INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

ICSID Case No. ARB/81/1

AMCO ASIA CORPORATION AND OTHERS V. REPUBLIC OF INDONESIA

DECISION ON JURISDICTION

---

25 September 1983

Tribunal:
Edward W. Rubin (Appointed by the investor)
Berthold Goldman (President)
Isi Foighel (Appointed by the State)

Voir le document sur jusmundi.com

Table of Contents

Decision on Jurisdiction 0
I. FACTS AND PROCEDURE 1
II. DISCUSSION 2
A. Jurisdiction over the Parties 4
AA. Jurisdiction over the Claimants 4
a) PT Amco 4
b) Amco Asia 9
c) Pan American 13
AB. Jurisdiction over the Respondent 15
B. Jurisdiction in Respect of the Matters in Dispute 16
C. Estoppel and Waiver 18
CA. Estoppel 18
CB. Waiver 21

Decision on Jurisdiction

I. FACTS AND PROCEDURE

1. The present arbitration was initiated on January 15, 1981 when Amco Asia Corporation (hereinafter called "Amco Asia"). Pan American Development Limited (hereinafter called "Pan American") and PT Amco Indonesia (hereinafter called �PT Amco"). collectively the Claimants, filed with the Secretary-General, icsid, a Request for Arbitration against the Republic of Indonesia ("the Respondent"). Paragraph 1 of said Request states the following:

    AMCO Asia Corporation. Pan American Development Limited and PT Amco hereby request arbitration of a legal dispute with the Republic of Indonesia arising directly out of their hotel investment in Indonesia in 1968. The investment was authorized by the Republic for a period of 30 years but in 1980 the Republic seized the investment in an armed, military action and cancelled the investment licence. The parties dispute the right of the Republic to seize the investment and cancel the licence.

    The Claimants requested that:

    damages be awarded against the Republic in the amount of not less than US $9,000,000. together with interest from March 31. 1980. costs and disbursements of this arbitration, counsel fees, and such other and further relief as the Centre shall deem just.

2. After the Tribunal was composed, the Respondent filed on June 21. 1982. a "Proposal... for disqualification of an arbitrator". In opposition to this proposal. Claimants filed a Memorandum, which was handed to the Tribunal and to the Respondent at the first session of the Tribunal, which was held in Washington. DC. on June 23 and 24, 1982.
During this session, the two unchallenged arbitrators heard, according to Article 9 of the icsid Rules on Arbitration, oral arguments on the proposal as well as a statement of the challenged arbitrator, and rejected the proposal by a decision of June 24. 1982.

3. Following said decision and on the same day. Claimants filed with the Tribunal a "Statement of Facts and Law", dated June 21. 1982. in support of the Request for Arbitration and concluding that they "should be awarded compensation of not less than US $12,494,000 together with interest and cost."
Following an order of the Tribunal, Respondent filed its CounterMemorial (hereinafter "CM") on December 30. 1982. which besides opposing the merits of the claims, raises objections to jurisdiction which are the subject-matter of this award.

    On January 21, 1983, the Tribunal, in accordance with Rule 41(3). suspended further proceedings on the merits of the claims made by the Claimants and permitted the Claimants thirty (30) days, later extended by a further 7 days, to file any written observations they wished to make on the issues of

jurisdiction raised by the Respondent.

Claimants, on February 28, 1983. filed a Reply to the Counter-Memorial, which contained, among other things, certain observations on the jurisdictional questions put forward by the Respondent.

After considering the representations of counsel to the Parties, the Tribunal in a decision (actually Procedural Order No. 3) of 1 April 1983. ordered that "legal objections to jurisdiction raised by the Respondent" were to be dealt with as a preliminary matter, and that the Respondent's contentions relating to jurisdiction which "involve examination of facts bymeans of testimonies" were to be joined to the further examination, if any. by the Tribunal of the merits of the claims. At the same time Respondent was given until April 25, 1983, to file its Observations with regard to its objections to jurisdiction and the Claimants were granted until May 23, 1983, to file a Rejoinder.

The Respondent's Observation on Jurisdiction and the Claimant's Rejoinder thereto were duly filed and the hearings for the oral arguments on the preliminary legal jurisdictional matters were held in Paris on June 28-29, 1983.

II. DISCUSSION

4. In its Counter-Memorial, dated December 30, 1982 the Respondent presented the following submissions concerning the matter of jurisdiction (pages 106-108):

> May it please the Tribunal
>
> 1. *On the principal objections to jurisdiction:*
>
> To adjudge and declare
>
> (a) That the Centre and this Tribunal are without jurisdiction to entertain or decide any of the claims advanced by Amco Asia in claimants' Request for Arbitration and Memorial, Indonesia not having consented to the jurisdiction of the Centre in respect of any dispute between Indonesia and Amco Asia:
>
> (b) That the Centre and this Tribunal are without jurisdiction to entertain or decide any of the claims advanced by Pan American in claimants' Request for Arbitration and Memorial. Indonesia not having consented to the jurisdiction of the Centre in respect of any dispute between Indonesia and Pan American;
>
> (c) Whether the Centre and this Tribunal have jurisdiction to entertain or decide any of the claims advanced by PT Amco in claimant’s Request for Arbitration and Memorial, Indonesia not having effectively consented that PT Amco. a national of the Republic, be treated as a United States national for purposes of the Convention.
>
> 2. *On the alternative objection to jurisdiction:*

> If this Tribunal should adjudge and declare that the Centre and this Tribunal have jurisdiction in respect of PT Amco. to adjudge and declare that the Centre and this Tribunal are without jurisdiction to entertain or decide any of the claims of PT Amco relating to the alleged hotel "seizure" and termination of the lease agreements with PT Wisma. the latter not being a Contracting State or an agency thereof designated to the Centre by such State, and disputes between private parties being outside the jurisdiction of the Centre.
>
> 3. *On the alternative objection to admissibility:*
>
> If this Tribunal should reject the objection to jurisdiction formulated in 2 above on the ground that PT Wisma and Indonesia are one and the same, to adjudge and declare that PT Amco has waived and is precluded from invoking consent to jurisdiction of the Centre in respect of its claims relating to the alleged hotel "seizure" and termination of the lease agreements with PT Wisma because of the decision on these matters by the Jakarta Court, and further to adjudge and declare that PT Amco's claims relating to the termination of the lease agreements therefore are inadmissible.

