supreme Court found it had no jurisdiction to annul the earlier judgments in favour of Idler, and that the action should have been brought in front of the same judge who had given the original judgment. The matter then reverted to the Superior Court of Caracas, which did set aside the judgment in favour of Idler, and indeed condemned him to pay "judicial tax" and a portion of the costs. This was in turn affirmed by the Supreme Court.

131. In the international arbitral proceedings brought by the United States against Venezuela, the arbitral commission stated that one of the key questions was whether the general effect of the proceedings of 1836-1839 constituted a denial of justice. Idler

received no notification of the proceedings in the lower court, but rather, a notification to appear in the Supreme Court in a suit instituted there; and the Commission took the view that, as it was the lower court that alone had jurisdiction, to summon him before one tribunal, when the business affecting his interests was to be done in another, was misleading. Further, the Commission stated that, even if no notification had been required, a notification of the sort given would be misleading. "... [W]e are inclined to think the act, from the standpoint of justice, would vitiate the whole proceedings". (Tab.112 at internal page 3515). The Commission, emphasising that a foreign citizen before the courts of a sovereign was entitled only to "ordinary justice", found that Idler did not get it and that therefore the proceedings against him were "a nullity" (ibid, 3517). The Commission did not consider whether, on substantive grounds, the decisions annulling the earlier judgments might not have been correct. Rather, it found that the denial of justice rendered them a nullity.

132. The second remaining case relied on by Amco was the Chattin Case, 1927 (Legal Exhibits to Claimants' Memorial, Tab.119; Legal App. to the Counter-

Memorial, Tab.KK). This arbitration between the United States and Mexico also concerned irregularities in judicial proceedings in criminal proceedings. Acts of the judiciary, in the view of presiding Commissioner Van Vollenhoven, alone could constitute a denial of justice, executive and legislative wrongs always being subject to judicial redress. Such judicial acts would only amount to a denial of justice if they constituted "an outrage, bad faith, wilful neglect of duty, or insufficiency of action apparent to any unbiased man" (Legal Exh. to Claimant's Memorial, Tab.119, Internal p.287). Commissioner Van Vollenhoven found, on the facts of the case, that "the whole of the proceedings discloses a most astonishing lack of seriousness on the part of the Court" (ibid, p.292) and that the proceedings were unjust. It matters not that in his powerful dissent Commissioner MacGregor found that local law had not been violated, and doubted too, on his analysis of the facts, that international law had been violated, for in the present case the finding of the First Tribunal that there had been procedural unlawfulness stands as res judicata.

133. It is relevant, too, that the Commission makes no supposition about the guilt or otherwise of Chattin

- indeed, it was not prepared to make a finding of illegality of his arrest. Against the background of a denial of justice, damages were nonetheless awarded.

134. Finally, in the Walter Fletcher Smith Case, 1929 (Previously Filed Claimants' Documents, Vol.II, Tab.0), an expropriation of a US citizen's property was found to be neither consistent with the constitutional requirements of Cuba nor with international law. Whereas the property could lawfully have been nationalised for a public purpose, it was found that the purpose was "amusement and private profit". The emphasis was not so much on the requirement of public international law that a taking of property be for "public utility" purposes, as on the good faith aspect:

> "From a careful examination of the testimony and of the records, the Arbitrator is impressed that the attempted expropriation of the claimant's property was not in compliance with the constitution, nor with the laws of the Republic; that the expropriation proceedings were not, in good faith, for the purpose of public utility. They do not present the features of an orderly attempt by officers of the law to carry out a formal order of condemnation. The destruction of the claimant's property was wanton, riotous, oppressive. It was effected by about one hundred and fifty men whose action appears to

> have been of a most violent character. There is some evidence that, before the expropriation proceedings, certain persons, being unable to purchase the property from the claimant, threatened to destroy it..." (ibid, Internal p.387).

135. The arbitration concluded that the property should be restored to the claimant. "No reflection is to be made upon the character of the courts of Cuba... Under all the circumstances of the case it seems clear that the action of those tribunals should not be held to render valid the proceedings of attempted expropriation." (Ibid, p.387). An award of damages was made "if the land is not to be restored" (ibid).

136. One can see from these international cases that the question in international law is not whether procedural irregularities generate damages per se. Rather, the international law test is whether there has been a denial of justice. They show equally that not every procedural irregularity constitutes a denial of justice. To this effect, see also Opinion of Professor Bowett (Legal App. to the Counter-Memorial, Vol.VIII, Tab.TTT, at p.10). At the same time, as Commissioner Nielson reminded in the McCurdy Case (op.cit., supra, para.124, at Internal page 150) even if no single act constitutes

a denial of justice, such denial of justice can result from "a combination of improper acts". In the recent case of Elettronica Sicula S.p.A. (ELSI) (USA v. Italy), ICJ Reports, 1989, the International Court of Justice drew a distinction between unlawfulness in municipal law and arbitrariness under international law. The distinction it drew is, in the view of the Tribunal, equally germane to the distinction between procedural unlawfulness and a denial of justice. The Court stated that arbitrariness "is not so much something opposed to a rule of law, as something opposed to the rule of law" (Ibid., para.128). The test, said the Court, was "a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety" (Ibid).

137. It thus is necessary to decide whether the procedural irregularities and other background factors in this case amounted to a denial of justice, that would taint the decision of BKPM, regardless of whether BKPM might have had substantive grounds for its action against Amco. The first question is whether it is correct, as Commissioner Van Vollenhoven contended in the Chattin Case, that acts of the judiciary alone can

constitute a denial of justice. Most arbitral awards do not make this distinction in the context of denial of justice. While all those cases cited above happened to concern, at some phase, judicial decisions, the Tribunal sees no provision of international law that makes impossible a denial of justice by an administrative body. BKPM was an administrative, rather than a strictly judicial, body. It has not been argued to us by Indonesia that the acts of BKPM, taken in context, could not themselves constitute a wrong in international law, if unlawful, but that only a failure of the courts to rectify them could constitute such a wrong. And if one applies the test in the ELSI Case ("a wilful disregard of due process of law"); or in the Idler Case (the need for "ordinary justice"); or in the Chattin Case ("bad faith, wilful neglect of duty, or insufficiency of action apparent to any unbiased man") it can be seen that the BKPM handling of PT Wisma's complaint, which led in turn to the approval of the President of the Republic to the proposal for revocation, constituted a denial of justice.

138. There are thus indications, both as a matter of Indonesian and international law, that the circumstances surrounding BKPM's decision tainted

the proceedings irrevocably.

139. The Tribunal therefore finds that, although certain substantive grounds might have existed for the revocation of the licence, the circumstances surrounding BKPM's decision make it unlawful.

140. That being so, the Tribunal could at this point conclude its findings on liability. However, other claims have been advanced by the parties, and being mindful of the requirements of Article 48(3) of the Convention on the Settlement of Investment Disputes, the Tribunal now deals with these.

(e) Amco's request for an adverse inference

141. In a letter of July 25, 1989, Amco made a submission "that an adverse inference should be drawn against Indonesia" with respect to certain PT Amco documents seized during the army and police intervention of April 1, 1980, some of which, it was alleged, were never returned. This was advanced as a submission relating to PT Amco's difficulties in proving compliance with its investment obligation. The Tribunal, not having to address the issue of whether

Amco fulfilled its investment obligation, need not decide whether certain such documents could have helped Amco or not in establishing its case in that regard.

(f) The Lawfulness of BKPM's Decision by Reference to Grounds Other than Shortfall of Equity Investment

142. Indonesia argued that, even if the BKPM revocation were unlawful by reference to the ground of shortfall of equity investment and failure to import the required amount of foreign equity capital, it would still be lawful by reference to other grounds: failure to make investment reports to Bank Indonesia and BKPM; failure to report capital transfers to Bank Indonesia; and tax fraud (Counter-Memorial, pp.88-92; Reply, pp.16-17). Indonesia claimed that Indonesian law required the licence revocation to be considered in the light of the totality of the circumstances existing at the time, including the entire administrative record before BKPM (Counter-Memorial, p.87). Amco replied that the revocation could be justified, if at all, only on the substantive grounds stated in the revocation decision. It denied that the Indonesian law requirement that an administrative act be evaluated in the light of the totality of circumstances meant

that grounds not cited in a revocation decision may be used to determine whether such decree is substantively justifiable (Reply, p.25). Oral argument was addressed to the Tribunal on this point, together with evidence showing the various grounds on which BKPM was entitled to revoke investment licences, and actual past practice in this regard.

143. The Tribunal, in dealing with this question, does not have to make findings of law because of its determination that BKPM's substantive decision was irrevocably tainted by bad faith. This necessarily means that, even were a decision on grounds other than those stated in the Decree in principle sustainable, they could no more be lawful than the decision made on grounds of shortfall of investment, because of the general background that pervaded the decision-making.

VII. FURTHER CLAIMS AND ARGUMENTS

(a) Estoppel

144. Two arguments of estoppel have arisen. Indonesia has claimed that Amco should be estopped from

arguing before this Tribunal that they directly invested any amount higher than the sum they represented in the Jakarta court proceedings in 1986 that they had directly invested (Counter-Memorial, p.78). Amco contended that Indonesia never during the period 1968 to 1980 notified Amco that it was in danger of losing its licence due to under-investment or non-registration of foreign equity capital, and that it should be estopped from relying on these matters as grounds for revocation (Memorial, pp.52-55).

145. The Tribunal doubts that the international law principle of estoppel would, on a proper understanding of the facts and examination of the evidence, be applicable in either of these cases. In any event, because the level of Amco's investment is not determinative of the issues as the Tribunal has formulated them in dealing with this question, it makes no formal findings of law on either of these claims.

(b) Legal Effect of the Indonesian Supreme Court Decision of April 30, 1985 on Amco's Entitlement to Damages

146. Indonesia claimed that the Supreme Court decision of April 30, 1985 cut off, as of January 12, 1982, Amco's right to compensation. The First Tribunal found that the lower court decisions did not operate to cut off any entitlement to damage (First Award, paras.259-263). This finding is res judicata. (Decision on Jurisdiction, para.53). However, this Tribunal has determined that as the Supreme Court decision occurred after the First Award, the question of whether it operated to terminate any entitlement to damages could not be res judicata (Ibid., para.54.)

