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INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the matter of

AMCO ASIA CORPORATION, PAN AMERICAN DEVELOPMENT LIMITED
AND P.T. AMCO INDONESIA (AMCO)

v.

REPUBLIC OF INDONESIA (INDONESIA)

(CASE ARB/81/1)

DECISION

On the Applications by INDONESIA and AMCO respectively
for ANNULMENT and PARTIAL ANNULMENT
of the Arbitral AWARD of June 5, 1990
and the Application by INDONESIA
for Annulment of the SUPPLEMENTAL AWARD of October 17, 1990

In the above matter

RENDERED BY THE AD HOC COMMITTEE

Constituted by the Chairman of the Administrative Council of the Centre in accordance with Article 52 of the Convention on the Settlement of Investment Disputes between States and Nationals of other States, and composed of

SOMPONG SUCHARITKUL	President
ARGHYRIOS A. FATOUROS	Member
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PART ONE

PRELIMINARY QUESTIONS AND ISSUES BEFORE THE AD HOC COMMITTEE

I. INTRODUCTION

1.01 The issues before the current Ad Hoc Committee relate to two Applications for Annulment of the AWARD of June 5, 1990, filed by the Parties to the present proceedings and an Application for Annulment of the SUPPLEMENTAL AWARD of October 17, 1990, filed by the Respondent, the Republic of INDONESIA ("INDONESIA").

A. THE APPLICATION BY INDONESIA FOR ANNULMENT OF THE AWARD OF JUNE 5, 1990

1.02 On October 3, 1990, within 120 days after the date of the AWARD of June 5, 1990, ("SECOND AWARD"), INDONESIA filed with the Secretary-General of the International Centre for Settlement of Investment Disputes ("ICSID"), an Application for Annulment of the above-mentioned AWARD pursuant to Article 52 of the ICSID CONVENTION (the "CONVENTION") and Rule 50 of the ICSID ARBITRATION RULES ("ARBITRATION RULES").

1.03 The grounds for INDONESIA's request for Annulment are those specified in Article 52 (1) of the CONVENTION, namely,

(1) that the Tribunal has manifestly exceeded its power (Sub-paragraph (b));

(2) that there has been a serious departure from a fundamental rule of procedure (Sub-paragraph (d)); and

(3) that the AWARD has failed to state the reasons on which it is based (Sub-paragraph (e)).

(See Application of the Republic of Indonesia for Annulment of the AWARD dated June 5, 1990, filed on October 3, 1990, page 1)

1.04 In particular and on either one or the combination of any two or all three of the grounds mentioned above, INDONESIA's Application seeks annulment of three findings by the Tribunal in the SECOND AWARD, namely,

(1) The finding that INDONESIA was liable under the new theory of a regulatory denial of justice based on a "generally tainted background"

surrounding the revocation of AMCO's license;

(2) The finding that the substantive validity of the revocation need not be decided in order to determine AMCO's entitlement to damages; and

(3) The findings that AMCO was entitled to an award of damages of its full contractual expectation based on a denial of justice.

(Ibid., IV, pages 27-38)

1.05 INDONESIA also submitted as additional grounds for annulment under Article 52 (1) (b) and (e) of the CONVENTION that "the Second Tribunal failed to state reasons and refused to consider under Indonesian Law : Indonesia's tax fraud counterclaim; Indonesia's tax concessions counterclaim; and Indonesia's customs concessions counterclaim".

(Ibid., IV, page 39)

1.06 As such, INDONESIA's Application for annulment seeks total nullification of the SECOND AWARD in respect of the three findings listed in paragraph 1.04 above.

(Ibid., VII Conclusion, page 41)

B. THE APPLICATION BY AMCO FOR ANNULMENT IN PART OF THE AWARD OF JUNE 5, 1990

1.07 On October 3, 1990, the very same day on which INDONESIA's Application for Annulment was filed, AMCO ASIA CORPORATION ("AMCO ASIA"), a company incorporated in Delaware, U.S.A., PAN AMERICAN DEVELOPMENT LIMITED ("PAN AMERICAN") a Hong Kong company and P.T. AMCO INDONESIA ("P.T. AMCO"), a company established under the aegis of the 1967 Foreign Investment Law of Indonesia, (collectively "AMCO") as claimants in the present dispute, also filed with the Secretary-General of ICSID an Application to annul the part of the SECOND AWARD relating to damages, including the ruling on relitigation of the quantification of damages, and "to reinstate the amount of damages granted in the earlier award of the Goldman Tribunal dated November 19, 1984 ("the FIRST AWARD")".

(See AMCO's APPLICATION FOR ANNULMENT IN PART, October 3, 1990, pages 1-7)

1.08 AMCO's Application for Annulment in Part of the SECOND AWARD was based on Article 52 (1) (b) of the CONVENTION on the ground that the Tribunal (i.e., the

SECOND TRIBUNAL or, as sometimes used by the PARTIES, the HIGGINS TRIBUNAL) manifestly exceeded its power by relitigating the nature of the prejudice suffered by AMCO and the quantification of damages due AMCO for INDONESIA's wrongful actions. In particular, AMCO stated

(1) that the SECOND TRIBUNAL manifestly exceeded its power when it

(a) relitigated the issue of what prejudice AMCO suffered from the wrongful army and police actions on March 31/April 1, 1980, and

(b) determined, contrary to the FIRST TRIBUNAL, that the only prejudice which AMCO suffered was a "general disturbance", not loss of future income; and

(2) that the SECOND TRIBUNAL manifestly exceeded its power when it relitigated the issue of the aggregate amount of damages due AMCO for the illegal army and police actions on April 1, 1980 and the illegal revocation of AMCO's investment authorization on July 9, 1980.

(Ibid., I and II, pages 8-17)

1.09 AMCO submitted in its Application for Annulment in Part that "the FIRST TRIBUNAL's quantification of damages was res judicata", that "the Higgins Tribunal's different quantification of damages was ultra petita"; and therefore, that "the amount of damages awarded by the Higgins Tribunal should be annulled and the amount awarded by the Goldman Tribunal should be restored".

(Ibid., page 17)

C. THE APPLICATION BY INDONESIA FOR ANNULMENT OF THE SUPPLEMENTAL AWARD OF OCTOBER 17, 1990

1.10 On February 14, 1991, within 120 days after the date on which the Supplemental Decisions and Rectification ("SUPPLEMENTAL AWARD") was rendered, i.e., certified and dispatched by the Secretary-General, on October 17, 1990, INDONESIA filed with the ICSID Secretariat its Application for Annulment of the SUPPLEMENTAL AWARD of October 17, 1990 by the SECOND TRIBUNAL.

(See Application of the Republic of Indonesia for Annulment of the Supplemental Award rendered on October 17, 1990, February 14, 1991, pages 1-13)

1.11 The grounds for annulment of the SUPPLEMENTAL AWARD of October 17, 1990

were specified by INDONESIA in terms of Article 52 (1) of the CONVENTION as follows :

(1) "The Second Tribunal manifestly exceeded its power" (Sub-paragraph (b));

(2) "The Second Tribunal seriously departed from a fundamental rule of procedure" (Sub-paragraph (d)); and

(3) "The Supplemental Award failed to state the reasons on which it was based" (Sub-paragraph (e)).

(Ibid., IV, pages 16-19)

1.12 In particular, INDONESIA supported its grounds for annulment as follows :

(1) by reconsidering and changing its decision on an issue where it neither omitted to decide nor corrected a clerical error, the Tribunal acted beyond the scope of its power under Article 49 (2) of the CONVENTION, thereby manifestly exceeded its power;

(2) by twice seriously departing from a fundamental rule of procedure :

(a) first, by failing to give notice to INDONESIA; and

(b) second, by failing to provide INDONESIA with the opportunity to be heard on the merits of the substance of AMCO's Rule 49 request, thereby denying equality of the Parties; and thereby seriously departing from a fundamental rule of procedure; and

(3) by failing to demonstrate the inadvertent quality of the error in the decision it sought to rectify, and by rationalizing the superiority of its new position over its old one, based on questionable accounting practice, the Tribunal failed to state the reasons on which the SUPPLEMENTAL AWARD was based.

(Ibid., III and IV, pages 14-19)

1.13 INDONESIA further requested that its Application for Annulment of the SUPPLEMENTAL AWARD, "be consolidated with and considered by the same Ad Hoc Committee simultaneously with its 3 October 1990 Application for Annulment of the SECOND AWARD".

(Ibid., VI. Conclusion, pages 19-20)

D. CONCURRENCE OF APPLICATIONS FOR ANNULMENT OF THE AWARD AND SUPPLEMENTAL AWARD OF THE SAME TRIBUNAL

(a) Finality of ICSID Awards

1.14 It is important to note at this juncture that within the ICSID system of Arbitration there is no appeal or any other remedy against an award except those provided for in the CONVENTION. An ICSID award is thus final and binding on the parties. The only post-award procedures provided for in the CONVENTION are confined to the remedies available under Articles 49 to 52 of the CONVENTION and can only be exercised within the framework of the CONVENTION and in accordance with its provisions, namely, addition to and correction of the award (Article 49), interpretation (Article 50), revision (Article 51) and annulment (Article 52). The award is therefore final in the sense that it is not subject to judicial review in national jurisdictions nor to any review on the merits within the autonomous ICSID system. It is not final in the sense that it is open to being supplemented or rectified, interpreted or annulled. It is to this last remedy that both Parties, INDONESIA as well as AMCO, are having recourse in the present annulment proceedings.

(b) Nature of annulment proceedings and of the remedy sought by the Parties

1.15 An annulment proceeding in the ICSID system of Arbitration is in effect a proceeding instituted against the arbitral Award. It is based exclusively on one or more of the five grounds enumerated expressis verbis in Article 52 (1) of the CONVENTION which serves to delimit the scope of the authority vested in the Arbitral Tribunal. In this sense, an application for annulment by one Party is directed against the AWARD and indirectly the Tribunal and not necessarily against the other Party. Thus, it is conceivable, as it occurs occasionally, that the award rendered by an Arbitral Tribunal may be subject to attack through the annulment process initiated by both Parties to the original proceeding. Thus, in the present annulment proceedings, both INDONESIA and AMCO appeared before the Ad Hoc Committee as complainants against the decisions and findings of the AWARD, including the SUPPLEMENTAL AWARD, rendered by the SECOND TRIBUNAL.

1.16 True it is that in the present annulment proceedings, both INDONESIA and AMCO expressed their disagreement with the SECOND AWARD. The grounds for their respective applications for annulment may be broadly similar in several areas, if not indeed identical in any respect, but the scope of their request for annulment may vary in diametrically opposite direction. Thus, INDONESIA is seeking total annulment of the SECOND AWARD subject to minor exceptions (see infra, Paragraph 4.02 II.), while AMCO is merely requesting its partial annulment and there was a distinct possibility at an earlier stage of the proceedings that, had the Respondent decided to withdraw its Applications for Annulment, the Claimants would have been prepared likewise to

withdraw their request for partial annulment. The fact that both Parties request the total or partial annulment of an ICSID AWARD does not necessarily imply that the AWARD is to be annulled to the extent requested by both Parties. Although the Parties could effectively agree to submit their dispute to an ICSID Arbitration and conversely also to withdraw the dispute thus submitted from pending proceedings, their agreement on the extent to which an otherwise valid ICSID AWARD is to be annulled will not automatically entail the effect of nullification of the AWARD even to the limited extent mutually desired by the Parties.

1.17 The remedy of annulment requested by either or by both Parties under Article 52 of the CONVENTION is essentially limited by the grounds expressly enumerated in paragraph 1, on which an application for annulment may be made. This limitation is further confirmed by Article 53 (1) by the exclusion of review of the merits of the Awards. Annulment is not a remedy against an incorrect decision. An Ad Hoc Committee may not in fact review or reverse an ICSID award on the merits under the guise of annulment under Article 52. The fact that annulment is in this sense a limited and extraordinary remedy does not require an Ad Hoc Committee to construe the terms of Article 52 (1), i.e., the grounds for annulment, either liberally because it is the only remedy obtainable against an unjust Award or restrictively to ensure finality and unassailability of an ICSID Award. In the view of the Committee, Article 52 (1) should be interpreted in accordance with its object and purpose : this precludes its application to the review of an Award on the merits and in a converse case excludes an unwarranted refusal to give full effect to it within the limited but significant area for which it was intended.

1.18 The Committee notes that consistently with the foregoing an Ad Hoc Committee is required to give full effect to the wording of Article 52 (1) which defines and delimits the grounds for annulment. Thus, Article 52 (1) (b) does not authorize a sanction against every excess of power by a Tribunal but provides that the excess of power be manifest which essentially limits the freedom of appreciation of Ad Hoc Committees as to whether the Tribunal has exceeded its power. Under sub-paragraph (d), not every departure from a rule of procedure will suffice to warrant annulment; the departure has to be serious and the rule of procedure fundamental to justify nullification by an Ad Hoc Committee. Again, Article 52 (1) (e) requires that the Tribunal gives reasons on which its decision is based. It does not require that the reasons be adequate or sufficient, while inconsistent reasons or frivolous reasons would be tantamount to absence of reasons. To permit freedom of appreciation by an Ad Hoc Committee of the quality of the reasons given by the Tribunal is to confer on Ad Hoc Committees considerably wider power than otherwise intended by the CONVENTION, including appellate jurisdiction and the power of review, explicitly excluded by the wording of Article 53 (1). It is incumbent upon Ad Hoc Committees to resist the temptation to rectify incorrect decisions or to annul unjust awards.

(c) Request for Total and Partial Annulment of the Award before the Ad Hoc Committees

1.19 Article 52 (3) of the CONVENTION authorizes an Ad Hoc Committee "to annul the award or any part thereof on any of the grounds set forth in paragraph (1)". Subject to further consideration of the issues relating to res judicata, the Committee is empowered to annul the SECOND AWARD or any part thereof in its examination of INDONESIA's Application for Annulment of the AWARD as a whole. As for AMCO's Application for Annulment in Part, the COMMITTEE notes that the Ad Hoc Committee may annul the Award only pursuant to AMCO's request and within the scope of that request, unless by necessary implication annulment of the part requested clearly entails nullification of other portions of the AWARD.

1.20 The authority provided by Article 52 (3) to enable an Ad Hoc Committee to annul the Award or any part thereof, does not imply its automatic exercise whenever and wherever one of the Parties has established one of the grounds for annulment. An Ad Hoc Committee retains a measure of discretion in its ruling on applications for annulment. This is clearly implied in the CONVENTION through the use of terms, such as "manifest", "serious" and "fundamental". This discretion is not unlimited and should not be exercised to the point of defeating the object and purpose of the remedy of annulment. The Ad Hoc Committee may refuse to exercise its authority to annul an Award if and when annulment is clearly not needed to remedy procedural injustice and annulment would unwarrantably erode the binding force and finality of ICSID Awards.

1.21 Such consideration, however, should not be understood as subjecting annulment proceedings to constraints caused by the need to protect the ICSID system. An argument has recently been advanced to the effect that the possibility of a series of annulments of ICSID Awards followed by resubmission of the disputes resulting in Awards open to yet further annulment proceedings might impair the effectiveness and serviceability of ICSID as an international institution for settlement of investment disputes between States and nationals of other States. The Committee has been constantly reminded of the dangerous possibility of a prolonged series of unending proceedings. This argument falsely assumes, however, that annulments are necessarily the result of overly strict standards applied by Ad Hoc Committees. It overlooks the possibility that the frequencies of such annulments may reflect neglect by Parties, counsel and arbitrators alike of the requirement flowing from the specificity of ICSID arbitration as defined by the CONVENTION and the ARBITRATION RULES. A purely statistical approach appears unwarranted as an evaluation of ICSID's effectiveness and serviceability.

II. BACKGROUND OF THE PRESENT PROCEEDINGS

A. REQUEST FOR ARBITRATION

2.01 On January 15, 1981, AMCO ASIA CORPORATION ("AMCO ASIA"), PAN AMERICAN DEVELOPMENT LIMITED ("PAN AMERICAN") and P.T. AMCO INDONESIA ("P.T. AMCO") collectively AMCO , the Claimants, filed with the Secretary-General of ICSID a REQUEST for ARBITRATION against the Republic of INDONESIA ("INDONESIA"), the Respondent. The REQUEST was submitted pursuant to Article 36 of the CONVENTION and was registered by the Secretary-General on the same date.