5. In their Reply to Indonesia’s Counter-Memorial, dated 28 February 1983, the Claimants presented the following conclusions, relating to the same matter (page 123):

> 1. Indonesia has twice consented in writing to ICSID arbitration of Claimants' investment dispute - once when it approved Claimants’ Investment Application containing an icsid arbitration clause, and once again when it promulgated an investment promotion literature guaranteeing arbitration of investment disputes such as this one.
>
> 2. The Tribunal’s jurisdiction extends to all of Indonesia's alleged wrongful actions including the seizure of the Hotel by its Army, the revocation of the investment licence by its Investment Board and the rescission of the Lease and Management Contract by its courts, because such actions deprived Claimants of their investment without compensation.

6. The Respondent concluded as follows its Observations on Jurisdiction, dated April 25. 1983:

> For the reasons stated above and in the Counter-Memorial, Indonesia renews its submissions (CM at 106-108) regarding the jurisdiction of the Tribunal.

7. Finally, the Conclusion of Claimant's Rejoinder to Indonesia's Observations on Jurisdiction reads as follows:

> For the reasons stated in Claimant's Reply and Rejoinder, the Tribunal should find that Indonesia has consented in writing to ICSID arbitration with each Claimant, and that the Tribunal's jurisdiction extends to all of the Claimant's causes of action.

8. It thus appears that to decide on the Respondent’s Objections to jurisdiction - which it is undoubtedly and uncontestedly competent to do (Convention. Article 41(1)), notwithstanding the

fact that since he registered the request, the Secretary-General had not found that the dispute was "manifestly outside the jurisdiction of the Centre" (Convention. Article 36(3)) - the Tribunal has to consider three sets of issues, namely:

— Has the Tribunal jurisdiction over the parties to the dispute? (a)

— Has the Tribunal jurisdiction in respect of the matters in dispute, or of some or none of them? (b)

— Are the Claimants estopped from or did they waive the right to invoke this Tribunal's jurisdiction.(c)

A. *Jurisdiction over the Parties*

9. These issues are raised by the Respondent in respect to the three Claimants, namely Amco Asia, Pan American and PT Amco. They will be dealt with separately in respect of each of the Claimants, starting however with PT Amco, continuing with Amco Asia and finishing with Pan American (AA).

On the other hand. Indonesia alleges that it has not rightly been designated as Respondent, since according to it, the claims put forward by the Claimants do not concern it, but PT Wisma. Accordingly, the Tribunal will examine whether this objection amounts to a denial of its jurisdiction over the true Respondent in the case, and if so, will decide on it (AB).

AA. *Jurisdiction over the Claimants*

a) *PT Amco*

10. It is stated in Article I of the above mentioned "Application to establish PT Amco Indonesia", which has been agreed to by Indonesia through the documents already analysed, that:

> ... the applicant puts forward an application to establish a foreign business in Indonesia (hereafter referred to as the business). The name of the business which will be established is PT Amco Indonesia. The BUSINESS will be domiciled in Indonesia and established within a period of thirty (30) days.

Then. Article IX of the said Application provides as follows:

> If at a later date there is a disagreement and dispute between the business and the government, this disagreement will be put before the International Centre for Settlement of Investment Disputes, in which body the Government of the Republic of Indonesia and the United States are

> members. All the decisions made by the Convention mentioned above will bind the sides which are in disagreement and dispute.

It is to be noted here that these quotations are drawn from the translation of the Application filed by the Claimants with their Request for Arbitration (Exh. A/t). In said translation, the word �business" corresponds to the word *"perusahaan"* in the Indonesian original of the Application (Exh. A). Discussions took place and a controversy arose as to the accurate translation of that word, the Respondent, contending that it corresponds in English to "company" rather than to "business". This controversy could possibly be relevant, with all reservations, to the determination of the Tribunal's jurisdiction in respect of Amco Asia; but as far as PT Amco is concerned, it has no bearing, since Article I of the Application designates expressly PT Amco as the � *perusahaan"* to be established, and Article IX submits to ICSID arbitration the disputes between the *"perusahaan"* and the Government.

11. Not denying this express submission of disputes to ICSID arbitration, to which PT Amco and the Government agreed, the Respondent states that �the Tribunal must... determine if it has jurisdiction over PT Amco" (CM 15); then, in its "Observations" (at 11) that:

> The jurisdictional limitations prescribed by the Convention, in particular as elaborated by the *Holiday Inns* case, raise substantial questions with respect to the Tribunal's jurisdiction over PT Amco. In order to resolve this doubt Indonesia therefore has requested that the Tribunal determine whether article 9 of the investment application constitutes a valid and effective consent by Indonesia to arbitration treating one of its own nationals. PT Amco. as a United States national for purposes of the Convention.

12. In fact, taking into account its elaboration during the oral argument presented by counsel to the Respondent at the hearings of June 28 and 29, 1983, the thus expressed "doubt" is close to a denial of the Tribunal's jurisdiction over PT Amco.

Be that as it may, the reasons of the Respondent's �doubt" or denial may be fairly summarized as follows:

> (i) The consent given by a sovereign State to an arbitration convention amounting to a limitation of its sovereignty is to be construed restrictively: this alleged principle of interpretation, in spite of it being more directly referred to in respect of the denied jurisdiction over Amco Asia and Pan American is indeed put forward as having a general application (Observations, at 2).
>
> (ii) PT Amco being, in the meaning of Article 25(2)(b) of the Convention a "juridical person... which had the nationality of the Contracting State party to the dispute" at the date on which the parties consented to submit such dispute to arbitration, the jurisdiction of the Centre could have been extended over it provided that "because of foreign control, the parties have agreed (it) should be treated as a national of another Contracting State for the purpose of the Convention" (Article 25(2)(b), infine): now, Article IX of the Application does not contain such an express agreement to treat PT Amco as a national of another State.

(iii) Finally, no formal and express indication is found in the arbitration clause as to the Contracting State in respect of which the parties would have agreed to treat PT Amco as a national. According to the Respondent, such an indication is indispensable for jurisdiction to be validly based on the final provision of Article 25(2)(b). Moreover, in the circumstances of the case, this lack of a clear and formal indication in this respect resulted in an ignorance by Indonesia of the nationality of the persons who controlled PT Amco.