147. Indonesia contended that the Supreme Court decision declared that the earlier judgment of January 12, 1983 was enforceable; that that entailed rescission of the managerial contract (rather than affirmation of BKPM's decision to revoke the licence agreement); and that therefore, as of that earlier date of January 12, 1982, Amco no longer had a contractual right to a share of profits (Counter-Memorial, pp.154-5).

148. Amco argued that the Supreme Court decision was merely an affirmation of the prior decisions of the District and Appellate Courts; and as these had been found by the First Tribunal not to terminate any damages to which Amco was entitled, so a decision merely affirming them could equally not have that effect. Amco, unlike Indonesia, took the view that the lower courts had based their judgments essentially on the licence revocation. As the First Tribunal had given this as a reason for its ruling on the effect of these judgments, and as the Supreme Court judgment merely affirmed them, it too could not cut off the entitlement to compensation (Memorial, p.32). Amco and Indonesia elaborated their contentions in oral argument.

149. The Tribunal has considered the arguments and studied the texts of each of the Indonesian court decisions. The starting point of its analysis is the finding of the First Tribunal on the lower court judgments that

> "It is also right that the decision of the Jakarta courts to rescind was based on several grounds ... However, among these grounds, the revocation of the licence was obviously fundamental and self-sufficient, as is shown by the very wording of the District Court

Decision in this respect ..." (First Award, para.260)

150. Indonesia states that the Ad Hoc Committee correctly found that the Supreme Court, when it came to deal with the matter "approve[d] the rescission of the management contract exclusively on grounds other than those adduced in the [licence] revocation order". (See Decision of the Ad Hoc Committee, para.115; and Counter-Memorial, p.155).

151. The Tribunal notes that views on the basis of the Supreme Court decision go beyond the jurisdiction ratione materiae of the Ad Hoc Committee and are necessarily obiter; and cannot determine the matter for this Tribunal, which must decide the issue itself.

152. The Tribunal observes that the Supreme Court carefully laid out all the findings of the two lower courts and the arguments that had been advanced by the parties. The findings of the lower courts included (but were not restricted to) the failure to invest US$3m. And the stated ratio decidendi of

the Supreme Court (Indonesia, Factual Appendix B, Tab.28) was simply that the lower courts' decisions were not contrary to law. It might be said that they thus were basing themselves on grounds other than licence revocation - but in the Tribunal's view the Supreme Court was affirming the grounds on which the lower courts based themselves. And central among these was the revocation of the licence. The Supreme Court did not find (because it was not asked to) that the revocation was invalid, but that PT Wisma still succeeded in having the management contract rescinded; nor did it find that the revocation was relevant, but that PT Wisma succeeded on other grounds. It essentially affirmed the earlier decisions, as they stood.

153. The Supreme Court judgment is thus not to be regarded as novus actus interveniens; and therefore does not operate to terminate the damages due to Amco.

(c) Unjust Enrichment

154. Amco advanced as its third cause of action the claim that Indonesia would be unjustly enriched if permitted to retain both the benefits of Amco's

investment and the earnings which Amco could have obtained from such investment. Amco contended that the concept of unjust enrichment was recognised in the law of Indonesia and also in international law (Memorial, pp.58-62).

155. Indonesia denied the applicability of the concept to the facts of the case as any beneficiary would have been PT Wisma. Indonesia further offered a legal opinion of Professor S. Gautama (Indonesia, Legal App. Vol.II, Tab.P) that there was no recognised right of unjust enrichment in Indonesian law. It was further argued, by reference to diverse authorities, that the concept of unjust enrichment was not a sufficiently specific principle of international law to sustain a claim by Amco (see Counter-Memorial, pp.180-183); and, by reference to a legal opinion of Professor C. Schreuer, that no international law tribunal had ever allowed a claim of unjust enrichment where the applicant was in breach of its obligations under the contract in issue (Indonesia, Legal App. Vol.VIII, Tab.XXX). For its part, Amco contended that international authority acknowledged the principle of unjust enrichment even if the investor's loss did not arise out of an internationally unlawful act (Reply,

pp.28-30).

156. The Tribunal notes that the beneficiary of any unjust enrichment (whether or not caused by illegal acts and whether or not Amco was itself in default) would have been PT Wisma and not Indonesia. It was PT Wisma that secured the benefit of the termination of PT Amco's entitlement to the share of the profits, once the Hotel had been built and was operational. Any advantage to the Indonesian government was too indeterminate to be identified as an unjust enrichment to the State without pronouncing upon whether the factual circumstances for the application of the concept existed, the existence of the concept in Indonesian law or its scope in international law. The Tribunal finds that on this ground Amco's third cause of action fails.

VIII. COUNTERCLAIM

157. In its Counter-Memorial, p.177, Indonesia claimed as follows:

> "Under Indonesian law the failure of a foreign investor to fulfil its obligations under a license and to comply with the foreign investment law will result not only in the revocation of the license, but also in the 'withdrawal of all facilities that have been granted commencing from the date on which approval was granted'. Indonesian law thus

> provides for the restitution of all monies which would have been paid by the foreign investor, e.g. as taxes and import duties, but for the tax holiday granted by the license."

158. At the oral hearings the Tribunal was shown all the Indonesian law said to support this claim.

159. Decree 63/1969 (Indonesia, Fact. App. A., Tab.3) provides in Article 4 that

> "If the capital investment plan is not implemented in accordance with the approval that has been granted, this may result in the withdrawal of the business license that has been issued and/or the withdrawal of all facilities that have been granted commencing from the date on which approval was granted, unless it can be proven that the default occurred for reason beyond the control of the applicant."

160. In his Legal Opinion (Indonesia, Legal App. Vol.I, Tab.B) Dr. Komar also makes reference to decree 54/1977. Article 6 of this provides:

> "In case the execution of the investment of capital is not in accordance with the agreement and stipulations determined by the Government and/or the capital investor does not fulfil his obligations to submit reports on the execution of the capital investment as stipulated in Article 4, sanction shall be applied to the capital investor in accordance with the laws and regulations in force, including the revocation of his permit to establish a business enterprise and/or the facilities/relief of fiscal duties already

granted."

161. It is thus clear that a lawful revocation by BKPM could have included a decision to end the facilities and relief granted and to require the return of moneys represented by them. The revocation by BKPM (Indonesia Exh. Vol.II, Tab.63, at p.5) did include such provisions; but the Tribunal has already held it not to be a lawful revocation. It is also clear that BKPM could, even without terminating the licence, have decided that PT Amco was in violation of its obligations, that facilities would be withdrawn, and that moneys representing them were to be returned. But no such decision, separate from the revocation decisions, was ever made.

162. The Tribunal thus finds that, as Indonesia has not succeeded in its primary claims, it fails in its counterclaim.

IX. DAMAGES

163. The issue of damages has to be addressed in relation to two different periods: (1) the period between April 1st (the army and police intervention) and July 9, 1980 (the BKPM decision); (2) the period subsequent to July 9, 1980.

(1) The Period between April 1 and July 9, 1980

164. It is res judicata that there is an obligation to compensate for any damage caused by unlawful intervention of the army and police (Decision on Jurisdiction, para.48).

165. The present Tribunal has concluded that the events of April 1 1980 did not cause PT Amco loss of right to a share of the profits under the 1978 Profit-Sharing Agreement (which could at that moment still be legally claimed from PT Wisma). The Tribunal further held that access to the Hotel cash flow was fiduciary in nature and, whatever the practice may have been between the parties before April 1, 1980, PT Amco was accountable to PT Wisma for the use of those funds. Financial loss due to diminution of the profit level there might otherwise have been,

under PT Amco's own management, is unproven. No other financial loss due to loss of management has been evidenced before the Tribunal.

166. The illegal army and police intervention of April 1, 1980 undoubtedly caused disturbance and burdens for Amco. The Tribunal's best assessment of the loss entailed by such disturbance and burdens over this period is US$10,000. This is awarded with interest at 6% from the date of this Award to the date of effective payment.

(2) The Period Subsequent to July 9, 1980

(a) Mitigation

167. BKPM's decision of July 9, 1980 caused PT Amco to lose its licence to engage in business ventures in Indonesia. It did not in terms cause PT Amco to lose all its rights under the Profit-Sharing Agreement of October 6, 1978 or the earlier Lease and Management Contract of April 22, 1968. It was contended by Indonesia before the Tribunal that PT Amco could still have sold its interests in these contracts to a third party and should indeed have done so, to mitigate any loss sustained by BKPM's decision to terminate its licence. It was said that

both Indonesian and international law pointed to such a duty to mitigate damages. (Indonesia Counter-Memorial, pp.102, 106 and Komar Opinion, Indonesia Legal App., Vol.I, Tab.B, p.68). Amco did not contest that Indonesian law and international law both acknowledge the principle of mitigation, but claimed that there was no realistic prospect of it being able to mitigate its loss.

168. The Tribunal notes that the 1968 Lease and Management Contract provided in clause 9(4) that "the shares shall only be possessed by the LOCAL PARTNER and the OVERSEAS PARTNER and shall not be transferred to a third (3rd) party under whatever name or reason". The Company envisaged under the 1968 contract was never established as the parties decided to proceed on the basis of a simple joint venture. The Tribunal notes that when PT Amco entered into a subcontract on August 22, 1969, and a sublease with Aeropacific Hotel Association on October 13, 1970, the concurrence of PT Wisma was formally provided. This indicates that transfer of PT Amco's rights could only take place with the consent of PT Wisma. Nothing in the 1978 Profit-Sharing Agreement changed the situation. Further, even had PT Amco been entitled to assign its

interests the events that had occurred since the beginning of April 1980 would have made it virtually impossible to find interested purchasers. The Tribunal finds that there was no failure on PT Amco's part to mitigate damages.

169. That being so, the Tribunal will now proceed to assess the loss suffered by PT Amco as a result of the revocation of the licence by BKPM.