B. THE PARTIES TO THE DISPUTE

2.02 The PARTIES to the Dispute, as listed in the Title of the ICSID Arbitration Case, include :

a. On the CLAIMANTS Side

(1) AMCO ASIA or Amco Asia Corporation, a company incorporated in Delaware, U.S.A., the initial foreign investor in this case;

(2) PAN AMERICAN or Pan American Development Ltd., a Hong Kong company, a subsequently disclosed principal on whose behalf AMCO ASIA initiated negotiations and concluded a Lease and Management Agreement regarding a joint-venture, the Hotel Kartika Plaza Project, in 1968 with P.T. WISMA KARTIKA ("P.T. WISMA"), the lessor, owner of the land and premises, an enterprise whose shares were acquired by INKOPAD, a cooperative set up under Indonesian law for the welfare of Indonesian Army personnel. P.T. WISMA was the successor to P.T. BLUNTAS, an enterprise created in 1964 by the Bank of Indonesia and an Indonesian private investor to develop an apartment/hotel complex on a specified site in Jakarta, now known as HOTEL KARTIKA PLAZA COMPLEX.

(3) P.T. AMCO or P.T. AMCO Indonesia, a company established by AMCO ASIA with the permission granted by the Minister of Public Works on July 29, 1968, within the framework of the 1967 Foreign Investment Law. P.T. AMCO was set up in accordance with the amended application submitted by AMCO ASIA, which included an arbitration clause submitting any dispute between P.T. AMCO and the Government of Indonesia to ICSID Arbitration. The

Articles of Association of P.T. AMCO were approved by the Minister of Justice on January 25, 1969, and registered with the Central Jakarta District Court on January 29, 1969, and published in Supplement No. 27 to the State Gazette of Indonesia No. 41 of 1969.
(See the FIRST AWARD, para 40)

b. On the RESPONDENT Side

THE REPUBLIC OF INDONESIA to which alleged actions and omissions have been attributed which engaged its responsibility. The actors or agencies whose acts have been imputed to the Indonesian Government include THE CAPITAL INVESTMENT COORDINATING BOARD or "BODAN KOORDINASI PENANNANAM MODAL" (BKPM) whose decision to revoke P.T. AMCO's license to operate as an authorized investor was alleged to have been reached in contravention of certain procedural requirements.

C. EVENTS LEADING TO THE DISPUTE

2.03 In the current annulment proceedings, it is not necessary for the COMMITTEE to recount in detail all the facts relating to the merits of the dispute. The AWARD on the merits rendered by the FIRST TRIBUNAL on November 20, 1984 (the "FIRST AWARD") (1 International Arbitration Report (1986), 601) may be referred to for a fuller account of the facts of the case, of which a summarized version is contained in the AWARD on the merits rendered by the SECOND TRIBUNAL on June 5, 1990 (the "SECOND AWARD"), against which Applications for Annulment have been filed by the PARTIES to the dispute. Suffice it therefore to list some of the major events leading to the dispute.

a. The Lease and Management Agreements and the Profit-Sharing Agreement

2.04 On April 22, 1968, a Lease and Management Agreement was concluded between AMCO ASIA and P.T. WISMA, successor to P.T.BLUNTAS, whereby AMCO ASIA was to invest up to the sum of US$ 4,000,000.00 overall to complete the original construction of a Hotel/Apartment left incomplete with up to US$ 3,000,000.00 being used for an additional six-storey building. This Lease and Management Agreement was to last 19 years for both structures. The profit-sharing formula and procedures were contained in an agreed addendum signed on May 18, 1968.

2.05 On May 6, 1968, AMCO ASIA submitted to the Government of Indonesia an application to establish P.T. AMCO under the aegis of the 1967 Foreign Investment Law. The application underwent various amendments. In the amended application, it was proposed

that there be an exemption from corporate taxes and dividend taxes for three years. P.T. AMCO was to be exempt from import duties with respect to capital goods, including spares and parts,if P.T. AMCO used "its own foreign exchange or supplemental foreign exchange in the limits set in the Government regulations in force". The application also included an arbitration clause which referred any dispute between P.T. 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 P.T. AMCO within the framework of the 1967 investment legislation. This permission or license in effect authorized P.T. AMCO to operate as investor under the new investment law with the benefit of tax concessions and exemption from certain import duties (FIRST AWARD, Paragraphs 21-32).

2.06 On January 24, 1969, P.T. WISMA extended the terms of the Lease and Management Agreement to 30 years. On August 22, 1969, P.T. AMCO concluded a Sub-Lease Agreement letting other persons and airlines manage and operate HOTEL KARTIKA PLAZA in exchange for credit facilities to enable P.T. AMCO to complete the construction of the Hotel. On October 13, 1970, a second Sub-Lease Agreement was concluded between P.T. AMCO and Aeropacific Hotel Association ("AEROPACIFIC"), a partnership consisting of the same sublessees as those of August 22, 1969. P.T. WISMA and AMCO ASIA agreed in writing to respect the terms of the Sub-Lease Agreements assigning the responsibilities to AEROPACIFIC to secure a loan from Algemeine Bank Nederland N.V. ("ABN") of US$ 1,000,000.00 to complete construction of the hotel. The second Sub-Lease continued until June 1978 when relations between P.T. AMCO and AEROPACIFIC deteriorated, ending in arbitration and resolution by agreement of March 29, 1980. (FIRST AWARD, para 77).

2.07 In 1971, P.T. AMCO disclosed the fact that it had entered into the 1968 Lease and Management Agreement with P.T. WISMA as agent and nominee for and on behalf of PAN AMERICAN. Transfer of a portion of AMCO ASIA's shares in P.T. AMCO to PAN AMERICAN was approved on May 1, 1972. (Ibid., paras 41-45).

2.08 After the legal disagreement between P.T. AMCO and AEROPACIFIC during the few months of 1978, INKOPAD undertook the management of the Hotel from June 1978, and on October 8, 1978, authorized P.T. WISMA to negotiate and conclude with P.T. AMCO a "Profit-Sharing Agreement for the Management of KARTIKA PLAZA Land and Building with all its contents". (Ibid., paras 77-78). P.T. AMCO resumed management of the Hotel after signing the Agreement.

2.09 On July 4, 1979, P.T. AMCO concluded with RAMADA INNS INC. and RAMADA INTERNATIONAL INC. respectively a License Agreement and an International Management Agreement. From November 1979 to March 31, 1980, P.T. WISMA and P.T. AMCO were in disagreement on several matters, particularly concerning the amounts due from P.T. AMCO to P.T. WISMA under the Profit-Sharing Management Agreement of 1978. Failing to agree on the figures due, P.T. WISMA gave two

successive notices, on March 15 and March 30, 1980, after which the management of the KARTIKA PLAZA building was to be conducted by P.T. WISMA as the owner. On March 31, 1980, P.T. WISMA notified all Managers and Department Heads that henceforth the management of the Hotel was to be assumed by a Management Council established by P.T. WISMA.

b. The Events of March 31/April 1, 1980 and Following

2.10 The Claimants alleged that, on March 31/April 1, 1980, the Indonesian Government "wrongfully seized" control and management of the Hotel from P.T. AMCO in what was described by AMCO as "an armed, military action" (Request for Arbitration by AMCO, page 12, Paragraph 30 and Statement of Fact and Law, page 7, Paragraph 11).

2.11 The Respondent, INDONESIA, contended that any military or public assistance was only directed to supporting the legal right of P.T. Wisma to control the hotel and was not a seizure of the hotel by the Government (SECOND AWARD, Paragraph 15).

2.12 The General Manager of the Hotel testified that a number of Indonesian Armed Forces personnel ("up to perhaps two dozens") including army and police personnel, were found present in or about the building, located in various positions including the lobby, corridors and guarding certain stairways and offices (FIRST AWARD, Paragraphs 99-100). The FIRST TRIBUNAL noted that "some members of the Armed Forces remained in the Hotel until October, 1980, at which time they were no longer required and they returned to their respective units". (Ibid., Paragraph 109).

c. The Revocation of the Investment License

2.13 As noted by the SECOND TRIBUNAL (SECOND AWARD, Paragraph 12) after the events of March 31/April 1, 1980, P.T. WISMA took over control and management of the KARTIKA PLAZA and reported certain information to BKPM, a Government agency responsible for examining applications by foreign investors, making recommendations to the Government and supervising the implementation of approved investments. After holding meetings with, and receiving further information from, representatives of P.T. WISMA, Mr. USMAN of BKPM recommended in his report that P.T. AMCO's license be reviewed. On May 12, 1980, the Chairman of BKPM requested termination of the license. This request was approved by the President of Indonesia, and on July 9, 1980, BKPM revoked P.T. AMCO's license.

2.14 The Claimants have alleged that the Respondent, having seized AMCO's investment, unjustifiably cancelled its investment license. INDONESIA has denied AMCO's claim that the cancellation of the investment license was unlawful. In a Counter-Claim, INDONESIA has asserted that as the cancellation of the investment license was justified, P.T. AMCO was obliged to pay all monies that should have been paid as taxes and import duties (FIRST AWARD, Paragraph 283).

D. EARLIER PROCEEDINGS

(1) THE AWARD OF THE FIRST TRIBUNAL

2.15 The FIRST TRIBUNAL, after reviewing the conflicting evidence regarding the presence of military personnel at the Hotel during March 31 and April 1, 1980 and thereafter, declared that it was satisfied that "There was a taking of the claimants' rights to the control and management of the land and all the KARTIKA PLAZA building" and that "a number of army and police personnel were present ... and by their very presence assisted with the successful seizure from P.T. AMCO of the exercise of its lease and management rights (FIRST AWARD, Paragraph 155). The First Tribunal found on the basis of the proven actions and omissions of the army/police personnel that the acts of P.T. WISMA constituted illegal self-help and the assistance to these acts given to P.T. WISMA and the lack of protection afforded to P.T. AMCO, a foreign investor in Indonesia, by the Army/Police was an "international wrong attributable to the Republic" (FIRST AWARD, Paragraph 178).

2.16 Before the FIRST TRIBUNAL, P.T. AMCO also claimed that INDONESIA had seized its investment in the building and management of the KARTIKA PLAZA Complex and then cancelled its investment license. In its counterclaim, INDONESIA asserted that, as the cancellation of the investment license was justified, being lawful both procedurally and substantively, P.T. AMCO was obliged to return tax concessions and other privileges granted by INDONESIA (FIRST AWARD, Paragraphs 142-146). In its AWARD dated November 20, 1984, the FIRST TRIBUNAL rejected INDONESIA's counterclaim and found for the claimants, ordering the Respondent to pay the sum of US$ 3,200,000.00 with interest to be paid outside INDONESIA.

(2) THE DECISION OF THE FIRST AD HOC COMMITTEE

2.17 On March 18, 1985, within 120 days after the date of the FIRST AWARD was rendered, INDONESIA filed an application in writing to the Secretary-General of ICSID requesting annulment of the AWARD of November 20, 1984 under Article 52 of the CONVENTION. An Ad Hoc Committee (THE FIRST AD HOC COMMITTEE) was set up pursuant to Article 52 (3) of the CONVENTION. The FIRST AD HOC COMMITTEE ordered and subsequently confirmed a stay of enforcement of the FIRST AWARD upon INDONESIA's furnishing of an irrevocable and unconditional bank guarantee issued on July 3, 1985.

2.18 On May 16, 1986, following a series of exchanges of written pleadings and oral hearings in 1985 and 1986, the FIRST AD HOC COMMITTEE, presided by Ignaz Seidl-Hohenveldern, decided to annul the FIRST AWARD "as a whole for the reasons and with

the qualifications set out above". (1 International Arbitration Report (1986) 649); 25 International Legal Materials (1986) 1439, final para). The annulment did not extend to the FIRST TRIBUNAL's findings on the illegality of the action of the army and police personnel on March 31/April 1, 1980. It extended to the findings on the duration of such illegality and on the amount of indemnity due on that account (Decision of the FIRST AD HOC COMMITTEE, p. 47), thereby demarcating the issues which were unannulled by the FIRST AD HOC COMMITTEE, and thus constituted "res judicata" for the dispute as between the PARTIES. The bank guarantee furnished by INDONESIA expired in accordance with its terms.

2.19 With the question of "illegality" of the action by the army and police personnel of Indonesia on March 31/April 1, 1980 left unannulled, the finding of the FIRST TRIBUNAL that AMCO is entitled to damages from INDONESIA is "res judicata". However, the damage caused to P.T. AMCO by the actions of the army and police personnel came to an end on the day of the revocation of P.T. AMCO's license, on July 9, 1980. Consequently, the FIRST AD HOC COMMITTEE annulled the award of damages to P.T. AMCO in paras 280-281 of the FIRST AWARD for the period before July 9, 1980 (Decision of the FIRST AD HOC COMMITTEE, paras 108-110). The First Ad Hoc Committee, not being an appellate tribunal, had no authority to determine the amount of damages due for the action by the army and police personnel for March 31/April 1, 1980, roughly a hundred days between the so-called "take-over" and "license cancellation". As a result, the FIRST TRIBUNAL's findings on the amount of damages were annulled as a whole.

(3) RESUBMISSION OF THE DISPUTE FOLLOWED BY THE AWARD AND SUPPLEMENTAL AWARD OF THE SECOND TRIBUNAL

(a) Request for Resubmission of the Dispute

2.20 On May 12, 1987, AMCO submitted to the Secretary-General of ICSID a Request for Resubmission of the Dispute pursuant to Article 52 (6) of the CONVENTION and Rule 55 of the ARBITRATION RULES. INDONESIA likewise on June 12, 1987 submitted a Request for Resubmission of the Dispute. A Second Tribunal was constituted on October 20, 1987. On December 21, 1987, the SECOND TRIBUNAL issued a Provisional Indication as to what determinations of the FIRST TRIBUNAL had been annulled by the FIRST AD HOC COMMITTEE on May 16, 1986, and what unannulled portions of the FIRST AWARD remained res judicata. Various other jurisdictional matters were contested by the PARTIES, and following oral hearings in London on January 30 and February 1, 1988, the SECOND TRIBUNAL gave its Decision on Jurisdiction including questions of res judicata on May 10, 1988. (3 ICSID Review 166 (1988); 27 ILM (1988) 1281).

(b) The SECOND AWARD

2.21 Following the filing by the PARTIES of Memorial, Counter-Memorial, Reply and Rejoinder on the merits of the case and a variety of correspondence on different issues between the Parties and the Tribunal, hearings on the merits were held in Washington, D.C., on September 18 to 29, 1989, and an award was rendered by the SECOND TRIBUNAL, on May 31, 1990. This award which is the SECOND AWARD in this case was received and dispatched by ICSID to the PARTIES on June 5, 1990. It is this AWARD of June 5, 1990 against which INDONESIA and AMCO, each in turn and on separate grounds, have respectively requested total and partial annulment, the requests now pending before the current AD HOC COMMITTEE.

2.22 In its conclusion following Paragraph 295 of the SECOND AWARD, the SECOND TRIBUNAL decided 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 U.S. dollars and twenty cents (US$ 2,567,966.20) with interest on this amount at the rate of six percent (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 U.S. 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..."

(c) The SUPPLEMENTAL AWARD

2.23 On July 20, 1990, AMCO submitted a Request, registered by ICSID on August 6, 1990, for Supplemental Decisions and Rectification of the SECOND AWARD of June 5, 1990, pursuant to Article 49 of the CONVENTION and Rule 49 of the ARBITRATION RULES. AMCO claimed that the SECOND TRIBUNAL omitted to decide certain questions relating to seven matters, viz : (1) Rate of Exchange; (2) 1978 Profit-Sharing Agreement; (3) Aeropacific Depreciation; (4) Net Cash Flow; (5) 1980 Inflation Rate; (6) 1990-99 Discount Rate; and (7) Ramada. AMCO further requested rectifications of clerical, arithmetical or similar errors in respect of all but the last of the above-mentioned matters.

2.24 Having considered AMCO's Request of July 20, 1990, for Supplemental Decisions and Rectification of the SECOND AWARD and a Letter concerning Jurisdiction submitted by INDONESIA on August 14, 1990, urging the SECOND TRIBUNAL to "decide its jurisdiction as a preliminary matter", and without an opportunity being given to INDONESIA to address the substance of AMCO's arguments, the SECOND TRIBUNAL decided on all the seven matters submitted by AMCO in its Request of July 20, 1990, denying the existence of any omission on the part of the SECOND TRIBUNAL on all but one of the seven items raised in AMCO's July 20 Request, namely, item (3) Aeropacific Depreciation, in regard to which the SECOND TRIBUNAL found a clerical, arithmetical or similar error to have been committed and proceeded to rectify it. The SECOND TRIBUNAL amended its previous Award of June 5, 1990 by new pages 170 and 171 of the SECOND AWARD incorporating consequential changes, increasing the amount of payment it ordered INDONESIA to make to AMCO from US$ 2,567,966.20 to US$ 2,677,126.20, an increase of US$ 109,160.00 (U.S. dollars one hundred nine thousand one hundred and sixty) with interest of six percent per annum, thereby amending the sum specified in operative sub-paragraph (1) of the final paragraph of its Award of June 5, 1990.