13. The Claimants oppose these arguments, contending:

— that the principle and the aim of interpretation of an arbitration is to seek to establish the true common will of the parties;

— that no formal requirement is provided for as to the way in which the consent to treat the local juridical person involved in the dispute as a foreign person should be given;

— and that a formal indication of the nationality based on control in the arbitration clause itself is not any more needed, the Claimants contending, in addition, that the Respondent knew PT Amco's situation in this respect.

14. The Tribunal cannot share the Respondent's views as to the �doubts" on its jurisdiction or as to its lack of jurisdiction over PT Amco.

(i) In the first place, like any other conventions, a convention to arbitrate is not to be construed *restrictively,* nor, as a matter of fact, *broadly* or *liberally.* It is to be construed in a way which leads to find out and to respect the common will of the parties: such a method of interpretation is but the application of the fundamental principle *pacta sunt servanda,* a principle common, indeed, to all systems of internal law and to international law.

Moreover - and this is again a general principle of law - any convention, including conventions to arbitrate, should be construed in good faith, that is to say by taking into account the consequences of their commitments the parties may be considered as having reasonably and legitimately envisaged.

(ii) Nothing in the Convention, and in particular in Article 25, provides for a formal requisite of an express clause stating that the parties have decided to treat a company having legally the nationality of the Contracting State, which is a party to the dispute, as a foreign company of another contracting State, because of the control to which it is submitted.

What is needed, for the final provision of Article 25(2)(b) to be applicable, is (1) that the juridical person, party to the dispute be legally a national of the Contracting State which is the other party and (2) that this juridical person being under foreign control, to the knowledge of the Contracting State, the parties agree to treat it as a foreign juridical person.

Now, in the Tribunal's view, these two conditions were fulfilled in the instance case, at the date on which the parties consented to submit possible future disputes to arbitration (which date is relevant, according to Article 25(2)(b)), and as a matter of fact, are still fulfilled today.

Voir le document sur jusmundi.com

Indeed, it is not disputed that due to its place of incorporation, to the law under which it has been incorporated and to the place of its registered seat (as well, to be said incidentally, as of its actual seat) PT Amco had and still has the nationality of Indonesia.

On the other hand. Article I of the Application states, as already recalled, that "the APPLICANT puts forward an APPLICATION to establish a *foreign business* in Indonesia (hereafter referred to as the BUSINESS)" (emphasis provided); and it goes on to state that "the name of the business which will be established is PT Amco Indonesia".

How could that not mean that PT Amco is a foreign company, in spite of it being necessarily, from a legal point of view, an Indonesian one? Moreover, Article III, paragraph 3 of the Application expressly indicates that "all the capital of the BUSINESS represents *foreign capital"* (emphasis provided) and that:

> at least on the first year of its end... will take place a gradual sale of shares to Indonesian citizens or Indonesian businesses, so that in this way at the end of the nineteenth (19th) year after the establishment of the business, all shares *become* the property of Indonesian citizens or business (emphasis provided).

How to say clearer that at the date of its establishment, PT Amco will be -and indeed was - a legally Indonesian company under foreign control?

It thus appears obvious that when agreeing to the Application, the Indonesian Government knew perfectly that PT Amco would be under foreign control. Knowing this expressly stated fact, the Government has agreed to the Application *and* to the arbitration clause in it: therefore, it is crystal clear that it agreed to treat PT Amco as a national of another Contracting State, for the purpose of the Convention.

To refer to the *Holiday Inns* award - in spite of the same not being a binding precedent in this case - here, this agreement is by no means *implied;* it is expressed, and clearly expressed, no formal or ritual clause being provided for in the Convention, nor needed in order for such an agreement to be binding on the parties.

(iii) Finally, the Tribunal does not think that an objection to the binding character of the arbitration clause can be drawn, in the circumstances of the case, from the fact that the country of which the controlling shareholders of PT Amco were the nationals was not expressly mentioned in said clause, nor from the fact, alleged by the Respondent, that it did effectively not know which this country was.

Taking first the legal point of view, and the contents of the agreement itself, the Tribunal will state, here again, that there is no provision in the Convention imposing a formal indication, in the arbitration clause itself, of the nationality of the foreign juridical or natural persons who control the juridical person having the nationality of the Contracting State, party to the dispute.

On the other hand, in the instance case, that nationality was clearly indicated in the Application. Indeed, paragraph 1 of the Preface of that document stated as follows:

> 1. This Application is made and put forward in the city of Jakarta on this day. the 6th of May. Nineteen hundred and sixty-seven by AMCO ASIA CORPORATION, an organization established and controlled in its affairs by the ordinances of businesses which operate in the United States.

Then paragraph 2 states that:

> the Applicant resides at the address 900 Market Street, in the city of Wilmington, in the State of Delaware. United States.

According to paragraph 4. the Applicant was:

> represented by Max Eugene Moore, in his position as President. South East Asia Representative, a business-man of United States citizenship.

Finally, it is stated in Article V of the Application that:

> the entire management of the business will be carried out and be in the control of the applicant as sole shareholder.

It thus appears that the nationality of the controller of PT Amco. the Indonesian juridical person to be established, was repeatedly and expressly stated in the Application to which the Indonesian Government agreed; under the circumstances, lacking any formal requirement in this respect in the Convention, there was no need for a particular statement of said nationality in the arbitration clause itself.

Truth to tell. Respondent contends that the true controller of PT Amco was not of American nationality, since, it alleges, Amco Asia itself was controlled by Mr Tan, a Dutch citizen residing in Hong Kong, through Pan American, a Hong Kong company of which said Mr Tan was the sole or the main shareholder.

To take this argument into consideration, the Tribunal would have to admit first that for the purpose of Article 25(2)(b) of the Convention, one should not take into account the legal nationality of the foreign juridical person which controls the local one. but the nationality of the juridical or natural persons who control the controlling juridical person itself: in other words, to take care of a control at the second, and possibly third, fourth, or xth degree.