(b) Principles of Compensation

170. To seek the relevant principles of compensation the Tribunal has examined both Indonesian law and international law. Amco claimed that Indonesian law requires "compensation for proximately caused and foreseeable injury, including lost earnings, arising from a tortious act". (Memorial, p.23). Indonesia emphasised that damages would not be awarded for uncertain or speculative loss. (Counter-Memorial, p.102). These arguments were expanded and elaborated in Amco's Reply, p.5 and Indonesia's Rejoinder, p.36; and in oral argument. The Tribunal has carefully considered the relevant provisions of the Indonesian Civil Code, especially Articles 1246 and 1365, as well as the treatises and

cases cited by the parties, and the analyses thereon provided in the legal opinions of Dr. Komar and Mrs. Kusnander. Article 1365 of the Indonesian Civil Code provides: "Persons responsible for any act in violation of the law which results in a loss to another person are obliged to replace such loss" (Previously Filed Claimants' Documents, Vol.II, Tab.R). Article 1246 of the Indonesian Civil Code further provides: "Cost, losses and interest which a claimant may claim shall consist of, in general, losses already suffered and profit which he would otherwise enjoy, subject to the exceptions and qualifications set forth below." (Ibid.) None of the exceptions and qualifications are applicable in this case.

171. The following principles are to be found in the Indonesian law: damage and loss caused by illegal acts shall be compensated by the wrongdoer. Injury must have been caused by the wrongful act and have been foreseeable. Loss must be proved and there shall be no compensation for losses that are speculative. Lost profits (including forfeited earnings) are compensable to the extent they are not speculative: Said Wachdin v. Perseroan Terbatan N.V. Aniem, cited in the Opinion of Dr. Komar

(Indonesia, Legal App.B, at p.70); and Article 1246 of the Indonesian Civil Code.

172. So far as international law is concerned, it is clear that damages are due for harm caused by wrongful acts. The Tribunal has characterised the BKPM revocation as a denial of justice. As with Indonesian law, the loss must be attributable to the wrongful act and foreseeable. And non-speculative loss may be recovered.

173. Indonesia contended that the damage to Amco was caused neither by the army and police action, nor by BKPM's procedural irregularities, nor by its revocation of the licence, but rather by Amco's own wrongful actions which entitled BKPM to terminate the licence. Indonesia further claimed that, if damages were due, they could only be in respect of profit levels that were foreseeable. Indonesia also contended that PT Amco should not recover any lost profits beyond the date of this Award. The Tribunal addresses each of the arguments in turn.

174. The Tribunal has found that the general background

to the BKPM decision constituted a denial of justice, and led to a decision which was indeed the cause of harm to Amco. To argue, as did Indonesia, that although there had been procedural irregularities, a "fair BKPM" would still have revoked the licence, because of Amco's own shortcomings, is to misaddress causality. The Tribunal cannot pronounce upon what a "fair BKPM" would have done. This is both speculative, and not the issue before it. Rather, it is required to characterise the acts that BKPM did engage in and to see if those acts, if unlawful, caused damage to Amco. It is not required to see if, had it acted fairly, harm might then have rather been attributed to Amco's own fault.

175. As to foreseeability, it appeared to be Indonesia's contention that, if compensation was due at all, only those foregone profits that could be foreseen in 1980 were compensable. But foreseeability goes to causation and damages, and normally not to the quantum of profit. That the revocation of the licence would cause Amco to be unable to secure its share of the profits under the Profit-Sharing Agreement was undoubtedly foreseeable. The principle of foreseeability does not require that

the party causing the loss is at that moment of time able to foresee the precise quantum of the loss actually sustained.

176. The Tribunal now turns from causation and foreseeability to the issue of whether compensation allows recovery of future profits. There is one school of thought in contemporary international law that suggests that future profits (lucrum cessans) is not available in the case of a lawful taking, where only damage actually sustained (damnum emergens) is recoverable: see Amoco International Finance Corp. v. Islamic Republic of Iran, (US-Iran Tribunal Reports 247, Indonesia, Legal App. Vol.VII, Tab.FFF); and Liamco v. Libyan Arab Republic, (62 ILR 140, Indonesia Legal App., Vol.V, Tab.RR); per Judge Ameli in INA Corp. v. Islamic Republic of Iran, (8 Iran-US Claims Tribunal Reports at 411, Indonesia Legal App., Vol.V, Tab.00). Another school holds that lucrum cessans is available for lawful as well as unlawful takings. For cases awarding an element for future lost profits although the taking was lawful, see American International Group Inc. v. Iran, (4 Iran-US Claims Tribunal Reports 96, Indonesia, Legal App. Vol.VI, Tab.DDD); and Kuwait v. Aminoil, (ILM (1982) 977, Indonesia,

Legal App. Vol.V, Tab.SS). See also Judge Brower in Sedco Inc. v. NIOC, (10 Iran-US Claims Tribunal at 197, ibid., Vol.V, Tab.QQ). For useful commentary on this issue, see Gray, Judicial Remedies in International Law (1987), esp. Ch.5, (Ibid., Vol.V, Tab.TT).

177. But neither Indonesia (which proclaimed the BKPM action lawful) nor Amco contested that profits could in principle be recovered. The dispute was rather as to what profits could be reasonably certain, and what speculative. In any event, the Tribunal has found the BKPM action unlawful.

178. The Tribunal finds that, where there has been an unlawful taking of contract rights, lost profits are in principle recoverable. No position is here taken, or need to taken, on the situation in a lawful taking. As it was put in the Shufeldt Claim (USA v. Guatemala) "The damnum emergens is always recoverable, but the lucrum cessans must be the direct fruit of the contract and not too remote or speculative." (Indonesia Legal App., Vol.VI, Tab.VV at p.1069). It is equally clear from the May Case (Guatemala v. USA), (Ibid., Tab.WW, at p.72) that

recovery was to be allowed for profits that would have been over the remaining period of the contract. The arbitrator stated that he could not lay down the law on damages more clearly than it had been put by Guatemala: "that whoever concludes a contract is bound not only to fulfil it but also to recoup or compensate (the other party) for damages and prejudice which result directly or indirectly from the non-fulfilment or infringement by default or fraud of the party concerned and that such compensation includes both damage suffered and profits lost: damnum emergens et lucrum cessans." (Ibid., p.73). The Tribunal concludes that BKPM's action was a denial of justice which effectively deprived Amco of its contract rights, and that non-speculative profits under that contract are recoverable.

179. Indonesia advanced the claim (Counter-Memorial, p.156) that PT Amco "should not recover expected lost profits beyond the date of judgment". Cited in support of this was a dictum in the Chorzow Factory Case that the compensation due was the loss from the time of dispossession "to the date of the present judgment" (Amco, New Legal Exhibits, Tab.105; Indonesia, Legal App., Vol.I, Tab.AA; PCIJ

(1928) Series A, No.17). This dictum is taken quite out of context, as the Permanent Court was considering restitution for an unlawful taking under an international treaty, and, on the particular facts, simply did not address the question of the future profit-generating capacity of the factory (still less of a property right that was only that of a stream of future profits) under general international law.

180. Nor is the reference in Indonesia's Counter-Memorial, p.157, footnote 425 to para.205 of Amoco International Finance v. Islamic Republic of Iran, op.cit., supra, at all convincing. The Chamber of the US-Iran Tribunal in that case was examining the Chorzow Factory Case (which we have already distinguished), and in terms with which this Tribunal would not necessarily agree.

181. Indonesia further argues that this claim is supported by reference to the relief of the investor from risk "once the investment arrangement is terminated" (Counter-Memorial, p.158). The Tribunal's view on how risk is to be dealt with are offered below, paras.255 and 279-282. It is not a

determinative factor in an argument as to whether lucrum cessans as well as damnum emergens is available.

182. It was urged on the Tribunal by Indonesia that, even allowing for non-speculative profits, the methods of valuation must reflect the value of the contract rights as they were perceived in 1980. Thus according to Indonesia, the valuation techniques should include no event or factor that was unknown or unascertainable in 1980.

183. However, neither the concept of foreseeability (which has been discussed above) nor that of non-speculation necessarily lead to this conclusion. The Tribunal believes that the key lies in focusing on the objectives of compensation where there has been an unlawful interference with contract rights. In Sapphire International Petroleum v. NIOC (35 ILR 136), a case of an unlawful taking, the arbitrator said:

> "According to the generally held view the object is to place the party to whom they are awarded in the same pecuniary position they would have been in if the contract had been performed in the manner provided for by the parties at the time of its conclusion."

184. The Permanent Court of Justice in the Chorzow Factory Case held that, in an unlawful nationalisation, there must be restitution to establish the situation that would otherwise have existed, or, "if this is not possible, payment of a sum corresponding to the value which restitution in kind would bear" (PCIJ Series A, No.17, at 47). Commenting on this principle as it applies today, Judge Holtzmann wrote: "While the TOPCO Award [17 ILM (1978) 3] directs restitutio in integrum, it emphasises, as did the Chorzow Factory Case, that awards of damages are intended to place the claimant in the same position as would restitutio in integrum": Separate Opinion, INA Corp. v. Islamic Republic of Iran, 8 Iran-US Claims Tribunal Reports 373 at 395.

185. This principle is well supported. Thus in the same case Judge Lagergren wrote: "[I]t is well settled that the measure of compensation ought to be such as to approximate as closely as possible in monetary terms to the principle of restitutio in integrum..." (INA Corp. Case, op.cit. supra, p.385). And Judge Ameli of Iran, in the same case, said; "Where the

conduct of a party is held to be unlawful, in terms of its contractual obligations, then the concept of restitutio in integrum may perhaps properly be invoked." (Ibid, p.411).

186. If the purpose of compensation is to put Amco in the position it would have been in had it received the benefits of the Profit-Sharing Agreement, then there is no reason of logic that requires that to be done by reference only to data that would have been known to a prudent businessman in 1980. It may, on one view, be the case that in a lawful taking, Amco would have been entitled to the fair market value of the contract at the moment of dispossession. In making such a valuation, a Tribunal in 1990 would necessarily exclude factors subsequent to 1980. But if Amco is to be placed as if the contract had remained in effect, then subsequent known factors bearing on that performance are to be reflected in the valuation technique. (cf. American International Group Inc. v. Iran, op.cit., supra: but this was a lawful taking.) Foreseeability not only bears on causation rather than on quantum, but it would anyway be an inappropriate test for damages that approximate to restitutio in integrum. The only subsequent known factors relevant to value

which are not to be relied on are those attributable to the illegality itself.