III. PROCEDURAL DEVELOPMENTS

A. CONSTITUTION OF THE AD HOC COMMITTEE

3.01 On January 30, 1990, the Secretary-General of ICSID notified INDONESIA and AMCO as Applicants in the present Annulment Proceedings for the Annulment of the Award of June 5, 1990, of the appointments by the Chairman of the Administrative Council and of the acceptance by the appointees constituting the new AD HOC COMMITTEE to consider the applications for annulment and partial annulment of the Award of June 5, 1990, as well as INDONESIA's application for annulment of the Supplemental Decisions and Rectification of October 17, 1990. The COMMITTEE thus constituted, consists of the following members :-

(1) Professor Arghyrios A. FATOUROS of Greece;
(2) Professor Dietrich SCHINDLER of Switzerland; and
(3) Professor Sompong SUCHARITKUL of Thailand.

B. INITIAL PROCEDURAL DECISION

3.02 On February 6, 1991, the COMMITTEE conferred by telephone and elected Professor Sompong SUCHARITKUL as President of the COMMITTEE; Ms. Margrete L. STEVENS, representing the Centre serving as Secretary of the Committee. (Item (i) of the INITIAL PROCEDURAL DECISION).

3.03 Noting that in its Application for Annulment of the Award, dated October 3, 1990, INDONESIA had requested a stay of enforcement of the Award pending the COMMITTEE's decision on its Application for Annulment, the COMMITTEE determined on the same day, February 6, 1991, that pursuant to Article 52 (5) of the CONVENTION, enforcement of the Award is accordingly stayed provisionally until the COMMITTEE rules on INDONESIA's request for stay of enforcement of the Award. (Item (ii) of the INITIAL PROCEDURAL DECISION).

3.04 The COMMITTEE adopted Procedural Order No. 1 (item (iii) of the INITIAL PROCEDURAL DECISION), announcing the dates and venue for Preliminary Procedural Consultation to be convened with the PARTIES at ICSID Headquarters in Washington, D.C., U.S.A., on March 1 and 2, 1991, preceded by the COMMITTEE's internal meeting on February 28, 1991. The First Session of the COMMITTEE Meeting with the PARTIES was to provide the COMMITTEE with an opportunity to review matters of procedure as well as administrative and financial matters, and in particular, as a matter of priority, to consider the request by INDONESIA for a stay of enforcement of the Award of June 5, 1990, pending the COMMITTEE's decision on the PARTIES' Applications for Annulment. At the President's request, the PARTIES were invited to submit their views on the procedural matters referred to in Rule 20 of the ARBITRATION RULES by February 15, 1991, and AMCO to submit observations (if any) on INDONESIA's request for stay of enforcement.

C. PRELIMINARY PROCEDURAL CONSULTATION

(1) The Minutes of the First Session of the COMMITTEE

3.05 The COMMITTEE held its First Session in Washington, D.C. on February 28, 1991. Pursuant to Rule 20 of the ARBITRATION RULES, the COMMITTEE met with the PARTIES for the first time for Preliminary Procedural Consultation on March 1 and 2, 1991. Each member of the COMMITTEE had signed the declaration in accordance with Rule 52 (2) in the form prescribed by Rule 6 (2) of the ARBITRATION RULES, and the PARTIES declared that they were satisfied that the COMMITTEE had been properly constituted, confirming that they had no objection in this regard. Having ascertained the views and submissions of the PARTIES, the COMMITTEE adopted Procedural Order No. 2, fixing the number and sequence of the written pleadings and the time limits for the presentation of the Memorials by the PARTIES by May 17, 1991; Counter-Memorials by June 17, 1991; Replies (if any) by July 1, 1991; and Rejoinders (if any) by July 15, 1991. Other procedural and administrative matters were also reviewed and decisions taken thereon were recorded in the Minutes of the First Session of the COMMITTEE.

3.06 At the request of INDONESIA, the President of the COMMITTEE decided by virtue of Rule 25 (2) of the ARBITRATION RULES to extend the time limits for the submission

of Memorials to June 4, 1991; Counter-Memorials by July 5, 1991; Replies to July 19, 1991 (if any); and Rejoinders by August 2, 1991 (if any). (Procedural Order No. 3, San Francisco, May 14, 1991). Following INDONESIA's request for extension for the submission of its Reply, the President of the COMMITTEE by virtue of ARBITRATION RULE 25 (2) decided to extend the time limits for the submission of the remaining written pleadings by the PARTIES to July 29, 1991 for Replies (if any), and August 15, 1991 for Rejoinders (if any). (Procedural Order No. 4, Hong Kong, July 19, 1991).

(2) Interim Order No. I : REQUEST FOR A STAY OF ENFORCEMENT

3.07 At this First Session of the COMMITTEE on March 1 and 2, 1991, each PARTY expanded its views on INDONESIA's request for a stay of enforcement of the AWARD of June 5, 1990. INDONESIA requested that the extension of the stay be without provision of security, while AMCO stated that the stay should be terminated and, if so required, INDONESIA should provide a bank guarantee. On this particular request of INDONESIA for stay of enforcement, the COMMITTEE decided on March 2, 1991, to continue stay of enforcement of the AWARD (including the SUPPLEMENTAL AWARD) on condition that "an irrevocable and unconditional guarantee from a reputable European bank on terms and provisions approved by the President of the COMMITTEE be furnished by INDONESIA by June 17, 1991." (Interim Order No. I, Washington, D.C., March 2, 1991, attached as ANNEX I to the Decision of the COMMITTEE). Thus, stay of enforcement was continued upon INDONESIA's furnishing of the bank guarantee on terms and provisions approved by the President of the COMMITTEE on June 14, 1991.

(3) Ruling on Allocation of Advance Payments

3.08 One of the preliminary matters which required prior considerations by the COMMITTEE was the question of Allocation of Advance Payments. The first Ad Hoc Committee in this case (para 125 of the Decision of May 16, 1986) ordered AMCO to pay one half of the costs of the first Ad Hoc Committee. Since INDONESIA advanced payment for these costs, the First Ad Hoc Committee ordered AMCO to pay INDONESIA the sum of US$ 103,313.75. In the Award of June 5, 1990, the SECOND TRIBUNAL set off the sum in question against the damages awarded to AMCO. Both PARTIES have since October 3, 1990 requested annulment of the Award and the provisional stay of enforcement was continued in effect by virtue of the COMMITTEE's Interim Order No. I of March 2, 1991. Having considered the requests of the PARTIES in regard to issues relating to allocation of advance payments, and, following in this respect the reasoning of the SECOND TRIBUNAL (as contained in its ruling of February 8, 1988, para 13), the COMMITTEE was unable to accede to INDONESIA's request that advance payments for the present proceedings under ICSID Administrative and Financial Regulations be apportioned in their entirety to AMCO until the outstanding award of US$ 103,313.75 and interest claimed to be due on it has been met. The COMMITTEE noted that both PARTIES conceded that the amount of approximately US$ 40,000.00 remaining from the proceedings before the SECOND TRIBUNAL was to be used as advance payment of the

proceedings before the SECOND TRIBUNAL was to be used as advance payment of the costs of the current proceeding, and ruled that since both PARTIES had applied for annulment, "an equal apportionment is appropriate" under either the pre-1984 Administrative and Financial Regulation 13 (3) (d) or as superseded by Administrative and Financial Regulation 14 (3) (e). (Ruling of the COMMITTEE on Allocation of Advance Payments, Washington, D.C., March 2, 1991).

D. SUBMISSION OF WRITTEN PLEADINGS BY THE PARTIES

3.09 Pursuant to Procedural Orders No. 2, 3 and 4, the PARTIES filed the following written pleadings within the authorized time limits :

(1) In respect of INDONESIA's Applications for the Annulment of the SECOND AWARD and the SUPPLEMENTAL AWARD

(a) By INDONESIA

(i)	MEMORIAL (with Appendices) In support of INDONESIA's Applications for Annulment	June 4, 1991
(ii)	REPLY (with Appendices)	July 19, 1991

(b) By AMCO

(i)	COUNTER-MEMORIAL In opposition to INDONESIA's Applications for Annulment	July 5, 1991

(2) In respect of AMCO's Application for Partial Annulment of the SECOND AWARD

(a) by AMCO

(i)	AMCO's Application of October 3, 1991 to be treated as AMCO'S MEMORIAL

(b) by INDONESIA

(i)	COUNTER-MEMORIAL (with Appendices) in opposition to AMCO's Application for Partial Annulment	July 5, 1991

3.10 Since AMCO did not submit its REPLY to INDONESIA's COUNTER-MEMORIAL in respect of AMCO's Application for Partial Annulment of the SECOND AWARD, there was no REJOINDER from either PARTY. AMCO also refrained from filing a REJOINDER in response to INDONESIA's REPLY of July 19, 1991, in support of INDONESIA's Applications for the Annulment of the SECOND AWARD and the SUPPLEMENTAL AWARD.

E. ORAL HEARINGS ON THE APPLICATIONS FOR ANNULMENT DECEMBER 9-12, 1991

3.11 The PARTIES appeared before the COMMITTEE to present their oral arguments in support of their respective Application for Annulment and in opposition to the other PARTY's Request for Annulment. The oral hearings took place at the Headquarters of ICSID in Washington, D.C., on December 9, 10 and 11, 1991. Members of the COMMITTEE were present. PARTIES were fully represented by Counsel of their choice, the Secretary of the COMMITTEE attending the session on behalf of the Centre. The names of Representatives of the PARTIES are listed in the inner cover page of this Decision.

3.12 Prior to the oral hearings, a series of correspondence had been exchanged by the PARTIES expressing and supporting their views as to the order and sequence of oral arguments to be submitted by each of the PARTIES. Both the morning session and the afternoon session of December 9, 1991, were devoted to oral presentations by Counsel for INDONESIA on INDONESIA's Application for Annulment. Ms. Lamm addressed issues relating to res judicata and Mr. Brower spoke on issues concerning liability and damages as well as on INDONESIA's Request for Annulment of the SUPPLEMENTAL AWARD. Mr. Brower's presentation was concluded during the first part of the morning session on December 10, 1991.

3.13 Mr. Rand, Counsel for AMCO, summarized the background and general context of the case in his opening statement following the conclusion of Mr. Brower's remarks. Mr. Friedland responded on behalf of AMCO to INDONESIA's Application for Annulment of the SECOND AWARD and completed his presentation during the afternoon session, followed by Mr. Rand who responded to INDONESIA's Application for Annulment of the SUPPLEMENTAL AWARD. Then Mr. Hornick addressed the issues relating to AMCO's Application for partial Annulment of the SECOND AWARD.

3.14 Upon completion of AMCO's presentation, Ms. Lamm responded to AMCO' Application for Partial Annulment, and completed her response during the morning session of December 11, 1991. Thereupon, Mr. Brower replied to Mr. Rand's opening statement relating to INDONESIA's request for Annulment. Ms. Lamm and Mr. Brower then took turns to reply to AMCO's response in support of INDONESIA's Application for Annulment. During the afternoon session, Mr. Hornick offered additional remarks by

way of rejoinder to INDONESIA's request for Annulment and answered INDONESIA's response to AMCO's request for Partial Annulment to which Ms. Lamm answered in a rejoinder.

3.15 Upon completion of presentations by Counsel for both PARTIES, the COMMITTEE sought further clarification from Counsel of AMCO on a certain aspect of AMCO's submissions. The President invited the PARTIES to make their final observations. Seeing that there were no further questions or comments, the COMMITTEE requested the PARTIES to forward to the COMMITTEE final written submissions by December 12, 1991. This both PARTIES did within the specified date.

F. MEETINGS OF THE COMMITTEE

3.16 After adjourning the oral hearings on December 11, 1991, the COMMITTEE met in the morning of December 12, 1991, to deliberate on the case and to plan future sessions of the COMMITTEE with the view to resolving the questions and issues involved and subsequent finalization of the COMMITTEE's decision. The COMMITTEE met to deliberate on the case for two days, March 26-27, 1992 at the Headquarters of the World Bank in Paris. The COMMITTEE planned to meet as soon as the draft Decision was prepared.

3.17 The COMMITTEE met for the last time on November 13-16, 1992, in San Francisco, U.S.A., to prepare the text of the Decision. The COMMITTEE decided on November 16, 1992 to declare the proceeding closed.

PART TWO

SUBMISSIONS AND CONTENTIONS BY THE PARTIES

I. FINAL WRITTEN SUBMISSIONS BY THE PARTIES

4.01 Without tracing each and every step of the series of arguments, contentions and submissions by the Parties, it is useful at this juncture to set out in extenso the final written submissions which the Parties forwarded to the COMMITTEE by December 12, 1991, in response to the COMMITTEE's request at the close of the oral hearings in Washington, D.C., on December 11, 1991.

(See paragraph 3.15 above)

A. INDONESIA'S SUBMISSIONS

4.02 "I. On the merits of partially annulling the Second Award as requested by the Respondent, to adjudge and declare:

1. That the SECOND TRIBUNAL manifestly exceeded its powers (res judicata; Article 42 (1) (failure to apply Indonesian law and acting ex aequo et bono), that it seriously departed from a fundamental rule of procedure (audiatur), and that it failed to state the reasons upon which it based the award in finding that Indonesia committed a denial of justice under a new international law theory of an administrative denial of justice based on a so-called generally tainted background.

2. That the SECOND TRIBUNAL manifestly exceeded its powers (res judicata; Article 42 (1) (failure to apply Indonesian law and acting ex aequo et bono), that it seriously departed from a fundamental rule of procedure (audiatur) and that it failed to state the reasons upon which it based the award in finding that the substantive bases for the license revocation need not be adjudicated as a precondition for any aspect of the award, including but not limited to liability, compensation, causation, and proportionality.

3. That the SECOND TRIBUNAL manifestly exceeded its powers (res judicata; Article 42 (1) (failure to apply Indonesian law principles of compensation and acting ex aequo et bono, that it seriously departed from a fundamental rule of procedure (audiatur), and that it failed to state the reasons regarding causation and proportionality, as well as the other reasons upon which it necessarily must have based the award in finding that Amco was entitled to expropriation-level damages equal to its full contractual expectancy.

4. That the SECOND TRIBUNAL manifestly exceeded its powers (res judicata, Article 42 (1) (failure to apply Indonesian law and acting ex aequo et bono), failed to state the reasons upon which the award is based in finding that Indonesia's tax concessions counterclaim failed because the Revocation Decree was unlawful.

5. That the SECOND TRIBUNAL manifestly exceeded its powers (rectification of an award not involving a clerical, arithmetical or similar error; and issuance of a decision without satisfying the prerequisite procedures mandated by Article 49 (2) and Rule 49 (4), and seriously departed from a fundamental rule of procedure (audiatur) in finding that there was an "inadvertent" error in the Supplemental Award that required rectification by the Supplemental Award's grant of additional damages to Amco, and that the Supplemental Award failed to state the reasons regarding inadvertency upon which the Supplemental Award necessarily must have been based.

Therefore, paragraphs 12, 40, 75-92, 112-13, 118-140, 142-143, 151-153, 161-162, 174-200 and paragraphs 1 and of the dispositif of the SECOND AWARD, and section 3 of the Supplemental Award must be annulled.

II. On the merits of partially annulling of SECOND AWARD as requested by claimants, to adjudge and declare that the SECOND TRIBUNAL did not manifestly exceed its powers with respect to the nature of the prejudice due to the acts of Indonesia's army and police and the calculation of the Hotel's anticipated profit stream.

Therefore, paragraphs 41-63, 164-66, 201-95 of the SECOND AWARD dated June 5, 1990 should not be annulled.

III. On both Applications, to adjudge and declare pursuant to Article 52 (4) of the ICSID Convention and ICSID Administrative and Financial Regulation 13 (3) (d), that claimants shall pay all costs of the annulment proceeding associated with Indonesia's and Amco's respective requests for annulment, including the fees and expenses of the members of the Committee, the charges for use of the facilities of the Centre, and all expenses incurred by Indonesia in connection with this proceeding."

B. AMCO'S REQUEST FOR RELIEF

4.03 "1. Indonesia's Application for Annulment should be denied in its entirety.

2. Amco's Application for Partial Annulment should be granted, with the consequence that the Higgins Tribunal's quantification of damages be replaced by the Goldman Tribunal's quantification of damages in the amount of US$ 3,200,000 plus interest at 6 % per annum from January 15, 1981, to the date of effective payment outside Indonesia.

3. Amco should be awarded its costs and counsel fees of this proceeding, in such amounts as notified to the Centre by Amco."