Such a reasoning is, in law, not in accord with the Convention. Indeed, the concept of nationality is there a classical one, based on the law under which the juridical person has been incorporated, the place of incorporation and the place of the social seat. An exception is brought to this concept in respect of juridical persons having the nationality, thus defined, of the Contracting State Party to the dispute, where said juridical persons are under foreign control. But no exception to the classical concept is provided for when it comes to the nationality of the foreign controller, even supposing - which is not at all clearly stated in the Convention - that the fact that the controller is the national of one or another foreign State is to be taken into account (in fact, it could be so where for political or economical reasons, it matters for the Contracting State to know the nationality of the controller or controllers, and where it is proven that would the Contracting State have known this nationality, it would not have agreed to the arbitration clause; such a situation might possibly be met in exceptional instances, but has by no means been proven, and not even alleged, in the instant case).

Moreover, it appears from the letter of 14 March. 1968 (Cl. Doc. No. 39) sent by the General Manager of PT Wisma Kartika (the juridical person who was the owner of the land on which the Kartika Plaza Hotel was to be built) to Mr T. K. Tan. in Hong Kong, that two months before the filing by Mr Max E.

Moore on behalf of Amco Asia of the Application. Mr Tan was asked to "assist Max in this project" (i.e. the hotel). This letter shows that in fact, the interest of Mr Tan in this planned investment was known, and far from raising any objection, was indeed encouraged.

Incidentally, the Tribunal would like to stress that the legal and factual reasons previously stated would amply suffice to reject the argument of the Respondent that it allegedly did not know the nationality of the remote controllers of the local company to be established, when agreeing to the Application and to the arbitration clause herein. The case could have been different if there would have been fraud or misrepresentation on this issue, which is not the fact herein.

15. For all the above stated reasons, the Tribunal concludes that it has jurisdiction over PT Amco. Respondent's Submissions as to the claims of PT Amco on which it contends that this Tribunal has no jurisdiction (Submissions 2 and 3. CM at 107-108) will be dealt with when the Tribunal will examine its jurisdiction in respect of the matters in dispute.

b) *Amco Asia*

16. To deny the Tribunal’s jurisdiction over Amco Asia. Respondent relies (while referring generally to the alleged principle of restrictive interpretation of limitations of sovereignty: CM. at 9-12) on the following analysis of documents and facts which it deems relevant:

(i) Article IX of the Application, read together with Article I of the same document,

> does not designate Amco Asia as having a right to invoke icsid arbitration against Indonesia, and hence docs not constitute an express consent in writing to the jurisdiction of the Centre over any claim of Amco Asia against Indonesia (CM at 13).

(ii) The Indonesian regulations on capital investment, relied upon by the Claimants to show Amco Asia's responsibilities in respect of the investment in question (Cl.Doc. 32. 33) refer to the �capital investor’’ or simply the �investors", not to the *foreign* investor (Observations, at 5-6);

(iii) There would be significant differences between the *Holiday Inns* case, and the present one, which should lead this Tribunal to reject the extension of the arbitration clause to the parent company, while this extension had been admitted in *Holiday Inns.*

17. Claimants respond to these contentions essentially in pointing out:

(i) that the arbitration clause, which:

> could have provided for arbitration of claims by the local corporation (the "Perseroan Terbatas", or "PT"), against Indonesia.... instead refers to disputes between Indonesia and the Business (the "Perusahaan"), thereby-reflecting an intent to include claims by the foreign investor for damage to its business. The intention was to cover any dispute

> relating to the investment Application, regardless of whether the person damaged was the Indonesian Government, the foreign investor or the local company to be incorporated through which the project would be implemented.

(Reply, at 18-19) (see also, on the meaning of "perusahaan". Claimant's Rejoinder, at 9-10).

(ii) that:

> this intention and understanding is clearly reflected in Indonesia's investment incentive law of 1967 (Cl. Doc. No. 1. Art. 22)... and in Indonesia's investment promotion literature of 1968... (Reply, at 19);

(iii) that:

> the wording of the arbitration clause, in the context of the investment climate for Indonesia in 1968. Indonesia's Foreign Investment Law of 1967. and the other statements made by Indonesia to induce foreign investment all caused Amco Asia to believe its investment in Indonesia would be protected by icsid arbitration (Reply, at 20).

adding in its Rejoinder:

> that even if there were no arbitration clause. Indonesia's foreign investment law and investment promotion literature contain Indonesia's written consent to ICSID arbitration (at 18-20).

18. Here again, the Tribunal will consider the issue in having essentially regard to what is, in its view, the crux of the matter, that is to say the true common will and intention of the parties, keeping in mind the fact that such will and intention are not to be drawn from a "restrictive" nor from a "liberal" interpretation of the arbitration clause, but from the normal expectations of the parties, as they may be established in view of the agreement as a whole, and of the aim and the spirit of the Washington Convention as well as of the Indonesian legislation and behaviour.

19. Beforehand, the Tribunal wish to state that it does not think that the linguistic comments presented by the parties, and in particular by the Respondent on the Indonesian word "perusahaan" and its accurate translation into English, while highly interesting, are really relevant.

    The controversy is whether this word should be translated by "company", as the Respondent contends it, or by "business", according to the Claimant's view. The consequence of the choice of the first translation would be, Respondent contends, that the "company" referred to being PT Amco. Article IX of the Application can be invoked by this company only, but not by Amco Asia, its parent company; on the contrary. Claimants contend that the correct translation being "business", Article IX covers the global enterprise composed of the parent company (Amco Asia) and the subsidiary (PT Amco).

20. It goes without saying that this Tribunal has not the slightest expertise in the Indonesian language; happily enough, in the circumstances of the case, it does not need it. As a matter of fact the

Indonesian-English dictionary by John M. Echols and Hassan Shadily, of which the Claimants filed the relevant pages (425-426; Cl. Doc. No. 81) indicates for *perusahaan:* "business, enterprise, undertaking, concern", "company" not being offered as a possible translation: accordingly. Claimants seem to be right as to the linguistic problem.

However, as already mentioned, the same Indonesian word is used in Article I. where it is stated that the name of the *"perusahaan"* which will be established in Indonesia is PT Amco, and in Article IX (the arbitration clause), where it is agreed that the disputes between the *"perusahaan"* and the Government "will be put before the ICSID". Consequently, the *"perusahaan"* expressly referred to in Article IX is PT Amco, no matter whether the Indonesian word should be translated by "company" or "business".