187. While subsequent known events of a general nature, unrelated to the Kartika Plaza problems, may appropriately be an element in the valuation process, the effects of the taking itself must be excluded. It is well established in international law that the value of property or contract rights must not be affected by the unlawful act that removed those rights. (For recent affirmation, see Starrett Housing Corporation v. Iran, (4 Iran-US Claims Tribunal Reports, Vol.3, 176 at 202; Indonesia, Legal App. VIII, Tab.ZZ).

(c) The Method of Valuation

188. It is the Tribunal's intention that its decisions on the method of valuation, and its reasons therefore, should be fully transparent.

189. Indonesia has argued that, if damages were to be awarded to PT Amco, they should be established as "the 'book value' of PT Amco's investment or, at most, the value of PT Amco's contract rights less

any diminution in their value due to PT Amco's failure to sell promptly to a willing buyer in order to minimise its losses." (Indonesia Counter-Memorial, p.138).

190. The question of Amco's alleged duty to mitigate its losses has been dealt with above. The appropriateness of the net book value method remains for consideration.

191. Net book value has been described as "assets minus liability without consequential damages". (American International Group Inc. v. Iran, 4 Iran-US Claims Tribunal Reports, 96 at 104). It can immediately be seen that it is a method unsuited to placing a party in the position of his contract having been performed.

192. Indonesia argues that PT Amco should be entitled at most to only part of the Hotel's entire net book value of $585,000, and, in any event, to no more than PT Amco's total investment in the project determined by Bank Indonesia to be $933,992.65 (Indonesia Counter-Memorial, p.139).

193. While it is true that the value of the assets has been used as the measure of damages in a number of international claims, it is by no means the prevailing method of valuation of damages (see "L'évaluation des dommages dans les arbitrages transnationaux", Ignaz Seidl-Hohenveldern, Annuaire francais de droit international, XXXIII - 1987, pp.7-31). Net book value was rejected, inter alia, in the American International Group Case, (op.cit. supra; Kuwait v. Aminoil, (op.cit., supra; and in Liamco v. Libyan Arab Republic, (op.cit., supra, para.176). In fact, the book value basis of valuation seems to have been only used where compensation for prospective earnings was excluded for some reason (Indonesia Counter-Memorial, pp.139-140), either "in the absence of other evidence" (Claim of Horst, Award of July 24, 1968, U.S. Foreign Claims Settlement Commission, No Cu-1418, p.3, Indonesia, Legal App. Vol.V, Tab.LL), or because a claim for prospective profits was "not compensable under the Act" (Claims of Aris Gloves Inc., Award of Jan.31, 1962, U.S. Foreign Claims Settlement Commission No. CZ-3035, p.240, ibid., Tab.MM), or because the claimant himself had requested as damages the reimbursement of his

invested capital (INA Corp. v. Islamic Republic of Iran (op.cit., supra), or the liquidation value of its equity interest (Sedco Inc. v. National Iranian Oil Co., 10 Iran-US Claims Tribunal Reports 180, op.cit., supra), or again because the claimant's property had never become a "going concern" before the claim for damages arose (Phelps Dodge v. Islamic Republic of Iran, 10 Iran-US Claims Tribunal Reports 121, Indonesia Legal App., Vol.V, Tab.PP).

194. None of the above arguments would appear to apply in the present case. Indonesian law specifically recognises the possibility of a claim for lost profits (Article 1246 of the Indonesian Civil Code, cited above, para.170) which envisages recovery for "profit which he would otherwise enjoy" if it is non-speculative and direct. See also Said Wachdin Case, op.cit., supra, para.

195. Finally, the particular nature of PT Amco's rights does not make the book value method of valuation an appropriate technique. PT Amco was not the owner of the Hotel Kartika Plaza. In exchange for its investment in the Hotel, PT Amco obtained long-term contractual rights which consisted of the Lease and

Management Contract of 1968 with PT Wisma with its various amendments, and the Profit-Sharing Agreement of 1978. These were not the type of assets to which the book value concept would be applicable.

196. Taking all the above factors into consideration, the Tribunal will adopt the following methods for valuation of the stream of profits. The assessment will be divided into two periods, from July 9, 1980 until the end of 1989; and from 1990 until 1999. For both of the periods there are some matters of law and some of judgment that the Tribunal must address. But as to valuation techniques, for 1980-1989 the Tribunal will not use the perspective of what the reasonable businessman in 1980 could foresee, because for this period it can use known data for relevant factors, including the year-by-year inflation rate, as provided to the Tribunal by the World Bank, from Laporangan Minggu, Bank Indonesia, as well as actual exchange and taxation rates. For 1980-1989 the Tribunal will increase the value of the base year by the yearly inflation rate (infra, paras.201-203), in order to maintain the real value of that base year over the period. Interest on the annual sums due will serve to bring them to present day values. However, from January

1, 1990 (1989 being the last full year for which known factors are available) and forwards, the Tribunal finds the DCF method appropriate to establish the net present value of PT Amco's rights for the remaining period of the lease, by capitalising earnings and expenditures which would otherwise have been spread over the future years of the life of the 1978 Profit Sharing Agreement. In applying these two techniques to each of these periods, the Tribunal is mindful that PT Amco's rights were 65% of the stream of profits until September 30, 1984; and 50% thereafter until September 30, 1999.

197. The Tribunal has also considered whether the applicable law permits the use of these methods of valuation. As to DCF, it is neither prescribed nor prohibited (nor would one expect it to be) in the Indonesian Civil Code. The DCF method has been used in appropriate international awards: e.g. Starrett Housing Corporation v. Iran (op.cit., supra) and Phillips Petroleum Company Iran v. Iran, 21 Iran-US Claims Tribunal Reports 79. As to the first method to be applied to the period July 9, 1980 until December 31, 1989, it is one that is logically indicated by the finding that the purpose of

compensation is to put Amco in the position of having received the benefits of the contract during this period. The Tribunal finds it a method that is entirely consistent with Indonesian law and international law.

198. The Tribunal notes also that both parties in the present case have acknowledged the appropriateness of the DCF method for the entire valuation, even though there have been contested views as to the application of the component elements, and even though Indonesia has constantly emphasised that the method should not be used in such a way as to allow the inclusion of speculative profit. The several reports by accounting experts introduced by each party before the First Tribunal, as well as before the present Tribunal, all used the discounted cash flow method of valuation. See for Amco: the Arthur Young and Company report of 1982 (Previously Filed Claimants' Documents, Vol.I, Tab.28); the Pannell Kerr Foster reports of 1983 (Ibid, Vol.II, Tab.137), and of 1988 (New Factual Exh., Tab.156). See for Indonesia: the Horwath and Horwath (UK) Ltd. reports of 1984 (Previously Filed Respondent's Exh., Tab.240); of September 10, 1988 (Indonesia Exh., Vol.V, Tab.90); and of November 11, 1988 (Ibid.,

Vol.VI, Tab.103).

199. While adopting this technique in respect of the period after December 31, 1989, the Tribunal calls attention to the fact that it is not a mechanistic device. The method itself relies on the application of assumptions which are necessarily judgmental. The DCF method is at once a flexible tool, that allows for an application of factors and elements judged as relevant. At the same time, it allows for the application of these judgmental elements to be articulated.

200. This being said, the Tribunal has to examine the assumptions upon which the future income of the Hotel could be forecast, that Hotel being the only source of income of PT Amco. On that subject, PT Amco and Indonesia presented divergent views on several issues; these will be addressed <u>seriatim</u>, in relation to the two valuation periods.

(d) Assumptions relating to Valuation of Hotel Profits: 1980-1989

(i) The base period

201. The Pannell Kerr Foster report of 1983 (op.cit., supra), upon which PT Amco relies, was based on a market research on the hotel industry in Jakarta, including the Kartika Plaza Hotel, for years 1978-1983. It also assumed that a loan of US$3 million, which had been undertaken by PT Amco under the 1978 Profit-Sharing Agreement would be made and used for renovations and that the investment would upgrade the Hotel to a four-star status.

202. The Horwath and Horwath reports (op.cit., supra) were based on the average monthly net profit of the Hotel for the fifteen month period beginning January 1, 1979 and ending March 31, 1980.

203. The Tribunal believes that the base period adopted by Horwath and Horwath is the sounder, reflecting the period when Amco actually was managing the Hotel. This base period will be used to arrive at an annualised figure which will constitute the base year. The base period suggested by Pannell Kerr Foster would include elements that would be too

speculative and would rely substantially on PT Wisma's management period, brought about by the unlawful acts of the army and police.

(ii) The office and store rental income

204. In their pleadings before the first Tribunal, Amco and Indonesia both used the base year office and store rental derived from the 1982 Arthur Young Report and which was set at Rp. 149 million (op.cit., supra).

205. Before this Tribunal, Amco argued that, based on newly available audited statements of PT Wisma, that figure was too low by at least 50 per cent. Upward adjustments were requested on the basis that (a) 1981 should be used as a base year instead of the 15 month 1979-1980 period; (b) a portion of the store rental income was included on PT Wisma's books rather than the Hotel's books; (c) actual rental performance after 1980 would justify an increase in Horwath and Horwath's projections; and (d) Horwath and Horwath had double counted the expenses which Arthur Young charged against gross revenue by including them in the expense portion of the 15-month accounts used to determine base-year Hotel

profits.

206. The Tribunal cannot accept the arguments raised under points (a), (b) and (c) above as they are predicated on events occurring under PT Wisma management. PT Wisma management was the consequence of the intervention of the army and police on April 1, 1980 and of the BKPM decision of July 9, 1980. Financial results obtained by this management are not to be relied on in seeking to identify what would have happened had PT Amco's contract rights remained intact. The same base period should be used as for hotel profits. As for (d), double-counting, no evidence has been adduced before the Tribunal demonstrating that store expenses had been included in the management accounts as part of the expenses of the Hotel operation. The Tribunal finds it too speculative to assume such a possibility.

207. The Tribunal therefore accepts the Arthur Young estimate of Rp. 149 million (at 1980 values) for office and store store rental income as a reasonable base figure.

(iii) The level and the depreciation rate of the replacement reserve

208. In their reports prepared for the first Tribunal, Pannell Kerr Foster used a 2% while Horwath and Horwath used a 4% replacement reserve of gross revenue from Hotel and office rental, to cover the replacement cost of unserviceable furniture, fixtures and equipment. In both cases, the reserve was expensed in the year it was taken.