II. SUBMISSIONS AND CONTENTIONS BY INDONESIA

A. IN REGARD TO INDONESIA'S REQUEST FOR ANNULMENT OF THE AWARD OF JUNE 5, 1990

5.01 As already noted, the Respondent has invoked three of the grounds for annulment listed in Article 52 (1) of the CONVENTION, namely, those under sub-paragraphs (1) (b), (1) (d) and (1) (e) (see supra, Paragraph 1.03). All three of them have been invoked with respect to the principal findings of the SECOND AWARD (see supra, Paragraph 1.04). The grounds under Article 52 (1) (b) and (e) have also been invoked with respect to the rejection of INDONESIA's Counter-Claims (see supra, Paragraph 1.05).

5.02 INDONESIA is therefore requesting the annulment of the SECOND AWARD as a whole. In its further submissions, the Respondent has noted a number of exceptions it requested (see its final submissions, quoted supra, Paragraph 4.02).

5.03 In setting out the Respondent's argumentation in this section, the sequence of points used in the Respondent's Memorial of June 4, 1991 will in the main be followed. The sequence in the initial Application and in the final summary of submissions (supra, Paragraph 4.01) differs in some respects without affecting the substance of the argument.

5.04 In this Part, all arguments and materials offered in the Respondent's written and oral submissions will be restated for review without necessarily tracing each and every argument and submission in the precise order in which they were presented. It follows from the structure of this decision that the points detailed in this section represent the Respondent's views, as understood by the AD HOC COMMITTEE, and as such it will not be necessary to repeat at every juncture that this is the Respondent's argument or point of view and not that of the COMMITTEE nor that of AMCO, the claimants, for that matter. AMCO's contentions and responses will be examined in Section III of this Part.

5.05 The first submission of the Respondent is complex and multifacetted. INDONESIA

submitted that the SECOND TRIBUNAL has manifestly exceeded its powers in that it has disregarded in several respects the principle of finality, i.e., the res judicata character of portions of the FIRST AWARD, after its partial annulment by the FIRST AD HOC COMMITTEE. The successive submissions of the Respondent in this respect are :

(a) That it was res judicata that, for liability to arise, both the procedural and substantive grounds for the revocation of AMCO's license had to be taken into consideration;

(b) That even if the substantive grounds could be left out of consideration, the FIRST TRIBUNAL's holding concerning the presence of procedural defects was res judicata and therefore the SECOND TRIBUNAL was not free to redecide the factual findings or the liability framework for procedural irregularities;

(c) That even if damages could be awarded solely on the basis of procedural defects, the SECOND TRIBUNAL was bound to consider the substantive grounds for the revocation before any final decision.

5.06 An important underlying argument concerns the res judicata character of the effects of an Ad Hoc Committee's decision in the framework of the ICSID system. It is common ground that a second Tribunal in an ICSID arbitration is bound by the Committee's decision annulling an award, or as in the present case, parts of an award. This means : (a) that the parts of the award that are annulled are to be redecided; the Tribunal cannot treat them as already decided; and (b) that the parts that are not annulled remain in effect; they cannot be redecided and are to be treated as res judicata within the ICSID system. The Respondent argues that the "reasons" for the entire decision and for each partial decision of the FIRST AD HOC COMMITTEE are necessarily covered by the res judicata effect, since the specific provisions of the dispositif do not make sense without the reasoning that supports them.

5.07 In applying this reasoning to the case at hand, the Respondent focusses on the issue of the revocation of AMCO's investment license. The FIRST TRIBUNAL had held that this revocation was unlawful both on procedural and on substantive grounds. The FIRST AD HOC COMMITTEE then found that the revocation was not justified on substantive grounds. Although it accepted and allowed to stand as res judicata the FIRST TRIBUNAL's findings as to the presence of procedural defects, it stated that they did not provide an independent ground for awarding damages. The total effect of the FIRST COMMITTEE's decision was then to leave for redecision to the SECOND TRIBUNAL two specific and rather narrow issues, that of determining the damages due to AMCO for the loss of management rights during the occupation of the hotel (April - July 1980) and that of deciding on INDONESIA's Counter-Claim.

5.08 By virtue of the FIRST TRIBUNAL's treatment of the relationship between procedural and substantive grounds as well as the explicit statement to that effect by the FIRST AD HOC COMMITTEE, it was res judicata that both procedural and substantive grounds had to be considered before there could be a finding of liability with respect to the revocation, even if such a finding were to be based on procedural defects alone.

5.09 Moreover, even if a decision on liability could be rendered without considering the substantive grounds for revocation, the FIRST TRIBUNAL's findings on the procedural issues was res judicata and it covered both factual elements and possible liability. It was for this reason that the FIRST AD HOC COMMITTEE had specifically annulled the grant of compensation for procedural defects by the FIRST TRIBUNAL (Paragraph 106 of FIRST AD HOC COMMITTEE's Decision). The SECOND TRIBUNAL was then not free to separate these res judicata findings from their established liability framework and base on them a new doctrine concerning liability for procedural defects only. In so doing, in fact, the SECOND TRIBUNAL had restated the FIRST TRIBUNAL's factual findings, thereby replacing them with its own new ones.

5.10 The SECOND TRIBUNAL has further violated the principle of finality (res judicata) by applying international law and disregarding Indonesian administrative law, when the latter had been held by the FIRST TRIBUNAL to be the applicable law to the proceedings, in accordance with Article 42 of the CONVENTION.

5.11 Secondly, the SECOND TRIBUNAL had also manifestly exceeded its powers by failing to apply and give full effect to Article 42 of the CONVENTION relating to the applicable law. This has occurred :

(a) When the Tribunal disregarded Indonesian administrative law and, invoking the concept of denial of justice, applied its own appreciation of international law instead;

(b) When it purported to apply international law but, through the misuse of existing principles as to denial of justice, decided in fact the case on an ex aequo et bono basis;

(c) When in computing damages it misapplied both Indonesian and international law.

5.12 Consistent interpretation of Article 42 of the CONVENTION, by Arbitration Tribunals, Ad Hoc Committees and scholars, has made clear that, in the framework of ICSID, absent an agreement by the parties to different effect, the law of the State party to the dispute is the applicable law. Rules of international law are to be applied only where there is a lacuna in the applicable (national) law or when the applicable law violates minimum international standards. In this case, no argument that there is a lacuna in

Indonesian law or that Indonesian law violates international standards has been made. Yet, the SECOND TRIBUNAL has held that "international law is fully applicable" and has stressed moreover that it makes no sense to speak of a "supplemental or corrective" role for international law.

5.13 The SECOND TRIBUNAL appears to have considered that a lacuna exists in Indonesian law, subject to a vague finding about the existence of "slight authority". It reached this conclusion by searching for a specific remedy that would be applicable to a situation such as the one in the case at hand, instead of relying on the entire existing legal framework of Indonesian administrative law and reaching itself the decision an Indonesian court would have reached on that basis.

5.14 The SECOND TRIBUNAL proceeded on the basis that it had to test each claim of law against first Indonesian law and then international law. This approach disregards the essentially secondary role attributed to international law in the framework of the CONVENTION.

5.15 The SECOND TRIBUNAL's holding as to liability based on procedural defects alone was in violation of Indonesian administrative law, according to which a finding of substantive failings is indispensable for determining the issue of liability.

5.16 The SECOND TRIBUNAL further disregarded Article 42 of the CONVENTION in that in purporting to apply international law it misused the concept of a denial of justice. It did so in several respects. First, denial of justice may occur only where a State fails to provide to an alien the means of redress to which he is entitled. Absent a showing of exhaustion of local remedies, there can be no finding of a denial of justice. Secondly, denial of justice may arise only where acts of judicial organs are involved and not with respect to administrative acts issued by executive agencies. In the third place, liability based on a denial of justice may be found to exist only where the conduct at issue is truly outrageous, something which is not the case here.

5.17 In view of the above, the purported application of the denial of justice doctrine by the SECOND TRIBUNAL failed to apply any established legal principle to the facts of the case and amounted in essence to an ex aequo et bono decision. Not only was the tribunal not empowered to decide the case on that basis, but its decision did not conform to established equitable standards, in particular because it ignored AMCO's own misconduct toward Indonesian authorities and law.

5.18 The SECOND TRIBUNAL further failed to apply the applicable law with respect to its method for assessment of damages. First, it disregarded the requirements of both Indonesian and international law with respect to the need for establishing a definite chain of causation between the acts involved and the loss to be compensated, since it has not been proved that the procedural failings on the part of BKPM were the cause of AMCO's loss. Secondly, it disregarded the principle of proportionality which Indonesian law

requires to be applied in such circumstances.

5.19 Thirdly, the SECOND AWARD failed to state the reasons for its findings and decisions :

(a) It failed to state reasons with respect to its finding of an administrative denial of justice as the basis of an award of damages for procedural defects only;

(b) It failed to state reasons for its rejection of the need for a consideration of the substantive grounds for the revocation of AMCO's license.

(c) It failed to state reasons upon which the AWARD was based in finding that INDONESIA's tax concession Counter-Claim failed because the revocation decree was unlawful.

5.20 In rejecting the formulation of the liability issue, which both PARTIES have proposed, in terms of liability vel non for procedural defects alone, the SECOND TRIBUNAL presented its own approach without offering any explanation as to the reasons why it was more appropriate or better than the other one.

5.21 The SECOND TRIBUNAL further failed to state reasons when it purported to examine and apply a number of references to authority and cases, both in Indonesian and in international law, which were not apposite in view of what the Tribunal wanted them to show. Such use of inapposite authority constitutes in fact a failure to state reasons for the Tribunal's decisions.

5.22 Finally, the SECOND AWARD departs from a fundamental rule of procedure in that it was prepared in violation of the audiatur rule in several respects :

(a) When the SECOND TRIBUNAL had recourse to a new framework of liability without notice to the parties, thereby depriving them of the right to be heard on issues which eventually determined the outcome;

(b) When it refused to consider new evidence, while making new inferences from the FIRST TRIBUNAL's factual findings.

5.23 It is to be observed that INDONESIA' submissions and contentions in this Section of Part Two are contested by AMCO in Section III of the same Part, while AMCO's submissions and contentions in Section III are noted in this Section as categorically rejected by INDONESIA.

(See paragraph 4.02 II above)

B. IN REGARD TO INDONESIA'S REQUEST FOR ANNULMENT OF THE SUPPLEMENTAL AWARD OF OCTOBER 17, 1990

5.24 In its Application of February 14, 1991, INDONESIA requested annulment of the SECOND TRIBUNAL's SUPPLEMENTAL AWARD of October 17, 1990, with respect to the value to be assigned to AMCO's Aeropacific assets.

5.25 The SECOND TRIBUNAL, on AMCO's request, and based on Article 49(2) of the CONVENTION, found that a "clerical, arithmetical or similar error" had occurred in the AWARD since two diverging figures were given therein for the Aeropacific assets transferred to AMCO under the AMCO-Aeropacific Settlement Agreement of March 29, 1980. Paragraphs 221 and 222 of the AWARD state that the book value of the assets amount to Rp. 421,451,054.- while, on the other hand, the calculation of the damages made in the AWARD was based on a larger net book value of Rp. 625,730,000.-, indicated in the tables annexed to Paragraph 284 on pages 170-171, column 7 of the AWARD. (As to this figure, see Paragraph 9.03 below). The TRIBUNAL, in its SUPPLEMENTAL AWARD, states that it had decided to rely on the lower figure indicated in Paragraph 222. It therefore rectified the figures indicated in Paragraph 284 of the AWARD. As a consequence of this rectification, the sum of the damages to be paid to AMCO by INDONESIA increased from US$ 2,567,966.20 to US$ 2,677,126.20.

5.26 INDONESIA requests annulment of this finding on three grounds. The first ground is "manifest excess of powers". INDONESIA contends that the TRIBUNAL, in adopting the SUPPLEMENTAL AWARD, did in fact reconsider an issue already decided instead of rectifying a clerical or similar error. It bases its argument on the fact that the SUPPLEMENTAL AWARD says : "The Tribunal..... has preferred" the lower figure. INDONESIA relates the expression "has preferred" to the rectification procedure, not to the time the TRIBUNAL rendered the AWARD, and therefore believes that the TRIBUNAL changed its mind in the rectification phase and altered its decision.

> (INDONESIA's Application for Annulment of the SUPPLEMENTAL AWARD, February 14, 1991, pages 12, 14 and 16).

5.27 The second ground for annulment, advanced by INDONESIA is "serious departure from a fundamental rule of procedure". INDONESIA contends that the TRIBUNAL deliberated without giving notice to INDONESIA, that it had failed to fix a time limit for receiving the observations of INDONESIA, as required by Arbitration Rule 49 (3), and had violated the principle that the PARTIES be treated equally.

> (Ibid., pages 15 and 17)

5.28 Third, INDONESIA contends that the TRIBUNAL failed to state reasons in not demonstrating the inadvertent quality of the error, by presenting illusory reasons and in not stating reasons for rejecting INDONESIA's position with respect to the jurisdictional

objections it had raised in its letter to the TRIBUNAL concerning jurisdiction.

(Ibid., pages 15, 18-19)

5.29 It is to be noted that to INDONESIA's submissions and contentions in this connection, AMCO responded in Section V of AMCO's Counter Memorial, pages 76-79, that the SUPPLEMENTAL AWARD of October 17, 1990 properly corrected an inadvertent error in the AWARD.

III. SUBMISSIONS AND CONTENTIONS BY AMCO

A. IN REGARD TO AMCO'S REQUEST FOR ANNULMENT IN PART OF THE AWARD OF JUNE 5, 1990

6.01 AMCO contends that the SECOND TRIBUNAL manifestly exceeded its powers (Article 52 (1) (b) of the CONVENTION) by relitigating two issues which had not been annulled by the FIRST AD HOC COMMITTEE and were therefore res judicata. These issues are :

(1) Redetermination of the Nature of the Prejudice Suffered by AMCO from the Army and Police Actions of March 31/April 1, 1980; and

(2) Redetermination of the Aggregate Amount of Damages Due AMCO for the Army and Police Actions of March 31/April 1, 1980, and the Revocation of AMCO's Investment License on July 9, 1980.

6.02 The first issue concerns the prejudice AMCO suffered from the army and police actions on March 31/April 1, 1980. AMCO points to the fact that the FIRST TRIBUNAL made an explicit finding on the nature of the prejudice in ruling that such actions deprived AMCO of its right to operate the Hotel Kartika Plaza and, from April 1, 1980, caused AMCO to lose future income it was entitled to expect from the exercise of such rights. AMCO argues that INDONESIA had not sought to annul this finding and that the FIRST AD HOC COMMITTEE did not annul it. Accordingly, the finding of the FIRST TRIBUNAL was, in AMCO's opinion, res judicata.

6.03 In contradiction to this, AMCO maintains, the SECOND TRIBUNAL relitigated the matter. It ruled that "the precise nature of the prejudice suffered" remained "properly open before this tribunal". Contrary to the FIRST AWARD, the SECOND TRIBUNAL determined that AMCO had not suffered any loss of future income from the army and police actions, but only "a general disturbance" for which it awarded AMCO a compensation of US$ 10,000.00. According to AMCO, it is res judicata that the army and police actions deprived AMCO of future income from April 1, 1980, and the

SECOND TRIBUNAL was bound to award AMCO the value of its lost income from April 1, 1980. The only issue which the TRIBUNAL had the power to decide, in AMCO's view, was whether in respect of this internationally wrongful act AMCO was entitled to all future income from the entire remaining lease period after April 1, 1980, or as INDONESIA contended, only for some lesser period commencing on April 1, 1980, and ending on the date of the license revocation or the date in October 1980, when the armed forces personnel withdrew from the hotel.

(AMCO' Application for Annulment in Part, October 3, 1990, pages 8-10)

6.04 The second issue relates to the quantification of the damages both for the army and police actions of March 31/April 1, 1980, and for the revocation of the investment license on July 9, 1980. The FIRST TRIBUNAL awarded AMCO damages of US$ 3.200,000.00 for both wrongs. It considered it unnecessary to determine what portion of AMCO's lost future income was attributable to the army and police actions and what portion to the revocation of the investment license, because the effects of the two causes "acted successively in an uninterrupted period of time".

(FIRST AWARD, Paragraph 258)

6.05 AMCO maintains that INDONESIA had not sought to annul the FIRST TRIBUNAL's quantification of AMCO's loss. It states that INDONESIA had not sought to annul in particular either the discounted cash flow method of valuation adopted by the FIRST TRIBUNAL, or the FIRST TRIBUNAL's interpretation of the profit-sharing formula between AMCO and P.T. WISMA, or any of the component findings on the calculation itself, including the estimated base year income, the inflation, discount and tax rates to be used, and the additional value which RAMADA would be expected to add. Furthermore, AMCO contends that the FIRST COMMITTEE did not annul any aspect of the damages quantification. In AMCO's view, the SECOND TRIBUNAL therefore acted in manifest excess of its powers when it relitigated the quantification of AMCO's loss, including all the items mentioned above and the exchange rate for the conversion of rupiahs to U.S. dollars. AMCO further asserts that after the SECOND TRIBUNAL reestablished INDONESIA's liability for the revocation of AMCO's investment license, the SECOND TRIBUNAL would have been bound to award AMCO the full sum of US$ 3,200,000.00 as fixed by the FIRST TRIBUNAL, such quantification being res judicata.