21. In the Tribunal's view, a second argument of the Claimants is not fully conclusive.

The Claimants rely in two respects on the Indonesian Law No. 1 of 1967 and the literature to promote foreign investment:

— on the one hand, as a means of interpretation of the investment agreement in this case, as including an agreement to arbitrate in respect of the foreign investor as well as of the local company;

— on the other hand, as constituting by themselves a written consent of Indonesia to submit all and each of the investment disputes to icsid arbitration.

22. Under its first aspect, the argument will be considered hereunder, when the Tribunal will expose its interpretation of the investment agreement in this case.

Under the second one, the argument cannot be admitted. To be sure. Article 21 of Act No. 1. 1967 "Re Foreign Capital Investment" (Cl. Doc. No. 1) provides that "the Government shall not undertake a total nationalization", nor other analogous measures, "except when declared by Act of Parliament that the interest of the State requires such a step". Then, Article 23 (para. 1) goes on to say that in case of such measures, "the Government has the obligation to provide compensation...". to be agreed upon by the parties; paragraph 3 provides that:

> if no agreement can be reached between the two parties regarding the amount, type and procedure for payment of compensation, arbitration shall take place which shall be binding on both parties;

Finally, paragraph 3 indicates how the arbitration board will be formed, as an *ad hoc* tribunal.

No mention is made of the ICSID arbitration in this provision, and indeed could not have been made, since at the time of enactment of that law, the Convention had not entered into force in respect of Indonesia (it did enter into force on October 28, 1968): that means necessarily that Article 23 of Law No. 1 of 1967 is not and cannot be a *direct* and *sufficient* commitment to submit investment disputes to ICSID arbitration. Moreover, the disputes referred to in Article 23 concern the determination of the compensation to be paid when one of the measures mentioned in Article 22 have been taken; now, in the present case. Indonesia denies that it took any measure of nationalization, etc.... so that

Voir le document sur jusmundi.com

the dispute seems to escape the *ad hoc* arbitration provided for in Article 23.

Nonetheless, these Indonesian statutory provisions may and should be taken into account when interpreting the present investment agreement in order to determine the field of implementation of the arbitration clause; they are, indeed, of significant relevance in this respect.

Similarly, and indeed *a fortiori,* promotion literature cannot be a direct commitment: however, it could be taken into account in the interpretation of the investment agreement.

23. The Tribunal comes now to this interpretation.

The same is obviously to be conducted in the framework of the Washington Convention, and in a way which respects its spirit and allows to reach its objectives. Suffices to point out, in this respect, the very first sentence of the Convention's Preamble:

> Considering the need for international cooperation for economic development, and the role of private international investment therein.

This sentence shows that ICSID arbitration is a method of settlement which corresponds to the interests, not only of investors, but of the Contracting States as well, provided that by their adhesion to the Convention they have shown that they considered this method as being effectively in their interest, being it also understood that they keep full freedom to implement it or not, in respect of each particular investment agreement. As to the investors, it goes without saying that they have practically in all cases interest to submit to this international arbitration any and all disputes with the host State relating to the investment. Thus, the Convention is aimed to protect, to the same extent and with the same vigour the investor and the host State, not forgetting that to protect investments is to protect the general interest of development and of developing countries.

Accordingly, while a consent in writing to ICSID arbitration is indispensable, since it is required by Article 25(1) of the Convention, such consent in writing is not to be expressed in a solemn, ritual and unique formulation. The investment agreement being in writing, it suffices to establish that its interpretation in good faith shows that the parties agreed to ICSID arbitration, in order for the ICSID Tribunal to have jurisdiction over them.

24. Such is the situation here.

The foreign investor was Amco Asia; PT Amco was but an instrumentality through which Amco Asia was to realize the investment.

Now, the goal of the arbitration clause was to protect the investor. How could such protection be ensured, if Amco Asia would be refused the benefit of the clause? Moreover, the Tribunal did find that PT Amco had this benefit, because of the foreign control under which it is placed: would it not be fully illogical to grant this protection to the controlled entity, but not to the controlling one?

No doubt Amco Asia has understood the clause in this way. But Indonesia could not reasonably have understood it otherwise, nor reasonably have imagined that the clause would not grant protection

to the investor himself, that is to say to Amco Asia. It is here that one should keep in mind the Indonesian legislation and literature: they show that the Indonesian Government considered that protection of investors through international arbitration was needed *in the interest of its country,* so that arbitration clauses to which it was going to subscribe were to be interpreted, for this reason too, as extending necessarily their benefit to the foreign investor. On their side, the investors were entitled to consider that Indonesia would not offer a �restrictive" interpretation of the arbitration clauses.

25. To conclude, there is a written consent to ICSID arbitration in the investment agreement (Article IX of the Application and its acceptance by the Government). The formal requirement of Article 25(1) of the Convention is thus fulfilled and what it left, is to interpret said written consent.

Such interpretation will lead the Tribunal to decide that the arbitration clause may be invoked by Amco Asia, over which it has, accordingly, jurisdiction.

The Tribunal does not think that this conclusion can be affected by some accessory issues or arguments which have been raised in this respect.

(i) There were controversies about the subject matter of the Indonesian Regulations relating to investment: did the same concern investment in general, or foreign investment in particular?

The Tribunal will limit itself to mention, in this respect, that the "Decree of the President of the Republic of Indonesia No. 54, year 1977" (Cl. Doc. 32) refers expressly in the Preamble to Law No. 1. year 1967 on Foreign Capital Investment, and contains a full set of provisions relating to the same (Chapter 1. Second Part). However, it is true that such provisions have no direct bearing on the issue of jurisdiction here at stake.

(ii) The parties referred again, in respect of this issue, to the *Holiday Inns* case; in particular, the Respondent pointed out that in that case, it was the parent companies that performed the investment, contending that in the present case, Amco Asia did nothing or almost nothing of that kind (which the Claimants deny).

The Tribunal will state again that in spite of superficial resemblances, the facts in the *Holiday Inns* case and in the instant one are largely different, so that the references to *Holiday Inns* are not really relevant, excepted that, as in said case, the arbitrators extended an arbitration clause to parties which had not personally executed it; accordingly, it would not seem to be contrary to that precedent (to the extent to which it is a precedent) to apply an arbitration clause to the foreign investor who filed and signed the Application for Investment in which said clause is included, even if in the literal formulation of that clause the foreign investor is not expressly mentioned.