209. In their 1988 reports and in their testimony before this Tribunal, Horwath and Horwath argued that a 5% charge should be retained as the replacement reserve and that it should be capitalised and depreciated over five years. It was argued, inter alia, that the actual expenditure between 1981 and 1987 was considerably higher than the amount produced by a 4% reserve. For their part, Pannell Kerr Foster argued in their 1988 report that the replacement reserve should be depreciated over a seven year period and should be based on 4% of hotel and commercial revenues.

210. Excluding those subsequent events directly related to the unlawful act, the Tribunal finds it

inappropriate to rely on the level of expenditure incurred by PT Wisma between 1981 and 1987 to establish the replacement reserve rate. Taking into account the various reports produced by the parties and the evidence adduced, the Tribunal finds a four per cent (4%) rate to be adequate in the circumstances.

211. As to the depreciation period, the Tribunal believes that, taking account of the type of assets (equipment, furniture, etc) that the reserve was intended to cover, a five year depreciation period is appropriate. It was also argued by Amco that the reserve should be decreased during the last few years of the Profit-Sharing Agreement, since PT Amco would not have allocated the same sum as a replacement reserve when the expiry of the Agreement was in sight. The Tribunal does not share that view. Being responsible for the management of the hotel, PT Amco was expected to keep it in good running condition for the whole of the Profit-Sharing Agreement, and this was expected in the Ramada Licence Agreement (Previously Filed Claimants' Documents, Vol.I, Tab.16). The Tribunal concludes that the same rate of replacement reserve should be maintained until the end of the Agreement.

Finally, Amco argued that depreciation should not be extended over the term of the Agreement, on the principle that depreciation belonged to PT Amco. As will be seen below, the Tribunal does not believe that, under the Profit-Sharing Agreement, PT Amco could appropriate depreciation to itself, but rather that it should be deducted from hotel profits before distribution in the appropriate shares between PT Amco and PT Wisma. In these circumstances, there appears no valid reason to decrease replacement in the last few years of the Agreement. The Tribunal has also concluded that the maintenance reserve should be calculated on the combined gross revenue of hotel and office rental. The base year figures for office rental did not appear to have included a deduction for such figures.

(iv) Entitlement to depreciation

212. Strong disagreement was expressed by the parties as to the way depreciation should be treated.

213. PT Amco argued, first, that it was entitled to the depreciation of the capital assets of the Hotel (Reply, pp.43-45) and, second, that PT Aeropacific's asset contributions to the Hotel should be included

in the Hotel depreciation from the effective date of the transfer of rights between PT Aeropacific and PT Amco in 1980.

214. As to Indonesia, it argued that, under the 1978 Profit-Sharing Agreement, PT Amco was not entitled to depreciation (see especially Counter-Memorial, p.171, fn.461 and Rejoinder, pp.66-9). While Horwath and Horwath had in its 1984 Report added depreciation to PT Amco's income anticipated under its contract, it changed its interpretation of the 1978 Profit-Sharing Agreement in its 1988 reports and concluded that PT Amco was only entitled to a share of the net profit after tax of the Hotel. Depreciation was deducted, as normally done, in arriving at the net profit. (See Indonesia, Exh., Vol.V, Tab.90, p.4; Amco, New Factual Exh., Tab.156, pp.37-8).

215. The Tribunal heard evidence that, between 1968 and 1978, the practice followed between the parties was for PT Amco to keep the depreciation. In the Tribunal's opinion clause 5(a) of the Lease and Management Contract, when read together with clause 5(b), leaves it unclear that PT Amco was entitled

to do this.

216. However, it is to the 1978 Profit-Sharing Agreement that the Tribunal must refer, that Agreement changing and adding to the 1968 Lease and Management Contract and declaring null and void all previous provisions "contrary and/or not in accordance with THIS AGREEMENT" (Indonesia Exh., Vol.II, Tab.47, clause 2B(1) and clause 3.3). The 1978 Agreement stipulates that one of its purposes is "the best possible implementation of the elements" of the 1968 Contract (Ibid., clause 2(a)). The Tribunal is of the view that the 1978 Agreement created a new regime between PT Wisma and PT Amco. Clause 2(b)(1) states specifically that "the Lease and Management Contract shall be replaced and understood as the PROFIT-SHARING AGREEMENT FOR THE MANAGEMENT OF THE KARTIKA PLAZA LAND AND BUILDING...)". PT Amco assumed the management responsibility for the whole complex and a profit-sharing scheme was established whereby between October 1, 1978 and September 30, 1984, PT Amco would receive 65% of the net income of the venture and 50% thereafter until September 30, 1999.

217. In clause 2(3)(b) it is provided:

> What is meant and intended by Net Income is: "Income which is received by the SECOND PARTY [PT AMCO] from all parties and rent or service for the use of Kartika Plaza land and buildings with its contents"
>
> less (minus)
>
> "all sorts of expenditures or costs which are needed for the Hotel Kartika's promotion, sales and after-sale routine maintenance (operating expenses and instandhouding) for the Kartika Plaza land and building, including corporate tax and insurance, IREDA (Regional Rehabilitation Contribution), and other state/regional contributions..."

218. While a detailed list of items to be deducted from gross income is enumerated, depreciation is not specifically mentioned. It might perhaps be thought that the reference to expenditures and costs needed for routine maintenance (including "instanthouding" - "preservation") is a reference to depreciation. However, deduction for routine maintenance does not cover depreciation of the hotel itself. The 1978 Agreement contains no provision for any payment of depreciation to PT Amco.

219. There is no evidence that, subsequent to 1978, PT Wisma accepted PT Amco's previous practice of keeping the depreciation. PT Amco's 1978 and 1979

financial reports were contested by PT Wisma, both before and after the events of April 1, 1980.

220. The Tribunal believes that a reading of the terms of the 1978 Profit-Sharing Agreement and reference to the customary accounting definition of net income (i.e. income subsequent to deduction of depreciation) leads to the view that hotel depreciation was to be deducted from gross income before arriving at the net income to be shared between the parties. PT Amco was thus not entitled to retain depreciation before proceeding to any distribution of the profits.

221. A further depreciation issue arose in relation to the treatment of the depreciation for the Rp. 421,451,054 (US$1,015,000) net book value of additional fixed assets in the Hotel carried on the books of Aeropacific and transferred to Amco under the Amco/Aeropacific Settlement Agreement of March 29, 1980 (Previously Filed Claimants' Documents, Tab.18). Amco argued that Horwath and Horwath were wrong in their 1984 report not to include any depreciation for those assets and that it should be entitled to the whole of that depreciation

(Memorial, p.80; and Reply, p.49). Indonesia contested this, emphazising that Aeropacific held no title to the capital assets of the Kartika Plaza Hotel (Counter-Memorial, p.140; and Rejoinder, p.69). In its November 1988 Report, Horwath and Horwath agreed to include an element for that depreciation in the profit and loss account of the Hotel but, in accordance with Indonesia's view of the matter, allocated it to PT Wisma as Hotel owner, and not to PT Amco. This reduced Amco's projected net income.

222. Some Rp. 421,451,054 (US$1,015,000) was on the books of Aeropacific for the construction it had done, and was then assigned to PT Amco under the PT Amco/Aeropacific Settlement Agreement (op.cit., supra). This situation was not changed, in the Tribunal's view, by the formal provision in Clause 9(1)(4) of the Sub-Lease of October 13, 1970 (approved by PT Wisma) that all alterations or improvements passed forthwith to PT Amco (Indonesia Exh., Vol.II, Tab.42). The reality remained that Aeropacific acted for PT Amco and the assets transferred back to PT Amco under the 1980 Settlement Agreement should be included in the hotel assets subject to depreciation. In the light of the

Tribunal's findings (above, para.220) on depreciation, such depreciation should be deducted before arriving at net income for the purpose of the 1978 Profit-Sharing Agreement.

(v) Entitlement to cash flow

223. Amco argued (Reply, p.43) that it was entitled to the Hotel cash flow, less PT Wisma's profit share. The arguments advanced by each of the parties on this issue essentially mirrored the arguments deployed on entitlement to depreciation.

224. The Tribunal cannot agree with Amco's claim under this head. As indicated above, para.61, PT Amco as manager had access to the Hotel cash flow and could decide on its use for hotel purposes. But this access was of a fiduciary nature. PT Amco did not have proprietary rights over the cash flow.

(vi) The impact of the Ramada Contracts

225. On July 4, 1979, PT Amco entered into two contracts: a Licence Agreement with Ramada Inns Inc. (op.cit., supra) and a Management Agreement with Ramada International Inc. (Previously Filed Claimants'

Documents, Vol.I, Tab.17). Under those agreements, Ramada licensed the use of its name by the Hotel, agreed to link it to Ramada's international booking system and to provide it with top quality managers. These agreements were approved in writing by PT Wisma (Ibid., Tabs. 16 and 17). The Ramada fees were paid by PT Amco and an experienced Ramada Manager, Mr. A.S. Shussel, was appointed by Ramada at the end of 1979. He had been in charge for a little over three (3) months when the army and the police actions occurred on April 1, 1980.

226. In their 1984 report, Horwath and Horwath included some Rp. 178 million of expenses attributable to PT Amco's affiliation with Ramada, but did not include any incremental profit that could be reasonably expected to result from such affiliation. Amco has contended before this Tribunal that such profit element should be included in compensation due to it.

227. Amco has contended (Memorial, p.89) that it would have been reasonable to assume that the Ramada management combined with the Ramada name and sophisticated booking system would have added at

least 25 per cent to gross revenues, and that at least fifty per cent of this increase would have represented profit, from which Ramada's fees would be deducted. This factor was claimed by Amco to represent an upward adjustment of US$301,000.000 to the present value of Amco's share of the profits.