6.06 INDONESIA, on the other hand, contends that, in the proceedings before the SECOND TRIBUNAL, AMCO had consistently interpreted the quantification of damages as having been annulled by the FIRST COMMITTEE and therefore as being open to new determination. INDONESIA therefore asserts that AMCO is estopped from arguing that the quantification is res judicata.

(INDONESIA's Counter-Memorial, July 5, 1991, pages 33-39)

B. IN REGARD TO INDONESIA'S REQUEST FOR ANNULMENT OF THE AWARD OF JUNE 5, 1990

6.07 In AMCO's COUNTER-MEMORIAL of July 5, 1991 in opposition to INDONESIA's Annulment Application, AMCO rejected INDONESIA's Request for Annulment on each and every ground and in its entirety. This position was reaffirmed in the final written submission by AMCO dated December 12, 1991, cited in Paragraph 4.03 above.

6.08 In particular, AMCO maintains that

(1) The SECOND TRIBUNAL did not violate any principle of finality by awarding damages due to the unlawful license revocation;

(2) The SECOND TRIBUNAL did not manifestly exceed its power in applying Indonesian and international law;

(3) The SECOND TRIBUNAL did not fail to state reasons for its AWARD; and

(4) The SECOND TRIBUNAL did not violate any Rule of Procedure, fundamental or otherwise, by holding that BKPM's violations constitute an administrative denial of justice.

6.09 These contentions were reiterated in the oral hearings by AMCO as indeed in a more categorical manner in the final written submissions of December 12, 1991.

C. IN REGARD TO INDONESIA'S REQUEST FOR ANNULMENT OF THE SUPPLEMENTAL AWARD OF OCTOBER 17, 1990

6.10 AMCO opposed INDONESIA's request for annulment of the Supplemental Award of October 17, 1991 in its Counter-Memorial of July 5, 1991, pages 76-78, on the ground that the SECOND TRIBUNAL's Rectification Decision properly corrected an inadvertent error in the SECOND AWARD.

6.11 AMCO's contention in this connection was included in a more sweeping rejection of INDONESIA's Request for Annulment in its entirety in Paragraph 1 of its final written submissions of December 12, 1991.

PART THREE

CONSIDERATIONS, FINDINGS AND POSITIONS OF THE COMMITTEE

7.01 Having set out in outline the series of successive Submissions and Contentions by the PARTIES, the COMMITTEE will now proceed to examine them in some detail and wherever appropriate to state its views thereon including the findings and positions adopted by the COMMITTEE on each of the issues requiring its consideration and decision. In so doing, the COMMITTEE finds it convenient to treat each Application for Annulment in the order in which the requests for annulment were presented and contested by the PARTIES. Where required by economy, however, and to avoid undue repetitions and overlaps, the COMMITTEE will discuss together several of the points contained in the submissions.

I. THE APPLICATION BY INDONESIA FOR ANNULMENT OF THE AWARD OF JUNE 5, 1990

A. RES JUDICATA IN RESPECT OF PROCEDURAL IRREGULARITIES

7.02 A central argument on the part of the Respondent is that the SECOND TRIBUNAL manifestly exceeded its powers because it disregarded the res judicata character of the FIRST TRIBUNAL's findings with respect to the issue of liability for procedural irregularities in the revocation of the investment license.

7.03 As already noted (supra, Paragraph 5.05 et seq.), the Respondent's argumentation is multifacetted and is formulated in terms of a series of alternative arguments. According to it, in the first place, it is res judicata that for liability to arise both procedural and substantive defects must be found to exist. Secondly, the FIRST TRIBUNAL's findings as to the presence of procedural defects was res judicata and covered both the factual findings and the lack of liability in the absence of substantive defects. Thirdly, it was res judicata that relevant issues had to be decided on the basis of Indonesian law.

7.04 This issue is in several respects fundamental to the matters before the COMMITTEE and deserves fuller exploration. The cumulative effects of the three decisions involved, namely, the FIRST AWARD, the FIRST AD HOC COMMITTEE'S DECISION and the SECOND AWARD, are interrelated in a highly complex manner. Moreover, it is not unfair to state that the three decisions are not of utmost clarity nor are they unequivocal with respect to this specific point.

7.05 When approaching the issue of the lawfulness of the license revocation, the FIRST TRIBUNAL considered the question of the legal character of the administrative act involved (the investment approval or license) and of the consequent relationship between

the PARTIES and concluded Paragraph 191 of the FIRST AWARD :

> "To characterize the combination of the application and the approval, not as a contract properly speaking, identical to a private law contract, but as a bilateral relationship creating obligations for both parties, does not prevent the Claimants from claiming compensation for the damages, if any, they suffered as a consequence of the withdrawal of the approval, provided, of course, that the same is not substantially justified. .... Respondent has put forward the reasons which, in its view, justified the license revocation in this case, and implicitly, but clearly, accepted .... that lacking such reasons, the applications's approval could not have been withdrawn." (emphasis added).

7.06 The FIRST TRIBUNAL then considered the facts concerning the procedure leading to the license revocation. It found several defects, and was thus led to the conclusion that "said 'procedure' did not grant to the Claimants due process of law" (Paragraph 201). It then went on to state (same paragraph) :

> "Accordingly, this procedure was contrary, not only to the Indonesian regulations... but to the general and fundamental principle of due process as well. This finding by itself allows the Tribunal to conclude that the revocation of the approval of the investment application was unlawfully and therefore wrongfully decided, whatever the reasons on which it was based, and even if, as a matter of substance, said reasons could have justified it." (emphasis added).

In the paragraph immediately following, the TRIBUNAL stated (Paragraph 202) :

> "However, the Tribunal believes it is necessary to examine and evaluate these reasons, and it will do so hereunder."

After a brief excursus on two subsidiary points, it repeated its earlier conclusion (Paragraph 203) :

> "It thus remains that the revocation was unlawful in respect of the procedure that resulted in it."

7.07 After a lengthy study of the substantive reasons for the revocation the FIRST TRIBUNAL found that they did not justify the revocation of the license and concluded (Paragraph 242):

> "In the Tribunal's view, this conclusion could be based merely on the substantial examination of the two reasons, on which the revocation Decision relies. However, the Tribunal wishes to recall that independently

> from this examination and its conclusions, the mere lack of due process would have been an insuperable obstacle to the lawfulness of the revocation : the fact of the matter is that the revocation of the license was unlawful in this respect, and unjustified as regards the reasons on which it is based." (emphasis added).

7.08 While not strictly speaking self-contradictory, the three successive conclusions just summarized and quoted do not seem to point precisely in the same direction. This has caused problems in the subsequent decisions. The very first quotation (Paragraph 191 of the FIRST AWARD; Paragraph 7.07 above) seems to suggest that justification on substantive grounds is a necessary precondition for liability. The second set of quotations (Paragraphs 201-203 of the FIRST AWARD; Paragraph 7.07 above) opens on a seemingly clear statement of procedural unlawfulness (Paragraph 201 of the FIRST AWARD). Yet, the AWARD deliberately leaves open the exact relationship between lack of due process and lack of substantive justification. The TRIBUNAL moves from the one to the other with minimal words of transition ("However, ... it is necessary ..."; "the Tribunal will now examine ..."), avoiding any clear indication as to the exact legal reason why it proceeds to examine the substantive ground for the revocation, and thereby leaving open the question whether procedural defects are sufficient to permit the award of damages or a finding of substantive defects must also be present. The third quotation, however (Paragraph 242 of the FIRST AWARD; Paragraph 7.07 above), expressly states that lack of due process would be sufficient to make the revocation "unlawful". By thus providing a clear answer in favor of the first alternative, it suggests that the impression left by the first quotation is not accurate.

7.09 A careful reading in context suggests that there is in fact no contradiction between the first and the third quotation. The affirmation in Paragraph 191 that, for damages to be due, the revocation should be justified in substance (cf. also to similar effect Paragraphs 194 and 213 of the FIRST AWARD) in no way negates the independent importance of procedural considerations. The issue the Tribunal is addressing is whether there can be damages for the revocation of an administrative act with quasi-contractual overtones (i.e., the investment approval or license). It answers this question in the affirmative, adding the obvious (but not unnecessary) caution that damages are not due where the revocation of the act in question is justified. There is no indication that by omitting to refer to procedural defects it means to limit its answer only to cases where substantive justification is lacking. It merely does not address at that point that question, to which in fact it turns immediately afterwards. Whatever inference one might have drawn, when reading Paragraph 191, from its silence on the importance of procedural defects, is shown to be unwarranted by the explicit language in Paragraph 242.

7.10 The problems that confronted the FIRST AD HOC COMMITTEE on this issue stem from its conclusion that the FIRST TRIBUNAL's findings as to the lack of substantive reasons constituted a manifest excess of powers and had to be annulled while the findings as to the presence of procedural irregularities were substantially correct and were therefore to

be left standing unannulled. The FIRST AD HOC COMMITTEE started by pointing out that the FIRST TRIBUNAL "felt that it lacked the power to suspend or cancel the effects of the ... revocation order" (Paragraph 74 of the FIRST AD HOC COMMITTEE's Decision) and therefore "could only award compensation to P.T. AMCO for damages, if any, sustained by it from the definite revocation order. The amount of such compensation was of course dependent on whether or not the revocation was justified on substantive grounds". (Ibid., emphasis added)

7.11 The FIRST AD HOC COMMITTEE then addressed directly the issue here considered. It noted (Paragraph 80 of the FIRST AD HOC COMMITTEE's Decision) that :

> "... the Tribunal held (FIRST AWARD, Paragraph 201) that these procedural irregularities were sufficient grounds for concluding that the BKPM revocation order was illegal according to Indonesian law, entailing the further consequence of responsibility of Indonesia for damages towards Amco."

The FIRST AD HOC COMMITTEE disagreed with this holding. It stated (Paragraph 81 of the FIRST AD HOC COMMITTEE's Decision) :

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

7.12 At this point, the FIRST AD HOC COMMITTEE could have annulled the FIRST TRIBUNAL's holding, possibly on the ground that its misunderstanding of Indonesian law amounted to an excess of powers. It took, however, a different route, perhaps because it did not consider such action appropriate in an annulment (as distinguished from a review) proceeding since the incorrect application of law is not a manifest excess of powers (unless it amounts to effective disregard of the applicable law). Possibly, it was not itself fully satisfied as to the legal basis for its position (as might be inferred from the rather weak and vague language it used : "the fundamental character of Indonesian administrative law seems ... to be such ... that ..."). It chose to adopt a construction of the FIRST AWARD more consistent with its own view on the matter. It thus stated (Paragraph 82 of the FIRST AD HOC COMMITTEE's Decision) :

> "The ad hoc Committee believes that the Tribunal in its finding (FIRST AWARD, Paragraph 201 in fine) concerning the illegality of the order because of procedural defects merely intended to state that the order did not fully comply with Indonesian administrative law. This intent is clearly suggested by the fact that the Tribunal immediately found it "necessary" (FIRST AWARD, Paragraph 202, first line) to deal with the substantive

> reasons of the revocation, for the assessment of the amount of damages, if any, due to Claimants because of the revocation." (emphasis added)

7.13 On that basis, the FIRST AD HOC COMMITTEE rejected the request for annulment, holding (Paragraph 83 of the FIRST AD HOC COMMITTEE's Decision) that :

> "... the Tribunal, by affirming the illegality of the revocation procedure while, at the same time, conditioning the award of damages upon the existence of substantive reasons for the revocation, did not manifestly exceed its powers in interpreting and applying Indonesian law in this regard."

Thus, in these last two quotations, the FIRST AD HOC COMMITTEE made it clear that the only reason it did not annul the finding of the FIRST TRIBUNAL was that it chose to offer an interpretation of the FIRST AWARD that made such annulment unnecessary. It is apparent, however, from the discussion of the FIRST AWARD already offered here that this interpretation of its findings on the issue at hand was not the only possible one.

7.14 The SECOND TRIBUNAL confronted this issue in its Decision on Jurisdiction on the basis of the distinction it applied between the actual decisions of the FIRST AD HOC COMMITTEE as to annulment of specific findings of the FIRST AWARD and the reasoning "integral to" such decisions. The SECOND TRIBUNAL decided to treat as res judicata only the former and to consider as open for redetermination the issues covered by the latter. As a consequence, it held that "the FIRST TRIBUNAL's finding that the procedure of the license revocation was unlawful" was res judicata (Paragraph 48, at (ii)). When, at a later point, it addressed directly the issue whether "procedural defects alone justify damages", it found "that the First Tribunal does not seem ever to have found in terms that procedural defects alone justify damages nor has the Ad Hoc Committee clearly pronounced on this precise issue (Paragraphs 90-92). Accordingly, this item was held to be open for reconsideration by the SECOND TRIBUNAL.

7.15 On the basis of the analysis offered above (Paragraphs 7.05-7.13), the SECOND TRIBUNAL's interpretation of the two earlier decisions is by no means unreasonable, whether or not one agrees with the final conclusion. The central issue is not whether the pertinent unannulled findings of the FIRST TRIBUNAL are res judicata for the proceedings before the SECOND TRIBUNAL. It is apparent that they are and nobody disputes it. The issue in controversy is whether the FIRST AD HOC COMMITTEE's interpretation of these findings, as set out above (Paragraphs 7.10-7.14), is binding on the SECOND TRIBUNAL as res judicata. It should be kept in mind, however, that an Ad Hoc Committee has the power to annul an Award but may not revise or amend it. To recognize binding effect to an interpretation of part of an Award by a Committee, even an interpretation on the basis of which the Committee decided not to annul that part, would be the equivalent of granting the Committee the power to amend, i.e., to establish authoritatively one of several possible constructions as the only valid one. The

CONVENTION provides in Article 50 a separate procedure for the authoritative interpretation of Awards. The function of annulment proceedings is separate and different.

7.16 The SECOND TRIBUNAL has not accepted the FIRST AD HOC COMMITTEE's interpretation of the points in the FIRST AWARD at issue here. It has proceeded to construe the AWARD on its own on these points and has reached conclusions which differ from those of the FIRST AD HOC COMMITTEE. These conclusions, however, as the analysis offered above (Paragraphs 7.05-7.13) suggests, cannot be considered manifestly erroneous, nor are they precluded by any res judicata effect flowing from the FIRST AD HOC COMMITTEE's grounds for not annulling the pertinent portions of the FIRST AWARD.

7.17 To sum up the conclusions from the preceding paragraphs (7.05-7.16), the SECOND TRIBUNAL has not disregarded any res judicata holdings nor has it manifestly exceeded its powers in its interpretation of the language and the effects of the FIRST AWARD and the FIRST AD HOC COMMITTEE's Decision with respect to the issue of liability for procedural defects in the revocation of AMCO's investment license. The consequences flowing from its approach, namely, the broadening of the issues to be redecided beyond two narrow questions (supra, Paragraph 5.07) were not inappropriate, nor did they involve a disregard for the principle of finality.

B. APPLICATION OF INDONESIAN AND INTERNATIONAL LAW

7.18 The Respondent argues further that the SECOND TRIBUNAL has failed to apply the applicable law, namely, Indonesian law. That law was applicable both because the finding to that effect in the FIRST AWARD was not annulled and was therefore res judicata and because Article 42 of the CONVENTION so requires, independently of any res judicata effect. Evidently, this is one and the same issue, comprising several discrete sets of submissions by the Respondent. First, the TRIBUNAL has failed sufficiently to consider and apply Indonesian law both with respect to the issue of liability for procedural defects alone and in the manner in which it assessed the compensation to be paid. Secondly, the TRIBUNAL failed to apply Indonesian law, because it purported to apply international law.

7.19 The question of applicable law is of considerable importance in ICSID arbitrations. It is well established, by the legislative history of the CONVENTION, by the case-law of ICSID Tribunals and Ad Hoc Committees and by doctrinal commentary, that the requirement of application of the national law of the State party to the dispute in Article 42 (1) of the CONVENTION is a central element of the structure of the ICSID system. It follows that non-application of such law may constitute manifest excess of powers which entails annulment. At the same time, the incorrect application of national law, its "misapplication" or incorrect interpretation does not normally provide a proper ground

for annulment. An Ad Hoc Committee is empowered to annul Awards only on the basis of the grounds listed in the CONVENTION. These grounds do not include the review of Awards, with respect to the correctness or validity of their interpretation or application of legal rules and principles. It is of course theoretically possible for an Ad Hoc Committee to infer from the treatment of national law in an Award the Tribunal's intention not to apply national law. More realistically, an Ad Hoc Committee may find that the misapplication, etc. of national law is of such a nature or degree as to constitute objectively (regardless of the Tribunal's actual or presumed intentions) its effective non-application.