Finally, whether and to what extent Amco Asia took part itself in the building of the hotel is not relevant.

26. For all the above stated reasons, the Tribunal will conclude that it has jurisdiction over Amco Asia.

c) *Pan American*

27. To deny the Tribunal’s jurisdiction over Pan American. Respondent points out (CM. at 14) that:

> article 9 of investment application submitted to Indonesia docs not mention Pan American at all and hence does not offer any basis for a finding of an express consent in writing to the jurisdiction of the Centre over any claim of Pan American against Indonesia.

In the Respondent’s view, no right to invoke icsid arbitration can derive for Pan American from "an alleged right of Amco Asia", since "Amco Asia itself has no right to invoke icsid arbitration." Moreover, according to the Respondent, the letter from the Secretary-General of the Department of Public Works and Power, to which Claimants refer (CM. Exh. 7) "simply gave permission to PT Amco to transfer a portion of the shares held by Amco Asia Corporation to Pan American"; "that letter", states the Respondent:

> does not constitute an express consent to icsid arbitration with Pan American and, under the strict constructions mandated for any alleged derogation from sovereignty. Indonesia’s consent cannot be implied from that letter.

Virtually the same arguments are presented in the "Observations" to sustain the objection against Tribunal’s jurisdiction over Pan American.

28. Claimants answer these arguments in relying on the transfer, that took place in 1972. of a "controlling block of shares of PT Amco from Amco Asia to Pan American", and on the approval of such transfer, in writing, by Indonesia, which according to the Claimants, has had as a consequence the transfer to Pan American of Amco Asia’s "right to icsid arbitration under the arbitration clause in the Investment Application" (Reply at 21-22).
Here again, virtually, the same arguments are put forward in Claimants' Rejoinder to Indonesia's Observations to Jurisdiction.

29. The Tribunal wishes to recall its previous statements as to the method of interpretation of agreements relating to ICSID arbitration: the same should not be "restrictive" nor "liberal" since it is aimed to draw from the documents submitted the common will and intention of the parties, and to give full effect to that intention.

30. That being said, the Tribunal refers to the letter of the Secretary-General of the Ministry of Public Works and Electric Power, dated April 25, 1972, where it is stated that this Department has "principally no objection" to the letter of PT Amco of April 13, 1972, with which "it is requested that partly of the shares held by Amco Asia Corporation is [sic] permitted to be transferred to Pan American Development Company Limited" (Cl. Doc. No. 34). This approval is confirmed with a letter of the Sub-committee for Foreign Investment. Foreign Investment Board, dated May 1. 1972, to the Secretary-General. Department of Public Works and Electric Power (Cl. Doc. No. 35).

31. The transfer thus approved was made by Amco Asia to Pan American. Now, according to the conclusion the Tribunal has reached in respect of Amco Asia, it has jurisdiction over this company; in other words, Amco Asia has the right to invoke this Tribunal's jurisdiction over it. Amco Asia has this right in its capacity as the foreign investor who made the Application containing the arbitration clause, agreed upon by Indonesia; and it is in that capacity that Amco Asia was authorized by the Indonesian Government to establish PT Amco, and became the shareholder of the same.

Accordingly, the right acquired by Amco Asia to invoke the arbitration clause is attached to its investment, represented by its shares in PT Amco, and *may* be transferred with those shares. To be sure, for such a transfer to be effective, the government of the host country must approve it, which approval has as its consequence that said government agrees to the transferee acquiring all rights attached to the shares, including the right to arbitrate, unless this latter right would be expressly excluded in the approval decision.

Such approval having been given in the instant case, it constitutes, together with Amco Asia's Request to transfer the shares, the agreement in writing to submit to ICSID arbitration the disputes with the transferee, requested by the Convention (Article 25).

32. A supplementary remark should be here made.

But for an oral statement made on behalf of the Claimants during the hearings of June 28 and 29, conclusive evidence has not been brought as to whether the "block" of shares transferred to Pan American was or was not a "controlling" one.

The Tribunal does not think that this issue is relevant. Indeed. Amco Asia had and still has the right to invoke the arbitration clause in its capacity as an investor and by way of consequence, as a shareholder of PT Amco; it has not this right on behalf of PT Amco. as a "controlling" shareholder of the same.

Consequently, the right to invoke the arbitration clause is transferred by Amco Asia with the shares it transfers, Amco Asia not losing the same right, be it as the initial investor or to the extent to which it keeps partly the shares it possessed originally. As a result, the right to invoke the arbitration clause is transferred with the transferred shares, whether or not the same constitute a controlling block, being it understood, once again, that for such transfer of the right to take place, the government's approval is indispensable.

33. For all the above stated reasons the Tribunal concludes that it has jurisdiction over Pan American.

AB. *Jurisdiction over the Respondent*

34. As such, jurisdiction over the Respondent cannot be denied, since the same is a Contracting State to the Washington Convention, and since it executed an arbitration clause that according to the present decision confers [on] the Tribunal jurisdiction over the Claimants.

The issue may however arise if one has regard to the "alternative objection to jurisdiction", put forward under Submission No. 2 made by the Respondent in its Counter-Memorial. Indeed, this objection might be construed as alleging that the claims which the Claimants could possibly entertain should not be directed towards Indonesia, but towards PT Wisma, and that the latter not being a contracting State, the Tribunal has no jurisdiction over the *true* respondent.

Would the alternative objection be thus construed, it would be in fact relating to the *matters* on which the Tribunal has or has not jurisdiction, an issue which the Tribunal will now consider; for the time being, and having regard to the Respondent such as the same is formally identified in the Request for Arbitration - that is to say to the Republic of Indonesia - there is no doubt that the Tribunal has jurisdiction over it.

B. *Jurisdiction in Respect of the Matters in Dispute*

35. As previously recalled, the Respondent raised in the Submissions of its Counter-Memorial, an alternative objection to jurisdiction, namely that "the Centre and this Tribunal are without jurisdiction to entertain or decide any of the claims of PT Amco relating to the alleged hotel "seizure" and termination of the lease agreement with PT Wisma, the latter not being a Contracting State or an agency thereof designated to the Centre by a contracting State, and disputes between private parties being outside the jurisdiction of the Centre".