228. Clearly Amco entered into the Ramada agreements in the belief that they would secure significant benefits. At the same time, the Ramada Licence Agreement was subject to stringent covenants and conditions. The agreements were to run for ten years with two additional five year options. PT Amco covenanted:

> "To maintain a high moral and ethical standard and atmosphere at LICENSEE'S Hotel; to comply with all local, state and federal laws, ordinances, rules and regulations ...; to maintain its premises and accommodations in a clean, attractive, safe and orderly manner, and to provide efficient, courteous and high quality service to the public, and to furnish hotel accommodations, services and conveniences of the same high quality and distinguishing characteristics as provided at Ramada Inns in and around the United States and elsewhere so that the Hotel operated by the LICENSEE hereunder shall help to create and maintain goodwill among the public for the system as a whole."

229. PT Amco's ability to benefit from the Ramada connection thus depended upon its own ability to comply with the Covenants. Further, the fees to be paid under the Licence Agreement and the Management Agreement were substantial. These fees were unrelated to the ascertainability of benefits deriving from Ramada.

230. Under the Licence Agreement a royalty fee in the amount of 3 per cent of gross room sales was to be paid. In addition Amco was to pay a sum equal to US$0.17 per currently available and sellable room per night or 1.2 per cent of gross room sales, whichever was greater, or such additional sum or sums as would from time to time be required by Ramada Inns upon recommendation of Ramada Inns Association. Under the Management Agreement Amco was to pay a management fee of 25 per cent of gross operating profit defined as the amount remaining after deducting all "expenses of operation" from all "gross revenues". Gross revenues consisted of revenues or income or sale of any kind. Operating expenses did not include payments (whether principal or interest) relating to financing of capital improvements or incumbering the hotel, depreciation, insurance premiums, etc.

231. During the oral hearings evidence was given as to the way the Ramada contracts were working in the early phase of their life.

232. Taking all of these factors into account, the Tribunal has come to the conclusion that any projections as to whether these contracts would have been beneficial cannot meet the test of being non-speculative. The elements of uncertainty are simply too great. The Ramada factor should be treated as a neutral element. The Tribunal therefore adopts the alternative approach adopted by Horwath and Horwath in its 1988 reports, which excluded the Ramada fees from the results for the period to March 31, 1980 but which also excluded any future enhancement of earnings resulting from the Ramada contracts (op.cit., supra, pp.21, 22, 26).

(vii) The hotel market in Jakarta 1980-1983

233. Applying the principle that it is appropriate to give effect to known factors unrelated to the licence revocation or unlawful takeover of the hotel, the Tribunal has considered the evidence as

to the state of the hotel market. This evidence has only been provided for the period 1980-1983. The issue was addressed by the parties in their briefs, see Amco Memorial, p.68; Indonesia Counter-Memorial, pp.162-166; Amco Reply, p.65; and Indonesia Rejoinder, pp.54-57.

234. Pannell Kerr Foster made extensive market research for the period 1978-1983 (Previously Filed Claimants' Documents, Vol.II, Tab.137). Section III contains information on the historical growth in supply.

235. Jones Lang Wootton prepared a report dated February 28, 1984 (Indonesia Exh. Vol.IV, Tab.81). The report contains information on available hotel rooms and planned investments in the hotel industry in Jakarta.

236. Having examined the argument and evidence presented, including the fragmentary data on historical growth and the projections of the experts, the Tribunal has concluded that the state of the hotel market does not fall into the category of facts of sufficient

certainty to have had an impact on profit levels to be compensated. No element for this is thus reflected in the calculations.

(viii) The treatment of corporate taxes

237. In their September 1988 report, Horwath and Horwath contended that, under the 1978 Profit-Sharing Agreement, Amco's profit share should be calculated after, rather than before, income taxes (op.cit., supra, p.4). This point of view was different from the one adopted by the same experts in their 1984 report.

238. Pannell Kerr Foster, in their October 1988 report, stated that this was a matter of legal interpretation, not of accounting, and that Horwath and Horwath's first interpretation was the right one.

239. While the financial impact of one option versus the other does not appear to be major, the issue generated considerable argument between Amco and Indonesia at the Washington hearings, PT Amco contending that the only taxes which were deductible

were the property and business taxes relative to the Hotel and Indonesia contending that all taxes, including corporate taxes, should be deducted. Much of the debate had to do with the translation to be given to the words pajak perusahaan in clause 3(b) of the 1978 Profit-Sharing Agreement. At the request of the Tribunal, additional written information was provided by the parties, after the Washington hearings, concerning the proper translation of those terms.

240. The Hotel Kartika Plaza was at no time incorporated as an entity separate from PT Amco and PT Wisma. It would have been normal business practice for the parties to pay separately the corporate tax after the distribution of hotel profits rather than having such a charge deducted from hotel profits before distribution. This procedure would have been all the more logical given that clause 3(b) of the 1978 Agreement provides for the deduction of "all kinds of expenditures or costs required for promotion, sales and after sales service or routine (operation and maintenance costs) of Hotel Kartika Plaza for the land and buildings of Kartika Plaza (...)" (Previously Filed Claimants' Documents, Vol.I, Tab.15, para.2(b), 3(b)). In common accounting

procedure corporate taxes would not be interpreted as being included in the above-mentioned types of deductible expenses.

241. Amco referred to the Corporate Tax Act of 1925 where the words "pajak pierseroan" are used to describe the corporate tax. It also refers to the Indonesian-English Dictionary by Echols and Shadily which defines "perusahaan" as "business, enterprise, undertaking, concern".

242. In practice, the word "perusahaan" seems to be given a rather broad meaning which could include a business as a corporate as well as a physical entity. Thus, PT Amco's investment application of May 6, 1968 (Previously Filed Claimants' Documents, Vol.I, Tab.5) refers to PT Amco as a "perusahaan" in Articles 1 and 9. In addition, the translation of the 1978 Profit-Sharing Agreement produced by Amco uses the expression "company tax" for the words "pajak perusahaan". The words following those quoted above in para.2(b) 3(b) of the Agreement read: "(...) including insurance and company tax" ("assuransi dan pajak perusahaan" in the Indonesian text).

243. In the Tribunal's opinion, the words "pajak perusahaan" could be translated by "company (or corporate) tax". The practice followed by PT Amco and PT Wisma should help determine whether, in this instance, the parties meant corporate tax to be deducted before profit distribution under the 1978 Agreement.

244. Evidence produced before the Tribunal indicates that this was the interpretation adopted by PT Amco in its relationship with PT Wisma. In a letter of March 19, 1980, addressed by Mr. E.M. Tomodok, Vice-Chairman of PT Amco, to Mr. H. Soltpipto, principal director of PT Wisma (Indonesia Exh., Vol.I, Tab.53, p.3), it is stated:

> "Because in the 'Profit-Sharing Agreement' dated 6 October 1978, company taxes and also 'investment expenses' are deducted from the calculation for distribution of net income, we hereby would also like your assessment concerning these costs.
>
> Company taxes are estimated at Rp. 20,000,000 and investment costs are Rp. 54, 878, 741.00".

245. The Rp. 20,000,000 amount appears consistent with the amount that would have to be paid by the Hotel

on the basis of the corporate tax rates in effect at the time.

246. On the basis of all the above, the Tribunal concludes that Amco's share of profits should be calculated after, rather than before, corporate income taxes.

(ix) Tax rates to be applied

247. In its September 1988 report, Horwath and Horwath stated that the 1984 rather than the 1980 tax rates should be applied to post-1983 earnings (op.cit., supra, p.7). In its report of February 28, 1984, Horwath and Horwath had applied uniformly the 1980 rates. Before this Tribunal, Indonesia argued that the 1984 tax rates should apply to post-1983 earnings and stated that the use of the 1984 tax rates probably lead to a lower tax burden than the 1980 rate because of a new configuration of tax rates and the elimination of a 20% dividend tax.

248. For its part, PT Amco argued that, while the impact of the 1984 tax rates would not have been necessarily negative, it was preferable to abide by

what was reasonably foreseeable in 1980 and that, if one were to accept the 1984 rates, one should include a provision for the periodic indexation of tax rates over the whole period covered by the Award.

249. The changes in taxation rates are known facts which would have been relevant to Amco had its contract remained in effect. Further, these changes in rates were unconnected with events surrounding the Kartika Plaza controversy. The 1980 taxation rates remained unchanged until 1984 and will therefore be applied for the period 1980-1983. A new taxation rate, which is still in existence, was established in 1984, and will be applied for the period 1984-1989. Applying known facts to put Amco in the position it would have been in had its contract been implemented, equally makes an element for indexation inappropriate.

(x) <u>The exchange rate</u>

250. In order to "minimise current value changes", and since hotel rates are quoted in US dollars, Pannell Kerr Foster in its 1983 report estimated all figures in US dollars, after having converted the base

period into such dollars at the 1980 exchange rate (op.cit., supra, section 1, p.11).

251. By contrast, Horwath and Horwath converted PT Amco's profit in a given year between 1981 and 1988 at the then applicable exchange rate and then discounted such dollar amount to present value. For years after 1988, the 1988 exchange rate (Rp. 1663.1 per dollar) was used (Indonesia Exh., Vol.V, Tab.90, p.6).

252. Although no definitive evidence to that effect was introduced before the Tribunal, it would appear that most of the Hotel income was earned in rupiahs. However, the currency in which the income was earned does not bear on whether the estimated Hotel profits between 1980 and 1999 should be converted on the basis of the current exchange rates of the year the income is earned or on the basis of the 1980 exchange rate.

253. The objective is to put Amco in the position it would have been in had its contract been performed. Profits would have been converted year by year, and

the differences in exchange rates year by year were known facts unrelated to the unlawful acts that prevented the contract being performed. It follows that the rupiah earnings should be converted each year at the appropriate exchange rate:

	Rp
1980	629.99
1981	631.76
1982	661.42
1983	909.26
1984	1,025.94
1985	1,110.58
1986	1,282.56
1987	1,643.85
1988	1,685.70
1989	1,770.06

(Source: IMF International Financial Statistics, Vol.XL (1987) and Vol.XLIII (1990)).

(xi) The inflation rate

254. The actual year by year average inflation rate between 1980 and 1990 will be applied to the hotel and office store rental profits. The figures to be applied, as provided to the Tribunal by the World Bank from Laporangan Minggu Bank Indonesia, are:

1980*	15.9
1981	12.2
1982	9.5
1983	11.8
1984	10.5
1985	4.7
1986	5.8
1987	9.3
1988	8.0
1989	6.3

(xii) Risk factor

255. As the valuation method employed for 1980-89 does not entail putting oneself in the position of a reasonable businessman in 1980, and thus including an element for unknown risks that might occur, no such factor is reflected in the figures for this first period.