7.20 In the instant case, the SECOND TRIBUNAL did inquire at some length into the pertinent authorities on Indonesian law that the PARTIES had brought to its attention (Paragraphs 114-121 of the SECOND AWARD). After minute consideration of their relevance to the specific points at issue, it ended by essentially dismissing most of them as not being quite in point, although still finding "some slight authority" which pointed in the same direction as the decision it eventually reached. Its conclusion is worth quoting in full (Paragraph 121 of the SECOND AWARD) :

> "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."

7.21 The COMMITTEE finds no manifest disregard of Indonesian law by the SECOND TRIBUNAL as to the issue of liability for procedural irregularities alone. The SECOND TRIBUNAL examined the cases and authorities submitted to it, stated in its AWARD its views on them and reached the conclusion which it also presented in the AWARD. It is not necessary (indeed it is not appropriate) for the COMMITTEE to reach its own definite conclusions as to the substance of Indonesian administrative law on the matter, nor does the COMMITTEE have to express its agreement or disagreement with the conclusions reached by the Tribunal. It is enough for the COMMITTEE to find, as it does, first, that the treatment of the issue and the conclusions reached by the SECOND TRIBUNAL are not so clearly in disregard of Indonesian law as to suggest that the Tribunal has failed to apply that law, thereby manifestly exceeding its powers, and secondly that the Tribunal has given reasons for reaching the conclusions it reached.

7.22 The above findings are sufficient to cover separate submissions by the Respondent to the effect that the SECOND TRIBUNAL has manifestly exceeded its powers when deciding that the substantive validity of the revocation need not be decided before awarding damages to AMCO and when rejecting the Respondent's counter-claims as well as in so deciding the Tribunal has failed to state reasons and has departed from a fundamental rule of procedure.

7.23 While the SECOND TRIBUNAL has seriously considered and sought to apply Indonesian law, it has also applied international law and has indeed based its final decision on the presence of an internationally unlawful act. The Respondent submits that, in so doing, it has applied international law instead of Indonesian law, thus disregarding the provisions of Article 42 (1) of the CONVENTION.

7.24 The relevant language of that provision prescribes that, in the absence of express agreement between the parties, "the law of the Contracting State party to the dispute ... and such rules of international law as may be applicable" will be applied. There has been considerable literature and case-law concerning the interpretation and application of this provision. The legislative history of the CONVENTION suggests that the Article was deliberately formulated in a manner which, while clearly providing for application of national law, left open the identity of the international law rules to be applied and the exact circumstances under which they may be applicable. Arbitral Tribunals, Ad Hoc Committees and learned writers have rephrased in various manners the provision of Article 42 (1); despite differences in the specific formulation, outcomes appear fairly comparable.

7.25 When dealing with this question, the SECOND TRIBUNAL (Paragraphs 37-40 of the SECOND AWARD) reviewed the pertinent submissions of the PARTIES as well as the positions of the FIRST TRIBUNAL and the FIRST AD HOC COMMITTEE, noting that the latter had qualified the role of international law as "supplemental and corrective" (Paragraph 22 of the FIRST AD HOC COMMITTEE decision). The SECOND TRIBUNAL disagreed and stated (Paragraph 40) :

> "If there are no relevant host-state laws on a particular matter, a search must 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."

7.26 The SECOND TRIBUNAL may have overstated the extent to which international law is generally applicable in the framework of an ICSID arbitration. It does make a difference, not only <u>in abstracto</u> but also in view of a number of possible specific situations, if international law is applied to supplement host-state law or only in case of conflict with that law. To state moreover that international law is "fully applicable" may amount to reading out of Article 42 (1) the carefully drafted and very definite reference to the application of host-state law. Still, the matter has to be considered in the specific context of each particular case and problem. In the instant case, one must take into account several specific points. To begin with, the extent to which the application of national law by the Tribunal left many questions unanswered is directly relevant; besides, it is not

true that in all cases the absence of a specific rule or remedy in a legal system necessarily implies that a rule in the opposite direction obtains. It should be kept in mind, furthermore, that the TRIBUNAL did find "some slight authority" in Indonesian law in the direction in which it eventually was to decide the case. Finally, it is also relevant that the TRIBUNAL did not find any international law cases "on all fours" with the problems it was facing. The COMMITTEE thus concludes that, in seeking a solution to the issues before it within the frameworks of both Indonesian and international law, the actual treatment of the matter by the SECOND TRIBUNAL was well within the provisions of Article 42 (1). The COMMITTEE finds therefore that the TRIBUNAL did not manifestly exceed its powers in applying international as well as Indonesian law to the issues.

7.27 The Respondent has argued further that the SECOND TRIBUNAL failed to apply the applicable law, both Indonesian and international, in assessing the damages to be awarded. It did so, according to the Respondent, by disregarding the requirements of causation and proportionality that are in fact found in both bodies of law. The COMMITTEE finds that there is no such failure for the following reasons.

7.28 The possible misapplication or incorrect application in the concrete instance of a legal rule or principle must be distinguished from the non-application of a body of law. The Respondent has criticized at length the manner in which the SECOND TRIBUNAL has approached the issue of causality and has insisted that an Indonesian court would in all likelihood have reached different results. Yet, the AD HOC COMMITTEE does not have to agree with or to approve the manner in which the TRIBUNAL has applied the law. It only has to inquire into the extent to which it has in fact applied legal principles (and not decided the issue ex aequo et bono, something which would constitute manifest excess of powers) as well as into the identity of the law the TRIBUNAL has applied. Errors in law or misunderstandings of its import do not fall under the heading of non-application of applicable law, subject to the caveats already mentioned (supra, Paragraph 7.19).

7.29 It is not necessary for present purposes to decide whether application of the principle of proportionality is strictly appropriate in this case, in the context of an award based solely on a lack of due process. Proportional allocation of loss according to the relative fault of the parties implies comparability between the types of fault involved. Denial of due process, however, has no equivalent on the other side of the equation. Still, the fundamental point made in the preceding paragraph is also applicable in this case. It is the application or non-application of the appropriate body of law that is pertinent for the purposes of an annulment decision, not the correct or incorrect manner in which the law may have been applied.

C. DENIAL OF JUSTICE, TAINTED BACKGROUND AND BAD FAITH

7.30 While the SECOND TRIBUNAL considered at some length the issue whether procedural defects alone justify the award of damages, an issue central to AMCO's claim as submitted to the TRIBUNAL, and found indeed that "there was some slight authority" to that effect in Indonesian law, it made clear that this is not the ground on which it was deciding the case before it. As the Tribunal repeatedly stated, the issue it decided was whether the disregard of due process in revoking AMCO's license was of such a character as to render the revocation unlawful, such unlawfulness being a ground on which the award of damages may be based. The Respondent has attacked this reformulation of the issue on several grounds. Before considering these complaints, it is useful briefly to summarize the SECOND TRIBUNAL's reasoning in this respect.

7.31 The SECOND TRIBUNAL formulated the legal point at issue in a number of ways. At an early stage (Paragraph 75 of the SECOND AWARD), it stated its disagreement with the manner in which the PARTIES had presented the issues and pointed out that :

> "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."

7.32 The TRIBUNAL then proceeded to review the facts concerning the origins of the revocation decision and related actions by Indonesian authorities (Paragraphs 76-97 of the SECOND AWARD). While treating the FIRST TRIBUNAL's finding of lack of due process as res judicata, the SECOND TRIBUNAL attributed particular importance to each of the procedural irregularities involved. It formulated its conclusion (Paragraph 98) in the terms used earlier (Paragraph 75, quoted above), adding "bad faith" as the specific quality that has "tainted" the decision's background :

> "The Tribunal finds that the whole approach to the issue of revocation of the license was tainted by bad faith, reflected in events and procedures."

7.33 The TRIBUNAL sought to determine the legal consequences of a "tainted background", first in its findings on Indonesian administrative law (already quoted above, Paragraph 7.18) and then in its consideration of international law authorities (Paragraphs 124-129 of the SECOND AWARD). Most of the international law cases considered are in fact dismissed as not apposite, in view of their lack of relevance to the possibility of "a tainted background" and of "bad faith". In concluding the analysis of the three cases it found most pertinent (Paragraphs 130-136 of the SECOND AWARD), the Tribunal introduced for the first time in the AWARD the notion of a denial of justice, stating (Paragraph 136) :

> "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. [The cases] show equally that not every procedural irregularity constitutes a denial of justice."

7.34 In the next paragraph, the SECOND TRIBUNAL reformulated the issue it was seeking to decide in the following terms (Paragraph 137 of the SECOND AWARD) :

> "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."

7.35 The SECOND TRIBUNAL next addressed the question whether a denial of justice may occur because of acts of an administrative body rather then a judicial one. It answered in the affirmative, although in not very strong terms (Paragraph 137 of the SECOND AWARD) :

> "... 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 ..."

7.36 The SECOND TRIBUNAL then reviewed further the several tests it had found in the cases discussed and concluded (Paragraph 137 of the SECOND AWARD) that, whatever test one might apply,

> "... it can be seen that the BKPM handling of PT Wisma's complaint ... constituted a denial of justice."

It next proceeded to restate its conclusions of law, using the notion of "taint" that it had employed earlier (Paragraph 138) :

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

And then stated its final finding (Paragraph 139), again using terms it had used earlier in the AWARD :

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

7.37 The Respondent focusses its attack primarily on the use by the Tribunal of the notion of denial of justice, while also contesting the other two key terms, "tainted background" and "bad faith". By reformulating and eventually deciding the issue in such terms, INDONESIA argued, the SECOND TRIBUNAL has manifestly exceeded its powers in several respects : First, it has infringed on the res judicata character of the FIRST TRIBUNAL's findings as to procedural defects, since denial of justice is a legal notion different from that of procedural defects. Secondly, the SECOND TRIBUNAL has invented the notion of an "administrative" denial of justice, which does not exist in international law. And finally, by using notions such as "taint" which are not established in either Indonesian or international law, it has in reality decided the case not on legal grounds but ex aequo et bono.

7.38 As the FIRST AD HOC COMMITTEE in this case has pointed out, in dealing with an award, a Committee must "examine closely both what the Tribunal said it was doing and what it was in fact doing, in resolving particular questions". (Paragraph 24 of the FIRST AD HOC COMMITTEE decision). It is thus necessary to start by examining more closely the manner in which the AWARD deals with the role of the procedural defects in the investment license revocation and the meaning and function in the AWARD of the three key terms repeatedly mentioned, namely "tainted background" (and "taint"), "bad faith" and "denial of justice". On the basis of this discussion, it will be possible to deal with other aspects of the Respondent's submissions.

7.39 The SECOND TRIBUNAL states more than once that the issue is not the mere presence of procedural irregularities (cf. the quotations in Paragraphs 7.23, 7.24 and 7.25 above). What is important, according to the TRIBUNAL, is the specific character of the irregularities, their quality and kind. It is for this reason that the TRIBUNAL reviews once again the concrete instances of irregularities, already established by the factual findings of the FIRST TRIBUNAL and treated in toto as res judicata. From this review, the TRIBUNAL concludes that the procedural defects in question are of such a character that they may form the basis of an award of damages. In seeking to express the particular quality of the defects in procedure, the TRIBUNAL invokes the terms and notions mentioned in the preceding paragraph.

7.40 The graphic expression "taint" or "tainted background" is not, as far as the COMMITTEE can recall, a term of art in international law (or for that matter in domestic legal systems). In the AWARD under consideration, it is used to refer to the treatment of AMCO by the Indonesian authorities, as manifested by the totality of their actions, described in both the FIRST and SECOND AWARDS : support of P.T. Wisma, inaction with respect to the takeover of the hotel by police and army forces, haste and lack of serious consideration in the procedure of the revocation of AMCO's investment license. It is the specific, globally negative character of that attitude (also qualified as "bad faith", see the next Paragraph) that provides the "taint" to the "background", that is to say to the entire complex of Indonesian government actions toward AMCO. The notion is thus used

to express the TRIBUNAL's negative conclusions as to the quality of the procedural defects in the license revocation process.

7.41 The term "bad faith", "reflected in events and procedures", cannot be seen as a particularly good choice of a word for referring to the quality of the actions by Indonesian authorities. The term is commonly used to refer to the absence of good faith. Such considerations do not arise here, however, since the existence of good faith cannot preclude wrongfulness or entail any exonerating effect upon an otherwise internationally wrongful act, especially one that arises out of the lack of proper procedural treatment. Nor does bad faith, in the normal sense of the term, make unlawful otherwise proper procedures. What the TRIBUNAL obviously means here, in a legal conclusion, is that procedures were deliberately defective, that the revocation procedure was distorted by an effort to utilize it toward a predetermined end. A term like "abuse of process" may be seen as equivalent in effect and perhaps more appropriate. In view, however, of the limited use of the term as well as of its context, it is hard to see in this anything beyond an inappropriate choice of word.

7.42 The term "denial of justice" appears at first blush as more central to the TRIBUNAL's reasoning than the other two terms examined. Its use and application by the SECOND TRIBUNAL, however, are not devoid of problems. Some of these problems may be attributed to imperfections in the drafting of the SECOND AWARD, which result in a less than fully consistent use of terms and a somewhat unclear structuring of the argument. Most of the problems, however, are inherent in the notion in question rather than the result of its use by the TRIBUNAL. Denial of justice is, of course, an old and venerable international law term, at one time very much in use by international lawyers. But it is a term with multiple meanings and usages, with no settled content, despite the efforts and suggestions of judges and scholars. It is noteworthy that the term is nowadays much less frequently used in diplomatic correspondence, in judicial decisions and arbitral awards as well as in doctrinal writings than it was a few decades ago.

7.43 The SECOND TRIBUNAL has not explained the exact sense in which it is using this term. As the excerpts quoted above (e.g., Paragraphs 7.31, 7.32 and 7.34) make clear, it uses "denial of justice" sometimes as a synonym for, and sometimes as an element of, the notion of a "tainted background". It is sometimes a conclusion and at other times one of the reasons for the conclusion. The term serves to provide the additional characterization needed to establish the unlawfulness of the procedural irregularities in the license revocation. This use is not inconsistent with the manner in which the term is commonly used in international law, although it is not the only possible one.

7.44 Among the several senses in which the term "denial of justice" is used in international law literature and case-law, several discrete meanings may be distinguished, three of which seem particularly relevant to present concerns. (See, e.g., the long list of uses of the term in O.J. Lissitzyn, "The Meaning of the Term Denial of Justice in International Law", 30 American Journal of International Law 632 (1936) and the shorter list in G.G.

Fitzmaurice, "The Meaning of the Term "Denial of Justice", British Yearbook of International Law 93 (1932)). According to a first meaning, a denial of justice occurs when an alien is not granted appropriate access to judicial organs or remedies; it follows that at the root of a denial of justice in this sense there is in all cases an act (or omission) of the judiciary. According to a second meaning, closely related to the first, a denial of justice may occur because of acts by any government organ, not only judicial ones. A third sense, finally, fuses the term essentially as a synonym for an internationally wrongful (or unlawful) act. (See in this sense C.C. Hyde, 2, International Law, rev. ed. 1945, page 909.)

7.45 In the instant case, it is not immediately apparent in which of these senses the SECOND TRIBUNAL is using the term. Its discussion of the possibility of an "administrative" denial of justice (Paragraph 137 of the SECOND AWARD, supra Paragraph 7.33) would seem to suggest that the term is used in the second sense. Closer study of the AWARD, however, suggests that it is rather in the third, and most general sense that the TRIBUNAL is using the term most of the time (even if with some inconsistencies).

7.46 It is important to note that the Tribunal refrains from using the notion of denial of justice at the start of its inquiry, when it first formulates its central question, as well as at the very end, when it offers its final conclusion. At the start, it states : "The issue ... is whether there exists a generally tainted background that necessarily renders a decision unlawful, even if substantive grounds may exist" (Paragraph 75 of the SECOND AWARD). Some sixty paragraphs later, it concludes, "although certain substantive grounds might have existed ..., the circumstances surrounding BKPM's decision make it unlawful" (Paragraph 139).