36. As mentioned earlier, the Tribunal in a decision of 1 April, 1983, ordered that all the Respondents' contentions relating to jurisdiction which involve examination of facts by means of testimony were to be joined to the further examination by the Tribunal of the merits of the dispute, and thus the question of whether in fact the Indonesian army did or did not seize the hotel was not supposed to be dealt with at the proceedings of the Tribunal in Paris on June 28-29, 1983 and accordingly, will be examined jointly with the merits.

However, the question of whether or not the Tribunal has jurisdiction over "the dispute regarding the hotel lease agreement" which, according to the Respondent, "was between two private parties, PT Amco and PT Wisma" was examined to some extent in oral argument at the June 1983 sessions of the Tribunal.

37. To deal with this assertion, the Tribunal must first examine the subject matter of the claim before it, and reach a conclusion as to the substantive nature thereof.

The Respondent asserts that what the Tribunal is being asked to examine is "a lease dispute" between two private parties (CM at 19).

For their part, the Claimants state in this respect the following (Reply at 32):

> Claimants are not asking the Tribunal to consider disputes they may have with PT Wisma

Kartika. Although the ultimate result of the military action may have been to transfer management and control of the hotel to PT Wisma Kartika, such subsequent transfer in no way affects the Tribunal's jurisdiction, even if PT Wisma Kartika were a legal entity distinct from the Indonesian government. The Indonesian government deprive Claimants of their investment in an armed military action.

38. The Tribunal is of the view that in order for it to make a judgement at this time as to the substantial nature of the dispute before it, it must look firstly and only at the claim itself as presented to ICSID and the Tribunal in the Claimants' Request for Arbitration. If on its face (that is, if there is no manifest or obvious misdescription or error in the characterization of the dispute by the Claimants) the claim is one "arising directly out of an investment", then this Tribunal would have jurisdiction to hear such claims. In other words, the Tribunal must not attempt at this stage to examine the claim itself in any detail, but the Tribunal must only be satisfied that *prima facie* the claim, as stated by the Claimants when initiating this arbitration, is within the jurisdictional mandate of ICSID arbitration, and consequently of this Tribunal.

In the present case, the claim, as stated by the Claimants in their request for Arbitration is one of an alleged seizure, nationalization or expropriation by Indonesia of an investment made by the Claimants in that country. Moreover, in the oral arguments, Claimants stated repeatedly: "We do not raise disputes about the lease as 'such' (Transcript at 139)", "... we are just not making any claims for lease violations". "We are not claiming violations of the lease" (Transcript at 139); and "... it is not our claim today that we’re trying to enforce lease provisions" (Transcript at 140).

Accordingly, the Tribunal concludes that the Claimants’ Request for Arbitration does not call upon it to arbitrate a dispute which was arisen out of "hotel lease agreement" as such, but which is one that arises out of an alleged nationalization or expropriation by Indonesia. This having been said, the Tribunal recognizes that the relationship between PT Amco and PT Wisma arising out of the lease might in some manner be linked to the claim made by the Claimants. But to go from this narrow recognition to the point where the Tribunal would conclude, as the Respondent would have it do, namely, that the entire claim (except for the revocation of Amco Asia’s investment licence) arises out of the lease and therefore is beyond the jurisdiction of this Tribunal, is something with which the Tribunal cannot agree. On the contrary, as already stated, the claim is stated as a claim for an alleged expropriation of an investment Claimants supposedly made in Indonesia. The Tribunal cannot see any manifest or obvious misdescription or error in the characterization of this claim.

39. Thus, the dispute put before the Tribunal not being a dispute on the lease agreement, it follows that it is not a dispute between "private parties"; as already stated by the Tribunal (see AB) the Respondent is not PT Wisma but the Republic of Indonesia.

Accordingly, while the Respondent rightly contends that this Tribunal has no jurisdiction over PT Wisma, such contention is not relevant, since the claim before the Tribunal is not against PT Wisma.

Whether or not the Claimants are estopped from or have waived to allege and bring evidence on any actions of PT Wisma, of which they contend that Indonesia is responsible will be the subject matter of the next section.

40. For all the above stated reasons, the Tribunal concludes that it has jurisdiction with respect to the matters of the dispute between the Claimants and Indonesia, as they are stated in the Request for Arbitration.

C. *Estoppel and Waiver*

41. In its Counter-Memorial, Observations on Jurisdiction and at the June 1983 hearings, the Respondent put forward a number of issues of estoppel and waiver allegedly relating to the jurisdiction of this Tribunal.
These issues will be considered separately under the headings of estoppel (CA) and waiver (CB).

CA. *Estoppel*

42. In its Counter-Memorial (at 89-94) the Respondent developed its contention in respect of estoppel under the following heading: "PT Amco is estopped from asserting that PT Wisma and Indonesia are one and the same". The same contention is reiterated in the "Observations" (at 18-21). Finally, a listing of grounds for estoppel was presented in oral argument during the Tribunal’s session in June 1983 (at 36 ff).
The Claimants went into the analysis and refutation of these grounds for alleged estoppel in their own oral argument during the same session (Minutes, at 136 ff).

43. The Tribunal will consider the grounds for alleged estoppel put forward by the Respondent, taking them as they were finally synthesized and listed in oral argument.

Under this presentation, said grounds are as follows:

(i) the fact that PT Amco agreed to dispute settlement mechanisms (i.e., ICC arbitration and mutual consultations) in the 1968 hotel lease between PT Wisma and PT Amco and its subsequent amendments;

(ii) the manner in which PT Amco has dealt with what has come to be called in these proceedings the *"alter ego* theory" in the Jakarta Court proceedings, and the manner in which the Claimants have dealt with same during the proceeding herein, namely that in the Jakarta Court proceedings PT Amco never attempted to assert any relationship between PT Wisma and Indonesia and/or the Indonesian army, nor, according to the Respondent did the Claimants attempt to do so in the current arbitration until the Claimants’ Rejoinder in which the Claimants put forward the position that PT Wisma was the *"alter ego"* of the Respondent;

(iii) the failure of PT Amco to assert in the Jakarta Court proceedings that ICSID was the proper forum for the dispute then in litigation, and indeed the insistence by PT Amco in the Jakarta procedures that the ICC was the proper forum for such dispute;

(iv) the failure of PT Amco in the Jakarta Court to invoke Article 47 of the Convention and its corresponding Rule 9. namely to seek provisional measures under icsid;

(v) the continued insistence of Claimants in these proceedings that the lease dispute between PT Amco and PT Wisma which was heard in the Indonesia Courts should have been and should be referred to the ICC as the proper forum.