(xiii) Discount rate

256. Because of the valuation method to be applied to the period 1980-1989, the use of a discount rate does

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* The average figure for 1980 is based on only ten months of data for 1979, the series beginning only in March 1979. The figure for 1989 is the provisional figure available at the date of the Award.

not arise.

(xiv) Interest rate

257. The Tribunal finds that the distinction advanced by Amco in its Memorial (see para. 31 above) that the Indonesian statutory rate of 6% per annum was inapplicable to monetary awards for wrongful acts to be untenable. It is res judicata that interest will be due at 6% per annum on the profits due year by year to Amco, until the time of payment. The First Tribunal, however, decided that interest was due at 6% per annum from January 15, 1981 (the date upon which ICSID proceedings commenced). There has been no finding by this Tribunal as to whether the date from which interest runs is res judicata, nor has the matter been raised by the parties. Although the amount of damages upon which the interest accrues has been annulled, the view of the Tribunal is that the date from which the 6% (itself unannulled) runs is not annulled. In view of the valuation method used for the period 1980-1989, interest would in principle have run from January 1, 1981. However, due to this res judicata, it will be treated as running from January 15, 1981.

258. The Award of the First Tribunal does not specifically state if the interest was to be simple or compound, but the absence of any directive that it be compounded on a yearly basis leads to the view that simple interest was awarded. The Tribunal has noted that in Amco's Memorial, p.192, they claim simple interest (while arguing for the Singapore rate). This Tribunal awards 6% simple interest per annum.

(e) Assumptions relating to Valuation of Hotel Profits: 1990-1999

259. The damages due up to 1990 are US$1,679,890.00. Interest up to May 31, 1990, the date of the Award, makes the damages due $US1,711,830.00. The Tribunal has now to consider the evaluation of damages over the remaining years of the lease. The discounted cash flow (DCF) method will be applied for the reasons given in paras.197-198 above.

(i) The base period

260. The base period for calculations for 1990-1999 will be 1989, as it is the last year for which there are available figures that correspond in real terms to the 1980 profits.

(ii) The office and store rental income

261. The Tribunal will rely on the 1989 figures, which best reflect the value in real terms of the base period relevant to 1990-1999.

(iii) The level and the depreciation rate of the replacement reserve

262. Issues relating to depreciation will be treated for this period identically to their treatment for the period 1980-89.

(iv) Entitlement to depreciation

263. This will be treated as for the period 1980-89

(v) Entitlement to cash flow

264. This will be treated as for the period 1980-1989.

(vi) The impact of the Ramada contracts

265. This will be treated as for the period 1980-1989.

(vii) The hotel market in Jakarta

266. As no evidence that is reasonably certain has been put to the Tribunal in relation to the period 1990-1999, no assumptions relating to this factor will be made.

(viii) The treatment of corporate taxes

267. This will be treated as for the period 1980-1989.

(ix) Tax rates

268. The 1984 tax rate, which is currently effective, will be applied, as it appears to the Tribunal to be the best non-speculative rate available.

(x) Exchange rate

269. Rupiah earnings will be converted at the 1989 exchange rate of 1,770.06 Rp., as it appears to the Tribunal to be the best non-speculative rate available.

(xi) (xii) (xiii) Discount rate (including inflation rate and risk factor)

270. The issue of the discount rate to be used in order

to arrive at net present value led to growingly divergent views between Amco and Indonesia as well as their experts.

271. Before the First Tribunal, they all agreed to use a discount rate of 15%, being 3% above the estimated annual inflation factor of 12%.

272. In their September 10, 1988 Report, Horwath and Horwath used two discount rates: the 15% rate which they had used in their 1984 report, or alternatively a 17% rate "to reflect inherent business risk". Then, on the basis of a report prepared by Professor David O.Dapice and dated November 14, 1988 (Indonesia Exh., Vol.VI, Tab.105), Horwath and Horwath submitted a new report dated November 11, 1988, recalculating the previously submitted models on the basis of a 30% discount rate for an income stream generated in rupiahs and repatriated annually into dollars and a 34% discount rate for a rupiah income stream discounted to 1980 and converted into dollars at the 1980 exchange rate (Indonesia Exh., Vol.VI, Tab.103, pp.16-17).

273. Amco also argued that a discount rate lower than 15% should apply if a below-market statutory interest rate of 6% were applicable for measuring the value of the loss of money.

274. The Tribunal does not accept Amco's argument that a relationship should be established between the Indonesian statutory interest rate and the appropriate discount rate that should apply to any income stream. The purpose of the discount rate is to establish the value of future income in present terms. A limited number of factors are taken into account to arrive at an appropriate discount rate, but the statutory rate of interest is not one of them.

275. As to the discount rates of 30% and 34% proposed by Indonesia, they arose from Professor Dapice's report of November 4, 1988. A central argument was that real rates of return of 20% were obtained from the Government of Indonesia during the eighties for the development of long-term projects; taking inflation into account, nominal rates were about 30%. Union Oil's development of a geothermal field in Indonesia was relied upon by Professor Dapice as a case in

point.

276. Professor Dapice's analysis appears essentially valid in principle but largely irrelevant to the present situation.

(1) While reference to large long-term investments such as the Union Oil project are interesting, it is pertinent to note that no evidence was produced of the kinds of rate of return expected in the service industry, and the hotel industry in particular, in the early eighties, still less the nineties.

(2) If one were to accept Professor Dapice's figures, one would have to expect a similar analysis by the investor as to his expected rate of return in the future. One would therefore have to apply a similar rate of escalation for the Hotel's profits after 1980, assuming a rational investment decision. Instead, both Pannell Kerr Foster (for the period post-1983) and Horwath and Horwath (for the period post-1980) used a 12% escalation factor which corresponded to the average inflation rate between 1980 and 1983 and constituted their estimated annual rate up to 1999.

277. The Tribunal has noted that in their report of November 1988, Horwath and Horwath refrain from any endorsement of Professor Dapice's conclusion. They merely state: "We understand that Indonesia has been advised by economist Professor David Dapice of the appropriate discount rates to be applied (...). (...) We have used the discount rates provided by Professor Dapice and applied these to all the models (...)" (Indonesia Exh. 103, pp.127).

278. Howarth and Howarth and Pannell Kerr Foster used a 12% inflation figure representing the average inflation rates for the years 1980-1983. The Tribunal has noted that a significant decline in the rate of inflation has occurred in Indonesia in the decade 1980-90. It appears reasonable in the circumstances to use the average rate of inflation of the last five years (1985-1989) as a projection for the remaining period. The average rate of inflation of 1985-1989 is 6.82 per cent.

279. As to the risk factor, the Tribunal has noted with interest the analysis of Howarth and Howarth in

their 1984 report, where they state:

> "The estimated net cash flow of the Hotel (...) has been discounted to arrive at an estimated value at April 1980 at the rate of 15 per cent, being 3 per cent above the estimated annual inflation factor.
>
> We have applied this relatively low margin over the assumed rate of inflation because the earnings have been based on known, historic results. If the earnings had been based on future projections of the Hotel's possible performance (taking into account the benefits of revised facilities, as in the case of the PKF report) we would have adopted a considerably higher margin over the rate of inflation in order to reflect the risks and uncertainties attached to such a projection." (Previously Filed Resp. Exh., Tab.240, para.3.1(g)).

280. The level of the risk factor at which the Tribunal arrives is heavily influenced by the fact that the level of assumed profit has been kept steady in real terms. The particular level of the risk factor is a matter of judgment. Pannell Kerr Foster set it at 3% (Previously Filed Claimants Documents, Vol.II, Tab.137; and New Fact. Exh., Tab.156) and Horwath and Horwath in 1984 set it originally at 3% (Previously Filed Resp. Exh. Tab.240, para.3(1)(g)) and in September 1988 at 5% (Indonesia Exh. Vol.V, Tab.90, p.6).

281. After studying all the factors involved and in particular the fact that the projected hotel

earnings have been based on known historic results, the trend in the US dollar and rupiah exchange rate, and given that Amco will receive in 1990 compensation paid in United States dollars, the Tribunal is of the view that a 4% risk factor should be adopted.

282. The Tribunal therefore concludes that a discount factor of 10.82% (4% risk factor plus 6.82% average inflation rate for 1985-1989) should be used to arrive at the 1980 net present value of the Hotel earnings for the period 1990-1999.

(f) Final Calculation of Damages

283. The figures reached on the basis of these principles have not been revised to reflect matters alluded to in paras.99-112 above. The Tribunal believes it is not for it to reflect those matters in the valuation, which should be objectively arrived at; but notes again that appropriate procedures existed in Indonesian law for the authorities to have addressed these matters, once the dispute between PT Wisma and PT Amco had focussed attention on them.

284. The final calculation of damages in the amount of US$2,696,330.00 with interest up to May 31, 1990 is shown below, at pp.169-170. The Tribunal has, in making the final calculation of damages, relied on the following (the reasoning for each of which has been elaborated above):

1. Base period

15 month period ending March 31, 1980. The hotel profit for the period was Rp. 181.2 million (Previously Filed Respondent's Exhibits Cited in Claimants' Memorial, Tab.240, para.3.1.a.; and Indonesia Exh., Vol.IV, Tab.82). The Ramada fee of Rp. 17.8 million, having been treated in the 1979-80 management accounts as an expense, is added back to the figures representing the 15 month base period. Thus the annualised base year results (12/15) are Rp. 159.2 million.

2. Office and store rental profits

Rp. 149.17 million.

3. Beginning and termination date

From July 9, 1980 to September 30, 1999.

4. Escalation rate

Yearly average inflation rate for the period July 9, 1980 to December 31, 1989. Average of the last five years (1985-1989) for the period January 1, 1990 to September 30, 1999, being 6.82%.

5. Discount rate

Projected inflation rate (average of 1985-1989: 6.82%), plus 4%, for the period of January 1, 1990 to September 30, 1999. The net present value is arrived at by discounting back to the date of the Award (May 31, 1990).

6. Exchange rate

Amco's profits to be converted into US dollars at the prevailing yearly rates for the period July 9, 1980 to December 31, 1989; and at the 1989 rate for the period January 1, 1990 to September 30, 1999.