7.47 It appears therefore that the central notion in the SECOND AWARD, the one that is indispensable for its reasoning, is the more general notion of unlawfulness and not the notion of a denial of justice, in any particular sense. The TRIBUNAL seeks to determine whether the governmental acts involved constitute internationally unlawful acts. Lack of due process, a tainted background, or even bad faith (in the sense the term is employed in the AWARD, see supra Paragraph 7.41) are elements which directly or indirectly render an act unlawful. Denial of justice, as well, appears to be a shorthand way to refer to those characteristics of an act which render it unlawful -- in this instance, the deliberate use of procedures to bring about a predetermined outcome, regardless of the possible existence of substantive grounds for the outcome. It is true that, as has been pointed out in the literature, this is not a very useful way of employing the term denial of justice; it is, however, a fairly common and established way.

7.48 It follows from this understanding of the reasoning of the SECOND AWARD that the use of the notion of denial of justice by the TRIBUNAL does not constitute a manifest excess of powers. From beginning to end, the SECOND TRIBUNAL was trying to determine whether an internationally unlawful act had occurred. In the process, it used the notion of denial of justice, as a synonym for, or an element leading to, the object of its efforts.

The latter remained fixed and clear : the lawfulness vel non of the Indonesian Government's actions, more specifically the procedural treatment of AMCO with respect to the revocation of its investment license. Defining the object of its quest in terms of wrongfulness or unlawfulness is an appropriate way of proceeding for the Tribunal in deciding the dispute between the PARTIES. The COMMITTEE finds moreover that this object is strictly legal in character and in no way constitutes a departure from the Tribunal's normal legal task and an endeavor to decide the case ex aequo et bono.

7.49 In dealing with the findings of the FIRST TRIBUNAL concerning the procedural defects of the license revocation process, the SECOND TRIBUNAL has not infringed upon the principle of finality. While treating the FIRST TRIBUNAL's finding of lack of due process as res judicata, it has attributed particular importance to each and all of the procedural irregularities in the revocation process. The Respondent complains that this "reworking" of the FIRST TRIBUNAL's findings amounts to a redetermination of the issues, especially in view of the new notions introduced by the SECOND TRIBUNAL, such as "tainted background", "denial of justice", etc. A close study of the FIRST and SECOND AWARDS, however, indicates that, beyond a marked difference in style and terminology, there are few, if any, significant differences in the findings that they utilize and to which they give effect (apart, of course, from the examination of the substantive grounds for the revocation, found only in the FIRST AWARD). It has to be stressed that the fundamental finding of lack of "due process" is found expressis verbis in the FIRST AWARD. The SECOND TRIBUNAL's reference to a denial of justice may indeed be seen as but a reformulation of that finding. Furthermore, the view that liability can be based on this finding alone is also found, albeit not unambiguously, in the FIRST AWARD, or at the very least (in view of the diverse interpretations possible) is not rejected by it.

7.50 Finally, in view of the reasoning in the preceding paragraphs, the use in the SECOND AWARD of the notion of a denial of justice by the Tribunal does not, in the COMMITTEE's view, constitute a departure from a fundamental rule of procedure, since reference to this notion did not involve invocation of a new cause of action but mere reiteration of the charge of unlawfulness. Moreover, the term itself had been used during the proceedings before the SECOND TRIBUNAL although it did not seem to have attracted much attention or debate (AMCO Counter-Memorial to Indonesia's Annulment Application, July 5, 1991, pp. 63-65).

D. ADMISSION OF NEW EVIDENCE AND ITS TREATMENT

7.51 Given the peculiar posture in which the dispute had reached the SECOND TRIBUNAL, after the partial annulment of the FIRST AWARD, the Tribunal had to move carefully between elements of the dispute before it which had been decided by the FIRST TRIBUNAL and were not annulled, and therefore left standing as res judicata, and elements which were open for redetermination by the SECOND TRIBUNAL. The

Tribunal determined in its Decision on Jurisdiction (Paragraph 7.14 above) that, while the FIRST AWARD's determination that procedural irregularities had marked the revocation of AMCO's investment license as res judicata, the award of damages and the consequent calculation of their amount were open for redetermination. The admission of new evidence with respect to an issue which was res judicata (namely, the presence and extent of lack of due process) would have been inappropriate, since the SECOND TRIBUNAL would be exceeding its powers if it were to redecide that issue. On the other hand, since the SECOND TRIBUNAL had to decide the issue of damages, it could and did accept new evidence with respect to that issue.

7.52 The actual import of the new evidence submitted by the Respondent is another question altogether, since one might easily perceive much of the new evidence as merely showing that AMCO had been diligent in seeking to reverse the revocation decision. The receipt by Indonesian authorities of letters protesting the revocation can hardly be considered as evidence that remedies were available or were provided, although meetings with Indonesian officials and other Indonesian Government responses to AMCO's complaints, however eventually frustrating to the latter, may be seen as being in the nature of remedial steps. Their actual import, however, in tempering the procedural defects that had been found to exist was for the SECOND TRIBUNAL to determine. Once again, it must be noted that the quality or correctness of the judgement of the Tribunal in dealing with this or other questions is not at issue in an annulment proceeding. The issue here is whether the SECOND TRIBUNAL seriously departed from a fundamental rule of procedure in the manner in which it dealt with the new evidence submitted by the Respondent. And the COMMITTEE finds that it did not so depart.

E. AMCO'S DISCREDITABLE ACTS

7.53 The Respondent has further submitted that the SECOND TRIBUNAL has seriously departed from the fundamental rule of procedure that the Parties be treated equally in that it treated the evidence in an "unbalanced" manner, disregarding or attributing little importance to AMCO's failures and discreditable acts while emphasizing Indonesia's failure to follow procedures. The SECOND TRIBUNAL, however, devotes a fairly lengthy section of its AWARD (Paragraphs 99-112) to detailing AMCO's "discreditable acts" in its dealing with the Government of Indonesia. It takes pains, in fact, to distinguish in this respect its own position from that of the FIRST TRIBUNAL, pointing out that "matters ... are less black and white" for it than for the FIRST TRIBUNAL and noting that "the evidence also reflects discreditably on Amco" (Paragraph 99 of the SECOND AWARD). In its conclusion (Paragraph 112), it accepts "that PT Amco's behaviour contained discreditable features" and goes on to assert that "that fact could not justify BKPM's approach to the question of revocation" (emphasis added). It cannot be said therefore that the SECOND TRIBUNAL has not considered AMCO's conduct in this respect. The term it has chosen to use in its conclusion, moreover, is significant : AMCO's conduct does not "justify" BKPM's "approach", that is to say, the lack of due

process in the revocation of the license. One might or might not read into that term an acknowledgement that AMCO's conduct may have been a factor in BKPM's decision. The point is, however, that to the extent that AMCO's conduct may be relevant, it pertains to the substantive grounds for revocation of the license, not to the procedure, with which the SECOND TRIBUNAL was dealing in its AWARD. The SECOND TRIBUNAL thus concluded that AMCO's failings, however discreditable, do not "justify" the Indonesian Government's departure from basic procedural norms. That judgement of the Tribunal, while laconically, even lapidarily formulated, is well within the ambit of its powers, nor can it be said that, read in context, it requires the formulation of additional reasons in support or explanation.

F. FAILURE TO STATE REASONS

7.54 The Respondent finally submits that the SECOND TRIBUNAL has failed to state reasons for its decision in a number of instances, where the reasons it has provided are not, according to the Respondent, clear or complete enough (see Supra, Paragraphs 5.19-5.21).

7.55 One significant point argued by the PARTIES and contested in the oral hearings of December 9-11, 1991 relates to the interpretation of Article 52 (1) (e) of the CONVENTION: specifically whether there is an additional requirement that the reasons stated be also "sufficiently pertinent". The standards of international arbitral propriety lead the COMMITTEE to adhere in this particular connection, to Article 31 of the Vienna Convention on the Law of Treaties, 1969. The wording of Sub-paragraph (1) (e) of Article 52 does not permit an interpretation beyond the "ordinary meaning" of the term used in the context and in the light of the object and purpose of the CONVENTION. The COMMITTEE can find no justification for adding a further requirement that the reasons stated be "sufficiently pertinent". To add such a phrase would be to amend the clear and unambiguous text of Article 52 (1) (e). The COMMITTEE has neither authority nor inclination to introduce any amendment to or modification of the provisions of the CONVENTION. Furthermore, the COMMITTEE must resist the temptation of arrogating to itself the power to review or to correct the decision of the SECOND TRIBUNAL. To require the sufficiency of pertinent reasons as distinguished from their mere existence, is to provide an Ad Hoc Committee with an unwarranted opportunity to act as a Court of Appeal. This the COMMITTEE will not do.

7.56 The COMMITTEE observes, however, that not every gap or ambiguity in a judgement constitutes a failure to state reasons. As was noted in the Introduction to this Decision (Paragraph 1.18 above), the ground for annulment in Article 52 (1) (e) of the CONVENTION is applicable where no reasons at all are given or where the reasons given are inconsistent or so weak as to be frivolous. While the SECOND TRIBUNAL is sometimes laconic in its reasons or not totally clear in its reasoning, this does not constitute failure to state reasons and the COMMITTEE is not disposed to find otherwise.

7.57 Statements have to be read in context. The "reasons" for a position or a statement may be found in the developments that follow. Thus, the SECOND TRIBUNAL's restatement of the central issue (Paragraph 75 of the SECOND AWARD) is explained by the elaborate developments that follow, including, for example, its analysis of the case-law in the light of the reformulation (Paragraphs 122-135 of the SECOND AWARD). It is not necessary, moreover, for a Tribunal to explain each and every statement and conclusion it has reached, e.g., in determining the import of case-law (Paragraphs 122-136 of the SECOND AWARD), or to spell out in mechanistic detail the manner in which a causal connection it finds to exist operates in abstracto in view of hypothetical possibilities (Paragraph 174 of the SECOND AWARD). Once again, possible misapplication of legal rules does not constitute a ground for annulment, especially in terms of a failure to state reasons.

7.58 Similar considerations apply to the Respondent's submission that the SECOND TRIBUNAL failed to state reasons for its rejection of INDONESIA's tax concessions counter-claims. This has not been a central issue in the SECOND AWARD, nor indeed in the Parties' submissions to the COMMITTEE. In fact, the SECOND AWARD dealt repeatedly and in some detail with the facts and the law concerning actions by AMCO on which the counter-claims were based. It concluded however that, while some of them might have formed the basis for lawful revocation of AMCO's investment license and for the Government claims arising out of such revocation, they could not by themselves form the basis for annulment when the revocation itself was found to be lawful. The argument is cogent and reasons are in no way absent.

II. THE APPLICATION BY AMCO FOR ANNULMENT IN PART OF THE AWARD OF JUNE 5, 1990

A. REDETERMINATION OF THE NATURE OF THE PREJUDICE SUFFERED BY AMCO AS THE RESULT OF THE ARMY AND POLICE ACTIONS ON MARCH 31/APRIL 1, 1980

8.01 In AMCO's contention, the FIRST TRIBUNAL's finding that the army and police actions on March 31/April 1, 1980, deprived AMCO of future income from April 1, 1980, is res judicata (Paragraph 6.01 above). The SECOND TRIBUNAL, however, decided that the only prejudice AMCO has suffered was a general disturbance.

8.02 In order to appreciate the res judicata character of the issue in question, it is necessary to take into consideration the relevant statements of the three successive ICSID bodies which have been called upon to consider this case, namely, the FIRST TRIBUNAL, the FIRST AD HOC COMMITTEE and the SECOND TRIBUNAL.

8.03 The FIRST TRIBUNAL made the following statement on the nature of the prejudice suffered by AMCO from the army and police actions :

> "257. The dispossession as such did not have any legal effect : it merely created a de facto situation, which was the actual deprivation of P.T. AMCO of the management and operation of the hotel, and of the daily cash flow the company received by exercising its rights.
>
> Accordingly, while it is right to say that the Claimants' deprivation of the right 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, Paragraph 257)

8.04 The FIRST TRIBUNAL awarded AMCO damages of US$ 3,200,000.00 for both the prejudices resulting from the army and police actions and for the revocation of the investment license, assuming that there existed a single causal link between these two events.

8.05 The FIRST AD HOC COMMITTEE found that, while the army and police actions were illegal and entailed Indonesia's responsibility, the revocation of the investment license was a lawful response of Indonesia to certain failures of AMCO. Not being entitled to determine what portion of the indemnity fixed by the FIRST TRIBUNAL was attributable to the prejudice caused by the army and police actions, the Committee annulled the "Tribunal's findings on the amount of damages as a whole" (Decision of the FIRST AD HOC COMMITTEE, Paragraph 110). In the dispositif of its decision, the FIRST AD HOC COMMITTEE stated that it

> "annuls the Award as a whole for the reasons and with the qualifications set out above."

It added :

> "The annulment does not extend to the Tribunal's finding that the action of Army and Police personnel on March 31/April 1, 1980, was illegal. The annulment extends, however, to the findings on the duration of such illegality and on the amount of the indemnity due on this account."

8.06 The SECOND TRIBUNAL understood this Annulment as embracing both the determination of the nature of the prejudice suffered by AMCO from the army and police actions and the quantification thereof (SECOND AWARD, paragraph 46). In redetermining these issues, it found that the army and police actions prevented AMCO

from exercising its right to management and control of the hotel and from access to its cash flow but did not deprive it of the right to its share of the profit under the 1978 Profit-Sharing Agreement (Paragraph 165). It further found that AMCO's access to the cash flow of the hotel was fiduciary in nature and its loss could not therefore cause AMCO any prejudice (Paragraphs 61, 165). It awarded AMCO a compensation of US$ 10,000.00 for general disturbance only. As to the question of the res judicata character of the determination of the nature of the prejudice, the SECOND TRIBUNAL stated that the wording of Paragraph 257 of the FIRST AWARD (quoted above) concerning the deprivation of future income by the army and police actions was not entirely clear. In its opinion, Paragraph 257 of the FIRST AWARD either refers to a "de facto inability to receive, from April to July 1980, its share of the profits under the 1978 Agreement" or is supposed to say "that the legal right to secure profits from the Hotel Kartika venture was ultimately lost by the revocation decree of July 9, the path to which began with the dispossession of March 31 - April 1" (Paragraph 49). The decisive element for the SECOND TRIBUNAL in its finding on the res judicata issue seems to have been the fact that the Ad Hoc Committee had annulled the FIRST AWARD "as a whole" and excluded from the annulment only "the finding that the action of the Army and Police personnel ... was illegal" but not the further questions dealt with in Paragraph 257 of the FIRST AWARD (Paragraph 50 of the SECOND AWARD).

8.07 Arbitration Rule 55 (3) states : "If the original award had only been annulled in part, the new Tribunal shall not reconsider any portion of the award not so annulled". If a new Tribunal reconsiders an issue not annulled, it exceeds its powers. In the present case the FIRST COMMITTEE had not taken any explicit decision on the controversial issue of the nature of the prejudice caused by the army and police actions. The SECOND TRIBUNAL therefore had to interpret the Committee's decision with regard to this issue. Its interpretation could be considered as a manifest excess of powers only if it were manifestly outside any bona fide interpretation of the FIRST COMMITTEE's decision and therefore obviously untenable.

8.08 An Ad Hoc Committee in an annulment proceeding is not entitled to decide which one of several possible interpretations of an annulment decision, among which the Tribunal could choose, was preferable. It has simply to ascertain whether the Tribunal whose award is challenged acted in manifest breach of its competence. The International Court of Justice, in its Judgement of November 12, 1991, concerning the Arbitral Award of July 31, 1989, between Guinea-Bissau and Senegal, stated to similar effect :

> "The Court does not have to enquire whether or not the Arbitration Agreement could, with regard to the Tribunal's competence, be interpreted in a number of ways, and if so to consider which would have been preferable. By proceeding in that way the Court would be treating the request as an appeal and not as a recours en nullité. The Court could not act in that way in the present case. It has simply to ascertain whether by rendering the disputed Award the Tribunal acted in manifest breach of the

competence conferred on it by the Arbitration Agreement, either by deciding in excess of, or by failing to exercise, its jurisdiction."

(ICJ Reports 1991, page 69, Paragraph 47)

8.09 If one follows the statements of the three ICSID bodies reproduced above, no manifest excess of powers attributable to the SECOND TRIBUNAL can be established. The FIRST COMMITTEE annulled the FIRST TRIBUNAL's "findings on the amount of damages as a whole" (Paragraph 110 of the FIRST AD HOC COMMITTEE's Decision) and annulled the Award "as a whole ... with the qualifications set out above". It stated that the annulment did not extend to the Tribunal's finding that the actions of army and police personnel was illegal, but extended to the findings on the duration of such illegality and the amount of the indemnity due on this account. No mention was made in this context of the nature of the prejudice suffered by AMCO from the army and police actions and of AMCO's deprivation of future profits. The FIRST COMMITTEE's decision annulling "the amount of the indemnity as a whole" could therefore, without any manifest excess of powers, be interpreted as including the nature and assessment of damages for the prejudice.