44. The Tribunal notes that four out of the five grounds for estoppel hereabove analysed (namely i, iii, iv, and v) relate to the "lease dispute" between PT Amco and PT Wisma.

Now, the Tribunal has already stated that the dispute on which it has been asked to arbitrate and on which it has jurisdiction is not the lease dispute between PT Amco and PT Wisma, and therefore, that it has no jurisdiction over PT Wisma. Consequently, these grounds for alleged estoppel are irrelevant, and the Tribunal need not consider them any further.

45. As to the second ground for estoppel, (ii), the Respondent alleges (1) that before their telex to the President of this Tribunal of March 18, 1983, the Claimants never contended that Indonesia and PT Wisma were one and the same, nor that PT Wisma was the *"alter ego"* of Indonesia; (2) that in the said telex, the Claimants stated that they do not contend that PT Wisma and Indonesia were one and the same: (3) finally, that in their Rejoinder. Claimants asserted that PT Wisma Kartika was merely the *alter ego* of the Indonesian "Army" (at 24) with respect to the hotel seizure.

Replying to the foregoing the Respondent requests the Tribunal to conclude that the Claimants are now precluded from asserting that PT Wisma is the *"alter ego"* of Indonesia, and in consequence that PT Wisma and Indonesia are one and the same.

46. It clearly appears that the whole argument is not directed to jurisdiction, but to admissibility or non-admissibility of assertions and/or evidence which the Claimants are or are not able to present as to the relationship between PT Wisma and Indonesia.

47. The Tribunal believes it would be useful at this point to briefly examine the concept of estoppel.

This concept is derived from the common law. However, it is based on the fundamental requirement of good faith, which is found in all systems of law, national as well as international. Nevertheless the theory of estoppel as such and as it is propounded in the Anglo-American legal systems is particular to those systems and cannot be in all details considered to have universal application.

That being said, it remains that several definitions of estoppel in common law may be used to draw from them the core of the concept, which can and should be applied in international disputes such as the present one.

As examples of such definitions, the Tribunal would cite first the one found in *The Law Relating to Estoppel by Representation.* (Spencer. Bower and Turner. 3rd edition. Butterworth. 1977), at page 4, which concerns estoppel by representation, that incidentally is relevant to the present case, and

which reads as follows:

> Where one person ("the representor") has made a representation to another person ("the representee") in words or by acts or conduct or (being under a duty to the representee to speak or act) by silence or inaction, with the intention (actual or presumptive) and with the result, of inducing the representee on the faith of such representation to alter his position to his detriment, the representor in any litigation which may afterwards take place between him and the representee, is estopped, as against the representee, from making or attempting to establish by evidence, any averment substantially at variance with his former representation, if the representee at the proper time, and in the proper manner, objects thereto.

Another apt definition may be found in the case of *Maclaine* v. *Gatty* (1921). AC 376 where at page 382 Lord Birkenhead stated:

> Where A has by his words or conduct justified B in believing that a certain state of facts exists, and B has acted upon such belief to his prejudice. A is not permitted to affirm against B that a different state of facts existed at the time.

In international law, one may find, again as an example, a definition which similarly combines the elements of prejudice to one party and advantage to the other in order for the substance of estoppel, whatever the term employed to describe the same, to be met:

> A State must not be permitted to benefit by its own inconsistency to the prejudice of another State (Vice-President Alfare in the case concerning the *Temple of Preah Vihar, Cambodia* v. *Thailand.* 1962 I.C.J. 6. 39-51),

Although this dictum refers to activities of States, the Tribunal is of the view that the same general principle is applicable in international economic relations where private parties are involved. In addition, the Tribunal considers that, in particular for its applications in international relations, the whole concept is characterized by the requirement of good faith.

48. In the instant case, the Tribunal has no hesitation in finding that (1) the argument of estoppel does not go to the issue of jurisdiction, but to the admissibility or non-admissibility of assertions or evidence; (2) the elements of the concept, i.e. benefit to the allegedly estopped party and/or prejudice to the other, are not present, which excludes necessarily any bad faith of the Claimants.

49. For all the above stated reasons.

    (1) the Tribunal concludes that the Claimants are not estopped from invoking the arbitration clause in the dispute and against the Respondent as the same are stated in the Request;

    (2) the Claimants are not estopped from asserting and from bringing evidence to show that, in respect of the facts of this case, PT Wisma and Indonesia were one and the same, or that PT Wisma was the *"alter ego"* of Indonesia;

    (3) however, the value of the assertions or of the evidence thus produced will have to be decided upon when deciding on the merits; at that time, the whole behaviour of both parties, and in

particular their successive positions or statements would have to be taken into account.

CB. *Waiver*

50. Respondent argued that even if jurisdiction is found to exist because the estoppel arguments do not lead the Tribunal to conclude that it lacks jurisdiction herein, then the Claimants must be considered to have waived any rights to any hearing on the merits of their claim because PT Amco fully and completely participated in the Indonesian court proceedings and indeed PT Amco did not request a stay of those proceedings so that the matter then in issue could be brought before ICSID for arbitration (CM. at 95 ff).

51. The Tribunal finds in the first place that the parties to the Jakarta Court case are not identical to the parties in the present proceedings. PT Wisma was one of the parties to the court proceedings and it is not a party here (although its actions may to the extent they are relevant to the claims under arbitration herein, be part of the evidence heard by this Tribunal on the merits). Indonesia, as such, which is the Respondent in the present arbitration was not a party to the Jakarta court proceedings. Likewise, as the Tribunal has stated above, the issues to be arbitrated by the Tribunal are not as suggested by the Respondent a lease dispute, which was the object of the Jakarta legal proceedings.

52. For all the above stated reasons, the Tribunal concludes that the Claimants did not waive their right to invoke the icsid arbitration clause, and consequently this Tribunal's jurisdiction, in respect of the claim as stated and of the Respondent as identified in the Request for Arbitration.
The Tribunal Decides as Follows:

The Tribunal has jurisdiction over the parties to the dispute and the subject-matter of the same as identified and described by the Claimants.

Voir le document sur jusmundi.com