7. Depreciation

Hotel profit is net profit after depreciation,

including Aeropacific depreciation. Depreciation is on a straight-line method, over a useful life of 20 years, with no salvage value.

8. Replacement reserve and depreciation

4% capitalised and depreciated over 5 years.

9. Entitlement to cash flow

Nil.

10. Corporate taxes

Amco's share of profits to be calculated after deduction of corporate income taxes.

11. Taxation rate

Actual annual prevailing tax rates, for the period 1980-1983. Rates established in 1984 and still in existence on the date of the Award, for the period 1984 to December 31, 1989. The current rate for 1989 for the period January 1, 1990 to September 30, 1999.

12. Share of profits to Amco

According to Profit-Sharing Agreement.

July 9, 1980 to September 30, 1984: 65%

October 1, 1984 to September 30, 1999: 50%

13. Interest rate

Non-compounded 6%, running from January 15, 1981.

Damages for the period July 9, 1980 to December 31, 1989

Year	4% Replacement	(*) Hotel Profit	(*) Office/ Store Rental Profit	Depreciation of 4% Replacement	Depreciation	Aeropacific Depreciation	Profit Before Tax	Total Tax	Profit After Tax	AMCO Profit Share	U.S. dollar Conversion ($000)	Cumulative Total	Non-compounded 6% Interest	Total
1980	26.78	88.97	71.93	5.36	16.03	28.83	110.68	23.20	87.48	56.86	90.69	90.69	-	90.69
1981	62.32	207.02	167.37	17.82	33.24	59.79	263.54	69.06	194.48	126.41	200.09	290.78	5.22	205.31
1982	68.24	226.69	183.27	31.47	33.24	59.79	285.46	75.64	209.82	136.38	206.19	496.97	17.45	223.64
1983	76.29	253.44	204.89	46.73	33.24	59.79	318.57	85.57	233.00	151.45	166.56	663.53	29.82	196.38
1984	84.30	280.05	226.41	63.59	33.24	59.79	349.84	116.44	233.40	142.89	139.28	802.81	39.81	179.09
1985	88.26	293.21	237.05	75.88	33.24	59.79	361.35	120.47	240.88	120.44	108.45	911.26	48.17	156.62
1986	93.38	310.22	250.80	82.09	33.24	59.79	385.90	129.06	256.84	128.42	100.13	1,011.39	54.68	154.81
1987	102.06	339.07	274.12	88.86	33.24	59.79	431.30	144.96	286.34	143.17	87.09	1,098.48	60.68	147.77
1988	110.23	366.20	296.05	95.65	33.24	59.79	473.57	159.75	313.82	156.91	93.08	1,191.56	65.91	158.99
1989	117.17	389.27	314.70	102.22	33.24	59.79	508.72	172.05	336.67	168.34	95.10	1,286.66	71.49	166.59
	829.03	2,754.14	2,226.59	609.67	315.19	566.94	3,488.93	1,096.20	2,392.73	1,331.27	1,286.66		393.23(**)	1,679.89

*) Inflation adjusted

**) To May 31, 1990, the date of the Award, the amount of interest is $425.17 for a final total of $1,711.83

Damages for the period January 1, 1990 to September 30, 1999

Year	4% Replacement	(*) Hotel Profit	(*) Office/ Store Rental Profit	Depreciation of 4% Replacement	Depreciation	Aeropacific Depreciation	Profit Before Tax	Total Tax	Profit After Tax	AMCO Profit Share	(**) (U.S. $000) Present Value of Profits
1990	125.16	415.81	336.16	109.60	33.24	59.79	549.34	186.27	363.07	181.54	102.56
1991	133.70	444.17	359.09	117.66	-	-	685.60	233.96	451.64	225.82	115.12
1992	142.81	474.46	383.58	125.81	-	-	732.23	250.28	481.95	240.97	110.85
1993	152.56	506.82	409.74	134.28	-	-	782.28	267.80	514.48	257.24	106.78
1994	162.96	541.39	437.68	143.44	-	-	835.63	286.47	549.16	274.58	102.85
1995	174.07	578.31	467.53	153.22	-	-	892.62	306.42	586.20	293.10	99.07
1996	185.94	617.75	499.42	163.67	-	-	953.50	327.72	625.78	312.89	95.43
1997	198.63	659.88	533.48	174.83	-	-	1,018.53	350.49	668.04	334.02	91.93
1998	212.17	704.89	569.86	186.75	-	-	1,088.00	374.80	713.20	356.60	88.56
1999	169.98	564.72	456.54	188.16	-	-	833.10	285.59	547.51	273.75	61.35
	1,657.98	5,508.20	4,453.08	1,497.42	33.24	59.79	8,370.83	2,869.80	5,501.03	2,750.51	974.50

(*) Inflation adjusted

(**) Present value to May 31, 1990

X. COSTS

285. Article 61 of the Convention on the Settlement of Investment Disputes requires that the Tribunal shall decide how and by whom expenses incurred by the parties in connection with the proceedings, as well as fees and expenses of the members of the Tribunal, and charges for the Centre, shall be paid.

286. The Tribunal decides that Amco and Indonesia shall each bear the costs they have incurred in the preparation and presention of their cases; and that the arbitrators' fees and expenses and the charges for the use of the facilities of the Centre shall be shared equally.

287. An issue has arisen which requires the Tribunal to decide if an adjustment should be made to this finding. On May 31, 1989 Amco wrote to the Tribunal, making certain allegations and attaching certain affidavit evidence. Amco claimed that certain of its documents had been taken by PT Wisma and not returned to it; Indonesia was responsible for this; and that Indonesia's counsel had had

access to these documents. Amco asked that "the Tribunal enter a preliminary award compensating Amco for the avoidable costs incurred over the years litigating a case while wrongfully deprived of its own files". The sum sought was "not less than $500,000". Amco later (letter of July 25) appeared to think a preliminary hearing no longer necessary. On August 8, 1989 the Tribunal issued an Interlocutory Decision stating that it made no order for a separate preliminary hearing.

288. Amco's request for "compensation ... for the avoidable costs" was not made as a substantive claim in the Memorials, but rather as a separate request by letter in the period before the oral hearings. In the Tribunal's view, it therefore falls to be considered as an element in that part of its Award which deals with costs.

289. The matter of allegedly stolen documents (going beyond the aspect of "avoidable costs" in relation thereto) was mentioned in the written pleadings, and in oral argument, and was dealt with in detail in the correspondence sent by the parties to the Tribunal (letters of Amco of May 31, June 16, July

25 and August 2; letters of Indonesia of June 15, July 14 and July 28).

290. The Tribunal believes that the evidence shows that certain Amco documents were taken by PT Wisma; and that not all of these were returned or otherwise made available to Amco. The Tribunal further believes that this was done in consequence of the army and police intervention, and that it cannot be said that any such acts were those of PT Wisma alone, for which Indonesia bears no legal responsibility. However, the evidence (both in the correspondence and in the oral hearings) leaves the dimensions of this problem very unclear. For the most part, the Tribunal is not in a position to know what documents, unlawfully taken, were or were not returned. Moreover, as most of Amco's documents relevant to this case would have been expected to exist outside of Indonesia, it is also unclear what additional costs Amco had incurred in the preparation of this case.

291. The Tribunal therefore makes no adjustment in this regard to its determination at para.286 above regarding costs.

XI. SET-OFF OF ANNULMENT COSTS

292. As applicant in the annulment proceedings, Indonesia was required under ICSID Financial Regulation 14(3)(e) to make advance deposits to cover all costs. In paragraph 125 of its Decision of May 16, 1986, the Ad Hoc Committee held that Amco should pay Indonesia one half of the cost of the annulment proceedings. The portion of the costs attributed to Amco remained unpaid at the outset of these proceedings.

293. The Republic of Indonesia on October 22, 1987 requested that the present Tribunal determine that advance payments for these proceedings should be apportioned in their entirety to Amco until the outstanding award, and interest claimed to be due on it had been met thereform. Certain written communications from the parties ensued.

294. The parties agreed to a proposal by the President of the present Tribunal of December 1, 1987 that advance costs for a period of six months should be made on an equal basis, to allow the work of the

Tribunal to commence.

295. On February 1, 1988 the Tribunal heard oral submissions of the parties on this matter. On February 8, 1988 the Tribunal issued a reasoned Ruling rejecting Indonesia's application for the allocation of advance costs solely to Amco. Paragraph 15 of that Ruling stated:

> "The Tribunal, without taking any present position itself, notes for the record that Amco, in its communication of January 20, 1988, "concede[s] that, as a matter of fairness, the present Tribunal should be permitted to set off against any award that it makes in [Amco's] favour any costs then owing by [Amco] to Indonesia relating to the annulment Decision."

Basing itself on this concession, the Tribunal now decides that the sum of US$128,363.80 which includes interest of 6% from May 16, 1986, will be set off against the sum of US$2,696,330.00 it has awarded to Amco as damages.

For the above stated reasons;

THE TRIBUNAL DECIDES AS FOLLOWS:

(1) the Republic of Indonesia shall pay to Amco Asia Corporation, Pan American Development Limited and

P.T. Amco Indonesia, jointly ("The Claimants"), the sum of two million five hundred and sixty-seven thousand and nine hundred and sixty-six US dollars and twenty cents (US$2,567,966.20) with interest on this amount at the rate of six per cent (6%) per annum from the date of the Award until the date of effective payment. The above sum includes a set off of one hundred and twenty-eight thousand and three hundred and sixty-three US dollars and eighty cents (US$128,363.80) for the amount including interest owed by the Claimants for their share of the costs of the Annulment Proceedings referred to in paragraph 295.

(2) The amounts due from the Republic of Indonesia shall be paid to the Claimants outside of Indonesia.

(3) The Republic of Indonesia's counterclaims are rejected.

(4) Each party shall bear the fees and expenses it incurred for the preparation and presentation of its case.

(5) Each party shall bear one half of the arbitrators' fees and expenses and of the charges for the use of the facilities of the Centre.

Done in Copenhagen, and dated this thirty-first day of May 1990

Professor Rosalyn Higgins, Q.C.

The Hon. Marc Lalonde, P.C., Q.C.

Per Magid