8.10 The COMMITTEE concludes accordingly that the SECOND TRIBUNAL did not manifestly exceed its powers by reascertaining the nature of the prejudice caused AMCO by army and police personnel for the purpose of quantification of compensation for the loss suffered.

B. REDETERMINATION OF THE AGGREGATE AMOUNT OF DAMAGES DUE AMCO FOR THE ARMY AND POLICE ACTIONS ON MARCH 31/APRIL 1, 1980, AND THE REVOCATION OF AMCO'S INVESTMENT LICENSE ON JULY 9, 1980

8.11 AMCO advances several arguments for its contention that the SECOND TRIBUNAL exceeded its powers in redetermining the aggregate amount of damages due AMCO.

8.12 First, AMCO alleges that the FIRST AD HOC COMMITTEE had not annulled any aspect of the damages quantification (Paragraphs 6.04-6.05 above). This argument coincides with the argument put forward under Section A. above where the Committee found that the FIRST AD HOC COMMITTEE's decision annulling the FIRST TRIBUNAL's "findings on the amount of damages as a whole" could without any manifest excess of powers be understood as including the calculation or quantification of the damages.

8.13 According to a second argument put forward by AMCO, INDONESIA had not sought the annulment of the FIRST TRIBUNAL's quantification of the amount of damages to be paid to AMCO. This argument proves to be irrelevant since INDONESIA had requested

the annulment of the findings on its liability and thereby implicitly also sought the annulment of the damages to be paid to AMCO. Moreover, the argument cannot be heard since the FIRST COMMITTEE's decision, which annulled the damages as a whole, is not reviewable.

8.14 Third, AMCO argues that the SECOND TRIBUNAL reestablished the liability of INDONESIA on essentially the same grounds as the FIRST TRIBUNAL had done, so that the FIRST TRIBUNAL's quantification should also be reestablished. Although the SECOND TRIBUNAL would have been free to reintroduce the FIRST TRIBUNAL's quantification of damages, it was not bound to do so since the quantification had been annulled as a whole.

8.15 A further point needs attention, the only one of the points advanced by AMCO not yet covered by the preceding considerations. AMCO contends that the date for the conversion of rupiahs to dollars, as fixed by the FIRST TRIBUNAL, was res judicata. The date was April 1, 1980. The FIRST TRIBUNAL had fixed this date, considering that, according to international law, the relevant date is the date the damages occurred (FIRST AWARD, Paragraph 280). The FIRST COMMITTEE decided that it was res judicata that "the applicable date for converting to U.S. dollars any damages expressed in rupiahs is "the date the damage occurred" (Decision of the FIRST AD HOC COMMITTEE, Paragraph 120). The SECOND TRIBUNAL confirmed this in its Decision on Jurisdiction (Paragraphs 66-67). In its main Award, the SECOND TRIBUNAL used another method for the valuation of the Hotel profits than that adopted by the FIRST TRIBUNAL. By this method, the Tribunal converted AMCO's profits to U.S. 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 1999 (SECOND AWARD, Paragraph 284.4, also Paragraphs 252-253).

8.16 The rule that damages are to be paid at the exchange rate of the date the damage occurred, is intended to prevent devaluation of the amount of compensation which is calculated in the currency of the State where the damages occurred but is payable in a foreign currency, owing to the fact that the first currency depreciates at a higher rate than does the currency in which the indemnity is to be paid. The rule in question is not intended to imply, however, that the indemnity for lost income of future years is to be paid at a higher exchange rate than the rate of the year in which the income is earned. The SECOND TRIBUNAL stated that the objective is "to put AMCO in the position it would have been in had its contract been performed" (SECOND AWARD, Paragraph 253). In its SUPPLEMENTAL DECISION of October 17, 1990, Paragraphs 1 and 2, the SECOND TRIBUNAL affirmed its reasoning in the following way :

> "In its Decision on Jurisdiction the Tribunal had affirmed that the applicable date for converting to U.S. dollars any damage expressed in rupiahs is the date that the damage occurred. The Tribunal has made it clear in its Award that what was lost was a share in a stream of profit.

> The damage was necessarily year by year damage. At paragraphs 252-253 of its Award of June 5, 1990, the Tribunal explained the basis of the year by year exchange rate to be applied in converting rupiahs to U.S. dollars for purposes of calculating damages.
>
> The Tribunal's decision was fully compatible with the res judicata referred to by AMCO."

A calculation which corresponds to this reasoning does not violate the aforementioned rule which is considered to be res judicata. Such is the finding of the COMMITTEE.

8.17 A final point is to be examined : INDONESIA contends that AMCO, in the proceedings before the SECOND TRIBUNAL, had consistently interpreted the calculation of damages as having been annulled by the FIRST COMMITTEE. In INDONESIA's view, AMCO is therefore estopped from asserting the contrary. INDONESIA asserts, inter alia, that in its resubmission of the dispute to the SECOND TRIBUNAL AMCO claimed a sum of US$ 15,000,000.00 as compensation for the acts of the army and police and expressly affirmed that "the annulment did extend to the amount of compensation due" (INDONESIA's Counter-Memorial, July 5, 1991, pages 33-39). INDONESIA refers to Arbitration Rule 41 stating that "Any objection that the dispute or any ancillary claim is not within the jurisdiction of the Tribunal shall be made as early as possible". Rule 41 fixes as the time limit the date of the filing of the Counter-Memorial. In the present case, INDONESIA alleges, this would have been September 12, 1988, i.e. the time limit set for the Counter-Memorial before the SECOND TRIBUNAL (Ibid., page 36).

8.18 The question raised by INDONESIA can be left open. As the COMMITTEE has come to the conclusion that the SECOND TRIBUNAL could without any manifest excess of powers consider the calculation of the indemnity for the army and police actions as having been annulled by the FIRST COMMITTEE there is no need to determine whether or not AMCO is estopped from contending that the FIRST TRIBUNAL's calculation was res judicata. There is accordingly no basis for AMCO's request for annulment in this particular respect.

III. THE APPLICATION BY INDONESIA FOR ANNULMENT OF THE SUPPLEMENTAL AWARD OF OCTOBER 17, 1990

A. MANIFEST EXCESS OF POWERS

9.01 INDONESIA contends that the SECOND TRIBUNAL, in adopting its SUPPLEMENTAL AWARD, did not simply rectify a clerical, arithmetical or similar error, as required by Article 49 (2) of the CONVENTION, but reconsidered the valuation to be given to the Aeropacific assets in violation of Article 52 (1) (b) of the CONVENTION (manifest excess of powers).

9.02 An ICSID award is binding on the Parties and shall not be subject to any other remedy except those provided for in the CONVENTION (Article 53 (1) of the CONVENTION). One of these exceptions is the rectification of "any clerical, arithmetical or similar error in the award" (Article 49 (2)). Such an error can consist in inadvertent mistakes in spelling, in dates, in miscalculations, etc. (INDONESIA's Application for Annulment of the Supplemental Award, February 14, 1991, page 13).

9.03 The SECOND AWARD contains two diverging figures for the book value of the Aeropacific assets. Paragraphs 221 and 222 mention the figure of Rp. 421,451,054, while the table annexed to Paragraph 284 on pages 170 and 171 of the AWARD leads to a sum of Rp. 625,730,000. (The correct figure, however, resulting from the addition of Rp. 566,940,000 and 59,790,000, as indicated on pages 170 and 171, column 7, of the SECOND AWARD, is Rp. 626,730,000. This possible mistake has no further consequence since the Tribunal decided to rely on the lower of the two valuations.) It is obvious that the Tribunal did not notice the divergence between the two figures used for the same assets. Otherwise it would have corrected the mistake. The divergence was clearly inadvertent. INDONESIA does not claim the contrary. It alleges that the Tribunal made an ex post facto reasoning and changed its original decision. INDONESIA bases its allegation on the expression "The Tribunal ... has preferred", used in the Supplemental Award on page 3. It suggests that this expression refers to the rectification phase, not to the time when the Tribunal adopted its Award. It is difficult to follow this reasoning. The Tribunal's expression may not have been fortunate, but it evidently refers to the time when the Tribunal rendered its Award. There are no indications whatsoever, which would allow the conclusion that the Tribunal had changed its mind and departed from its earlier decision. On the contrary, the two paragraphs of the AWARD which are devoted to the Aeropacific assets (Paragraphs 221 and 222) mention the lower of the two sums, i.e., the sum fixed in the Supplemental Award. These two paragraphs were the result of the Tribunal's deliberations whereas the tables reproduced on pages 170-171, showing the higher figures, were established by accounting experts. The Tribunal seems to have overlooked that the tables were no longer correct after it had decided to rely on the lower figures. Although the Tribunal's inadvertence had considerable consequences for the PARTIES, this does not affect its character as an error in the sense of Article 49 (2).

9.04 It follows that INDONESIA's claim that the SECOND TRIBUNAL manifestly exceeded its powers must be dismissed.

B. SERIOUS DEPARTURE FROM A FUNDAMENTAL RULE OF PROCEDURE

9.05 Article 49 (2) of the CONVENTION provides that the Tribunal may, upon request of a party and "after notice to the other party", rectify any clerical or similar error. Arbitration Rule 49 (4) specifies : "The Tribunal shall fix a time limit for the parties to

file their observations on the request and shall determine the procedure for its consideration". (This is Rule 49 (3) in the Revised Arbitration Rules applicable to proceedings after September 26, 1984). The SECOND TRIBUNAL, after having received AMCO's request of July 20, 1990, for supplemental decisions, did not fix a time limit for INDONESIA's submission of its observations on the request. Nevertheless, INDONESIA received a copy of AMCO's request from the Secretary-General of ICSID in accordance with Arbitration Rule 49 (3) (or Revised Rule 49 (2)). On August 14, 1990, INDONESIA addressed a letter to the Tribunal's President, Professor Rosalyn Higgins, urging the Tribunal to decline jurisdiction over the issues raised in AMCO's request. The letter stated that if the Tribunal should determine that further proceedings are appropriate, INDONESIA expressly reserves "the right to make submissions on the substance of AMCO's July 20 Request before the Tribunal considers it on those grounds" (page 12 of the letter).

9.06 The Tribunal did not fix a time limit, nor did it give reasons in the Supplemental Award for not doing so. Neither did it take note of INDONESIA's reservation to make further submissions. It only acknowledges that it "considered ... the Memorandum submitted by Indonesia on August 14, 1990", but in its AWARD it never refers to INDONESIA's arguments. Thus, the Tribunal clearly departed from Arbitration Rule 49 (4).

9.07 According to Article 52 (1) (d) of the CONVENTION, an Ad Hoc Committee has the authority to annul an award or any part of it if the departure from the rule of procedure is serious and if the rule is fundamental.

9.08 The mandatory rule in question, Rule 49 (4), requiring a time limit to be fixed for the Parties to file their observations must be considered as fundamental. If a Tribunal takes a decision on the request of a Party without giving the other Party an opportunity to express itself on that request, it does not treat the Parties equally. In MINE v. Guinea (ICSID CASE ARB/84/4), the Ad Hoc Committee considered the comparable provision of Article 18 of the UNCITRAL Model Law on International Commercial Arbitration as a clear example of a fundamental rule. This rule states : "The parties shall be treated equally and each party shall be given full opportunity of presenting his case" (Decision of December 14, 1989, 5 Foreign Investment Law Journal, 1990, Paragraph 5.06, page 104). An argument could be made that in the case of rectification of an apparent clerical, arithmetical or similar error, there is hardly any need to fix a time limit for the Parties to file their observations. However, Rule 49 (4) expressly requires that the Tribunal fix a time limit in such cases. This rule of procedure does not lose its fundamental character by the fact that the decision to be taken might seem apparent.

9.09 As to the question whether the departure from a rule is serious, the Ad Hoc Committee in MINE v. Guinea stated that the departure "must be substantial and be such as to deprive a party of the benefit or protection which the rule was intended to provide" (Ibid., page 104, Paragraph 5.05).

9.10 In the present case, the serious nature of the departure can be affirmed on both counts. The Tribunal simply disregarded Arbitration Rule 49 (4). It did not even take note of its existence. Nor did it make any observation on INDONESIA's reservation presented in the letter of August 14, 1990. No doubt, INDONESIA had received AMCO's request and had taken the opportunity to address preliminary observations to the Tribunal contesting jurisdiction, but it was entitled to expect that a time limit would be fixed and an opportunity provided for INDONESIA to present its substantive defense, at any rate, when the Tribunal had not simply refused to exercise jurisdiction. The Tribunal summarily dismissed twelve of the thirteen grounds advanced by AMCO for supplementation and rectification except for one. It is in respect of this one that INDONESIA was therefore deprived of the benefit of the protection the rule is intended to provide. The fact that the decision to be taken seemed apparent cannot be considered as a justification for dispensation with a mandatory rule of procedure designed to guarantee equality of opportunity for the Parties to have their views heard on the issues to be addressed and decided by the Tribunal, nor is the matter merely de minimis. The COMMITTEE therefore concludes that the Tribunal, by omitting to fix a time limit to enable INDONESIA to file its observations on AMCO's request, seriously departed from a fundamental rule of procedure. On this ground, the SUPPLEMENTAL AWARD of October 17, 1990, cannot be left unannulled.

C. FAILURE TO STATE REASONS

9.11 INDONESIA contends that the SECOND TRIBUNAL failed to state the reasons upon which "its reconsideration of the asset valuation" was based (INDONESIA's Application for Annulment of the Supplemental Award, February 14, 1991, pages 18-19) As previously stated, the SECOND TRIBUNAL did not exceed its power to rectify a clerical error. Its duty to state reasons (Article 48 (3) of the CONVENTION) was therefore confined to making plausible the assertion that the error was inadvertent and that the rectified figures corresponded to the decision it had taken when it adopted the Award.

9.12 As was stated in this connection, the SECOND TRIBUNAL in both instances gave sufficiently relevant indications of its reasons. No violation of the duty to state reasons can therefore be found.

9.13 INDONESIA further contends that the Tribunal "failed to state reasons for rejecting Indonesia's position with respect to the threshold jurisdictional objections raised in its Letter concerning Jurisdiction" (Ibid., page 19). As the COMMITTEE has found it possible to annul the Supplemental Award because the SECOND TRIBUNAL had not given INDONESIA an opportunity to file its observations in compliance with Rule 49 (4) of the Arbitration Rules, the additional contention that the Tribunal had not stated reasons for not considering INDONESIA's objections is devoid of any object.

IV. COSTS

10.01 Having regard to the fact that both PARTIES have submitted Applications for Annulment, and that they have maintained, throughout the entire proceedings, an equally high degree of self-restraint, patience and due diligence in cooperation with the COMMITTEE, thereby enabling the COMMITTEE to reach its conclusions without undue delay, the COMMITTEE finds that each of the PARTIES, AMCO as well as INDONESIA, should contribute in equal parts to the costs of the COMMITTEE and that each PARTY should bear its own costs for legal counsel.

PART FOUR

CONCLUSION

DECISION OF THE COMMITTEE

For these reasons,

THE COMMITTEE,

Noting that the stay of enforcement of the AWARD ordered by the COMMITTEE's Interim Order No. I terminates automatically as of the date of this Decision pursuant to Arbitration Rule 54 (3),

UNANIMOUSLY

A. (1) Rejects in its entirety INDONESIA's Application for Annulment of the AWARD of June 5, 1990;

(2) Rejects in its entirety AMCO's Application for Annulment in Part of the AWARD of June 5, 1990; and

(3) Finds consequently that the AWARD of June 5, 1990 is valid and binding for INDONESIA and AMCO, which have the obligation to apply it;

B. Annuls the SUPPLEMENTAL AWARD of October 17, 1990 for serious departure from a fundamental rule of procedure under Article 52 (1) (d) of the ICSID CONVENTION and Arbitration Rule 49 (4);

C. Orders that the Bank Guarantee issued by N.V. de INDONESISCHE BANK (a Netherlands Bank) dated June 14, 1991 on behalf of INDONESIA in favor of AMCO shall take effect in accordance with its terms upon fulfillment of financial obligations as to the sharing of costs by the PARTIES, taking into account the COMMITTEE's Decision (operative Paragraph B.) annulling the SUPPLEMENTAL AWARD of October 17, 1990, thereby leaving unannulled the amount of US$ 2,567,966.20, awarded by the SECOND TRIBUNAL on June 5, 1990 with interest of six percent per annum, without the supplemental increase of US$ 109,160.00 which is annulled;

D. Rules that the PARTIES bear equally the charges of the Centre, as determined by the Secretary-General, as well as the fees and expenses of the Members of the COMMITTEE; and that the PARTIES bear their own costs and expenses, including counsel fees, in connection with the present proceedings.

DONE in San Francisco, on December 3, 1992.

Arghyrios A. FATOURIOS Sompong SUCHARITKUL Dietrich SCHINDLER